THE

ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME XXVII.

THE ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXVII.

HUSBAND AND WIFE.

LONDON
BUTTERWORTH & CO., BELL YARD, TEMPLE BAR.

SYDNEY :
MELBOURNE : BUTTERWORTH & CO. (AUSTRALIA), LTD.

CALCUTTA :
MADRAS :
BOMBAY : BUTTERWORTH & CO. (INDIA), LTD.

TORONTO :
WINNIPEG : BUTTERWORTH & CO. (CANADA), LTD.

WELLINGTON (N.Z.) : BUTTERWORTH & CO. (AUSTRALIA), LTD.

1926

PRINTED IN GREAT BRITAIN

Printed in Great

BY

WILLIAM CLOWES & SONS, LIMITED

LONDON AND BECCLES.

Editorial Board.

COMMENCED UNDER THE DIRECTION OF
the late
THE RIGHT HONOURABLE THE

EARL OF HALSBURY,

LORD HIGH CHANCELLOR OF GREAT BRITAIN, 1885-86, 1886-92, and 1895-1905
A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S
MOST HONOURABLE PRIVY COUNCIL.

Editor in Chief:

SIR T. WILLES CHITTY, BART.,

BENCHER OF THE INNER TEMPLE, KING'S REMEMBRANCER,
SENIOR MASTER OF THE SUPREME COURT,
MANAGING EDITOR OF "THE LAWS OF ENGLAND."

Editor:

HARRY GEEN, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

Together with

HAROLD G. MEYER, ESQ., M.A., LL.B., R. K. HANDOO, ESQ., M.A.,
Barristers-at-Law; and J. B. WHITMORE, ESQ., B.A.,
Solicitor of the Supreme Court.

Colonial Editor:

HENRY STEPHEN, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

Sub-Editorial Staff:

JOHN ROBERT MCILRAITH, ESQ., LL.B., JOHN SOUTHALL, ESQ., B.A., R. HARRISON, ESQ., B.A., REGINALD DODD, ESQ., PHILIP R. THOMASON, ESQ., B.A., LL.B., E. S. MOBERLY BELL, ESQ., L. C. BELL-COX, ESQ., B.A., A. C. GRAINGER, ESQ., B.A., W. F. F. PRINS, ESQ., W. J. WILLIAMS, ESQ., B.A., A. C. G. SAWER, ESQ., B.A., W. KERR CHALMERS, ESQ., M.A., J. R. O. JONES, ESQ., B.A., O. SHEPHERD, ESQ., M.A., LL.B., T. LE G. NEL, ESQ., M.A., LL.B., R. HENDRY WHITE, ESQ., G. I. A. WATSON, ESQ., P. F. SKOTTOWE, ESQ., LL.B., G. H. CURTIS, ESQ., B.A., B.C.L., Barristers-at-Law; and J. H. FISHER EVANS, ESQ., E. STOPFORD HOLLAND, ESQ., and HOWELL JONES, ESQ., B.A.

Associate Editors and Advisory Board.

Scotland:

THE RIGHT HON. LORD SALVESEN,

FORMERLY SENATOR OF THE COLLEGE OF JUSTICE, SCOTLAND.

Ireland:

THE RIGHT HON. CHARLES A. O'CONNOR,

LATELY A JUDGE OF THE SUPREME COURT OF THE IRISH FREE STATE.

THE RIGHT HON. SIR DUNBAR PLUNKET BARTON, BART.,

LATELY A JUDGE OF THE CHANCERY DIVISION AND FORMERLY A JUDGE OF THE KING'S BENCH DIVISION AND OF THE HIGH COURT OF JUSTICE IN IRELAND,

AND

the late

HENRY DANIEL CONNER, ESQ., M.A.,

ONE OF HIS MAJESTY'S COUNSEL.

Empire of India:

THE RIGHT HON. SIR LAWRENCE JENKINS, K.C.I.E.,

LATELY CHIEF JUSTICE OF BENGAL, A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

The Dominion of Canada:

THE RIGHT HON. SIR CHARLES FITZPATRICK, G.C.M.G.,

FORMERLY CHIEF JUSTICE OF THE SUPREME COURT OF CANADA, A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL, NOW LIEUTENANT-GOVERNOR OF THE PROVINCE OF QUEBEC.

the late

THE RIGHT HON. SIR LOUIS HENRY DAVIES, K.C.M.G.,

CHIEF JUSTICE OF THE SUPREME COURT OF CANADA, A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,

AND

E. R. CAMERON, ESQ., K.C.,

REGISTRAR OF THE SUPREME COURT OF CANADA.

Provinces of Canada:

Alberta.

THE HON. HORACE HARVEY,

CHIEF JUSTICE OF THE SUPREME COURT OF ALBERTA.

British Columbia.

THE HON. JAMES A. MACDONALD,

CHIEF JUSTICE OF THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Manitoba.

THE HON. THOMAS G. MATHERS,

CHIEF JUSTICE OF THE COURT OF KING'S BENCH, MANITOBA.

New

THE HON. OSWALD S. CROCKET,

A JUDGE OF THE SUPREME COURT OF NEW BRUNSWICK.

Scotia.

THE HON. BENJAMIN RUSSELL,

A JUDGE OF THE SUPREME COURT OF NOVA SCOTIA.

Ontario.

THE HON. W. E. MIDDLETON,

A JUDGE OF THE SUPREME COURT OF ONTARIO.

Prince Edward Island.

THE HON. JOHN A. MATHIESON,

CHIEF JUSTICE OF THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Quebec.

THE HON. SIR FRANÇOIS X. LEMIEUX,

CHIEF JUSTICE OF THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC.

Saskatchewan.

THE HON. SIR FREDERICK W. G. HAULTAIN,

CHIEF JUSTICE OF SASKATCHEWAN.

The Commonwealth of Australia:

the late

THE RIGHT HON. SIR SAMUEL WALKER GRIFFITH, G.C.M.G.,

CHIEF JUSTICE OF AUSTRALIA,
A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

Assisted by

PROFESSOR THE HON. JOHN BEVERLEY PEDEN,

DEAN OF THE FACULTY OF LAW,

R. CLIVE TEECE, Esq.,

BARRISTER-AT-LAW.

Dominion of New Zealand:

THE RIGHT HON. SIR ROBERT STOUT, K.C.M.G.,

CHIEF JUSTICE OF NEW ZEALAND,
A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

The Dominion of Newfoundland:

THE HON. SIR WILLIAM H. HORWOOD,

CHIEF JUSTICE OF NEWFOUNDLAND.

The Union of South Africa:

THE RIGHT HON. SIR JAMES ROSE-INNES, K.C.M.G.,

CHIEF JUSTICE OF THE UNION OF SOUTH AFRICA,
A MEMBER OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

Assisted by

MURRAY BISSET, ESQ.,

BARRISTER-AT-LAW.

Administration

MISS WINIFRED SMALLWOOD.

The Title in this Volume has been contributed as follows:-

TITLE.	CONTRIBUTED BY
HUSBAND AND WIFE.	E. C. P. LASCELLES, Esq., O.B.E., G. F. L. BRIDGMAN, Esq., J. T. MILES, Esq., M.A. (Oxon.), B.A. (Lond.), and H. W. CLEMENTS, Esq., Barristers-at-Law.

In this Volume English Cases reported up to 1st January, 1926, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

TABLE OF CONTENTS

AND

TABLE OF CROSS-REFERENCES.

PAGE

Reports included in this Work and their Abbreviations – – – – xiii

Abbreviations used in this Work – – – – – – – – xxxi

Meaning of Terms used in Classifying Annotating Cases – – – xxxv

Table of Cases – – – – – – – – – – xxxvii

HUSBAND AND WIFE – – – – – – – – 1—572

[*For detailed Table of Contents and Table of Cross-References, see* pages 1—23]

HYPOTHECATION.

See LIEN ; MORTGAGE ; SHIPPING AND NAVIGATION.

IDIOTS.

See LUNATICS AND PERSONS OF UNSOUND MIND.

IDLE AND DISORDERLY PERSONS.

See MAGISTRATES ; POOR LAW.

ILLEGAL ARREST AND IMPRISONMENT.

See CRIMINAL LAW AND PROCEDURE ; TRESPASS.

ILLEGAL CONTRACTS.

See CONTRACT.

ILLEGITIMACY.

See BASTARDY.

IMBECILES.
See LUNATICS AND PERSONS OF UNSOUND MIND.

IMMEMORIAL USAGE.
See CUSTOM AND USAGES.

IMMIGRATION.
See ALIENS.

IMMORAL CONTRACTS.
See CONTRACT.

IMPEACHMENT.
See PARLIAMENT.

IMPEACHMENT OF WASTE.
See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

IMPOTENCE.
See HUSBAND AND WIFE.

IMPRISONMENT.
See CRIMINAL LAW AND PROCEDURE; MAGISTRATES; PRISONS.

IMPROVEMENT OF LAND.
See LAND IMPROVEMENT; SETTLEMENTS; SEWERS AND DRAINS.

INCEST.
See CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE.

INCLOSURE.
See COMMONS AND RIGHTS OF COMMON; HIGHWAYS, STREETS AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS.

INCOME AND CAPITAL.
See PARTICULAR TITLES *passim*.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current) ...	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—55	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649 ...	
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740 ...	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797 ...	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R. ...	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848 ...	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839 ...	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol. ...	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	

Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1791	Scot.
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ...	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ...	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C. ...	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ...	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ...	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827 ...	
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ...	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ...	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol.,	Eng.
Bro. N. C. ...	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ...	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ...	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819	Eng.
Brod. & F. ...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	
Brownl. ...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
ruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ...	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	
Bull. N. P. ...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741 ...	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	
Burr. S. C. ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. B. R.	Canadian Bankruptcy Reports Annotated, 1920—(current) ...	Can.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834—1913 ...	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.... ...	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785 ...	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609-	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	Canadian Gazette	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl.	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, n2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Commo Pleas, fol., 1 vol., 1664—1673 ...	Eng.
	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727 ...	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Cass. Dig. ...	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875 ...	Eng.
Ch. Cas. in Ch. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.

	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent. ...	Coke's Entries	Eng.
Co. Inst. ...	Coke's Institutes	Eng.
Co. L. J. ...	Colonial Law Journal	N.Z.
Co. Litt. ...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep. ...	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current)	Eng.
Com. Dig. ...	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig. ...	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas. ...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D. ...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig. ...	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk. ...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C. ...	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas. ...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H. ...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep. ...	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R. ...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car. ...	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz. ...	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac. ...	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols.	
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A. ...	Dorion's Queen's Bench Reports	Can.
D. L. R.	Dominion Law Reports	Can.

Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	Eng.
Dav. Ir.	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	Ir.
Dav. Pat. Cas. ...	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw. ...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch. ...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B. ...	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C. ...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And. ...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G.	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J. ...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	Eng.
De G. M. & G. ...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559--1798	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665---1677	Scot.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly ...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas. ...	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B. ...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl. ...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L. ...	Dowling and Lowndes' Practice Reports, 7 vols., 1843--1849	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S. ...	Dowling's Practice Reports, New Series, 2 vols., 1841---1843	Eng.
Dr. & Wal. ...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	Ir.
Dr. & War. ...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	Ir.
	Draper's King's Bench Reports	Can.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm. ...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury *temp.* **Nap.**	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859	Ir.
Drury *temp.* **Sug.**	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841	Ir.
Dugd. Orig. ...	Dugdale's Origines Juridiciales	Eng.
Dunl. (Ct. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	
Dunning ...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
E. & A.	Upper Canada Error and Appeal	Can.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	Eng.
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	Eng.
E. B. & E. ...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	Eng.
E. D. C. ...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	South African Law Reports, Eastern Districts Local Division	S. Af.
E. L. R. ...	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.)	English Reports	Eng.
E. R.	Ontario Election Reports	Can.
Eag. & Y. ...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	Eng.

East ...	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden ...	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar ...	Edgar's Decisions, Court of Session (Scotland). fol., 1724—1725	Scot.
Edw. ...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies ...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—	Scot.
Emden's B. C. ...	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep. ...	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F. ...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz. .	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K. .	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep. .	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir. .	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg. .	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch. .	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B. .	Freeman's Reports, King's Bench and Common Pleas, 1 vol.,	Eng.
G. ...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R.	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig.	General Index Digest	Can.
G. W. L.	South African Law Reports, Griqualand West Local Division	S. Af.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale ...	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb. ...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J. ...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas. ...	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascock ...	Glascock's Reports (Ireland), 1 vol., 1831—1832	Ir.

Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsborough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr.	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill.	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C.	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850 ...	Eng.
H. & W. ...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date)	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (*e.g.*, [1915] H. B. R.)	Eng.
H. C.	Reports of the High Court of Griqualand West	S. Af.
H. E. C.	Hodgin's Election Reports	Can.
H. L. Cas. ...	Clark's Reports, House of Lords, 11 vols., 1847—1863 ...	Eng.
Hag. Adm ...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ...	Eng.
Hailes	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ...	Hale's Common Law	Eng.
Hale, P. C. ...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han.	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc.	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard.	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay	Hay's Reports	Ind.
Hay & Marr. ...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Hayes	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832 ...	Ir.
Hayes & Jo. ...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het.	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Hob.	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625 ...	Eng.
Hodg.	Hodges' Reports, Common Pleas, 3 vols., 1835—1837 ...	Eng.
Hog.	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834 ...	Ir.
Holt, Adm. ...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ...	W. Holt's Equity Reports, 2 vols., 1845...	Eng.
Holt, K. B. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess.	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735	
Hong Kong L. R.	Hong Kong Reports	Hong Kong
Hop. & Colt. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C.	Howard's Chancery Practice	Ir.
How. C. S. ...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ...	Howard's Equity Exchequer	Ir.
How. P. L. ...	Howard on the Popery Laws	Ir.
Hud. & B. ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ...	Hudson on Building Contracts, 2 vols.	Eng.
Hume	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut.	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638 ...	Eng.
Hy. Bl.	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde	Hyde's Reports	Ind.
I. C. L. R. ...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

I. L. R.	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All. ...	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom. ...	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc. ...	Indian Law Reports, Calcutta	Ind
I. L. R. (Vol.) Lah. ..	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad. ...	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat. ..	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran. ...	Indian Law Reports, Rangoon	Ind.
I. L. T.	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (*e.g.*, [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L. ...	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866...	Ir.
Ir. L. Rec. 1st ser. ...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831 ...	Ir.
Ir. L. Rec. N. S. ...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838 ...	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867 ...	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852 ...	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821 ...	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol. 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840 ...	Ir.
Jebb, Cr. & Pr. Cas. ...	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Eng.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838 ...	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ...	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ...	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec. ...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec. ...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ...	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
l. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734...	Eng.
Keny. ..	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ...	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr ..	New Brunswick Reports (Kerr)	Can.

Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836 ...	Eng.
Knox	Knox's Reports	Aus.
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909-1910	Eng.
Konst. Rat. App. ..	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908 ...	Eng.
L. & G. *temp.* Plunk. ..	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. *temp.* Sugd. ..	Lloyd and Goold's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz. ..	Local Courts and Municipal Gazette	Can.
L. C. J.	Lower Canada Jurist	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C.	Lower Canada Reports	Eng.
	Local Government Reports, 1902—(current)	Eng.
L. J. Adm. ...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy. ...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C. ...	Law Journal (County Courts Reporter), 1912—(current) ...	Eng.
L. J. C. P. ...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch. ...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl. ...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex. ...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq. ...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C. ...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C. ...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S. ...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M. ...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C. ...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P. ...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	Legal News	Can.
L. R. A. & E. ...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R. ...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875 ...	Eng.
L. R. C. P. ...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq. ...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch. ...	Law Reports, Exchequer, 10 vols., 1865—1875...	Eng.
L. R. H. L. ...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir. ...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D. ...	Law Reports, Probate and Divorce, 3 vols., 1865—1875 ...	Eng.
L. R. P. C. ...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B. ...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B. ...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo. ...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S. ...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
L	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym. .	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee .. .	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
Lee *temp.* Hard.	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

Leg. Rep.	Legal Reporter	Ir.
Legge ..	Legge's Reports	Aus.
Leon. ..	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	*Eng.*
Lev. ..	*Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696*	*Eng.*
Lew. C. C.	*Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838*	Eng.
	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ...	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III....	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ...	Eng.
	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Lloyd, L. R. ...	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas. ...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774 ...	Eng.
Long. & T. ...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol.,	Ir.
Lords Journals ...	Journals of the House of Lords	Eng.
Lud. E. C. ...	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 2—1704	Eng.
Lut. Reg. Cas. ...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ...	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W. ...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R. ...	Montreal Condensed Reports	Can.
M. H. C. R. ...	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench ...	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	Can.
M. M. Cas. ...	Martin's Reports of Mining Cases	Can.
Mac.	Macassey's New Zealand Reports	N.Z.
Mac. & G. ...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H. ...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ...	Eng.
M'Cle.	M'Cleland's Reports, Exchequer, 1 vol., 1821	Eng.
M'Cle. & Yo. ...	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	
Macfarlane ...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts,	Scot.
Macl. & Rob. ...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols.,	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G. ...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulare Anglicanum	Eng.
Madox, Exch. ...	Madox's History and Antiquities of the Exchequer, 2 vols. ...	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G. ...	Manning and Granger's Reports, Common Pleas, 7 vols, 1840—1845	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Man. L. J. ...	Manitoba Law Journal	Can.
Man. L. R. ...	Manitoba Law Reports	Can.
Man. R. *temp.* Wood	Manitoba Reports *temp.* Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C. ...	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ...	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ...	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326 ...	Eng.
Meg.	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	*Milward's Ecclesiastical Reports (Ireland)*, 1 vol., 1819—1843	Ir.
Mod. Rep. ...	*Modern Reports, 12 vols., 1669—1755*	Eng.
Mol.	*Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831* ...	Ir.
Mont.	*Montagu's Reports, Bankruptcy, 1 vol., 1829—1832*	Eng.
Mont. & A. ...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830 ...	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827 ...	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ...	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ...	Eng.
My. & K. ...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835 ...	Eng.
N. (preceded by date)	Northern Ireland Law Reports, 1925— (current) (*e.g.*, [1925] N.)	Ir.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R.	Natal Law Reports	S. Af.
N. P. D.	South African Law Reports, Natal Provincial Division ...	S. Af.
N. S. R.	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.)	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtn. Cas.	New South Wales Industrial Arbitration Cases ..	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity) ..	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law) ..	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. .	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	North-West Territories Reports	Can.
N. Z. Jur.	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.

N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas. ...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R. ...	Newfoundland Reports	Nfld.
Nolan	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases ...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P. ...	Old Bailey Session Papers	Eng.
O. Bridg. ...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S. ...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	Ontario Law Reports	Can.
O'M. & H. ...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	Ontario Reports	Can.
O. R.	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C.	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S.	Upper Canada Queen's Bench, Old Series	Can.
O. W. N. ...	Ontario Weekly Notes	Can.
O. W. R. ...	Ontario Weekly Reporter	Can.
Old.	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig. ...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (*e.g.*, [1891] P.)	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	Prince Edward Island Reports	Can.
P. R.	Ontario Practice	Can.
P. Wms. ...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 8—1717	Eng.
Pat. App. ...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck.	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	Pelham (S. A.) Reports	Aus.
Per. & Dav. ...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S. ...	Perrault's Counseil Superieur	Can.
Per. P.	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas. ...	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R. ...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph.	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	Price's Mining Commissioners' Cases	Can.
Pug.	New Brunswick Reports (Pugsley)	Can.
Py. R.	Pykes' Lower Canada Reports	Can.
B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (*e.g.*, [1891]	Eng.
	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P. ...	Queensland Justice of Peace Reports	Aus.
Q. L. J. ...	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
	Quebec Law Reports	Can.
Q. L. R. (Beor) ...	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaries de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C. ...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R.	Queensland State Reports	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q. ...	Quebec Revised Reports	Can.
R. L. N. S. ...	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S. ...	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch. ...	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A....	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas. ...	Reserved Cases	Ir.
Rick. & M. ...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S. ...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S. ...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. *temp.* H. ...	Ridgeway's Reports *temp.* Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl. ...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ...	Eng.
Rob. L. & W. ...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App. ...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App. ...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr. ...	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep. ...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ...	Eng.
	Romilly's Notes of Cases in Equity, 1 part, 1772—1787 ...	Eng.
Roscoe's B. C. ...	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C. ...	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ...	Eng.
Rul. Cas. ...	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M. ...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833 ...	Eng.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893	
	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (*e.g.*, [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (*e.g.*, [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausse and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols.,	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R. ..	Scottish Law Reporter, 1865—1924	Scot.
Sc. R. R. ...	Scots Revised Reports	
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols.,	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Shower's Cases in Parliament, fol., 1 vol., 1694—1699... ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St. ...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G. ...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep. ...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr. ...	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P. ...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B. ...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ..	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	
Swan. ...	Swanston's Reports, Chancery, 3 vols., 1818—1821	
Swin. ...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H. ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo. ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L. ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R. ..	The Times Law Reports, 1884—(current)	Eng.
T. P. ..	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D. ...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S. ...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt. ...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay. ...	Taylor's King's Bench Reports	Can.
Temp. **Wood**	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom. ...	Nova Scotia Reports (Thomson)	Can.
Toth. ...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist. ...	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr. .	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur. ..	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.

U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R. .	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.) .	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.) ..	Victorian Reports (Equity)	Aus.
V. R. (Law) ..	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr. ..	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817... ...	Eng.
Ves. & B. ..	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814...	Eng.
Ves. Sen. ..	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr. ..	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp. ..	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857...	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis by Lyne ...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard. ...	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850...	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.

Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	
Y. & C. Ex. ...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols.,	
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y B. (Sel. Soc.) ...	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxix., *ante*.)

A.-G.	for Attorney-General.
Act.	,, Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming.
Akt.	,, Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Appit.	,, Appellant.
Apprvd.	,, Approved.
Arbn.	,, Arbitration.
Archbp.	,, Archbishop.
Art.	,, Article.
Ass. Tax Case	,, Assessed Tax Case.
Assce.	,, Assurance.
Assocn.	,, Association.
B. C.	Borough Council.
Bkpcy.	Bankruptcy.
Bkpt.	Bankrupt.
Bldg. Soc.	,, Building Society.
Bp.	Bishop.
C. A.	Court of Appeal.
C. & S. L. Ry. Co.	City & South London Railway Co.
C. C. A.	Court of Criminal Appeal.
C. C. R.	County Court Rules.
C. C. R.	Court of Crown Cases Reserved.
C. L. P. Act.	Common Law Procedure Act.
C. L. Ry. Co.	Central London Railway Co.
C. O. R.	Crown Office Rules.
C. S. U. C.	Consolidated Statutes of Upper Canada.
Ca. sa.	*Capias ad satisfaciandum.*
Cale. Ry. Co.	,, Caledonian Railway Co.
Ch.	Chancery.
Ch. Div.	Chancery Division.
Co.	Company.
Co-op. Assocn.	Co-operative Supply Association.
Comrs.	Commissioners.
Consd.	Considered.
Corpn.	Corporation.
	Court.
Ct. of Ch.	Court of Chancery.
Ct. of Eq.	,, Court of Equity.
Ct. of R.	,, Court of Review.
D. C.	Divisional Court.
Dbtd.	,, Doubted.
Deft.	,, Defendant.

Distd.	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
Ex p.	„ *Ex parte.*
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
Fi. fa.	„ *Fieri facias.*
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	Great Central Railway Co.
G. E. Ry. Co.	Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	Great Western Railway Co.
Govt.	Government.
Grdns.	Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	Order.
Overd.	Overruled.

P. C. . .	for Privy Council.
Petn. . .	„ Petition or Election Petition.
Pltf. . .	„ Plaintiff.
Q. B. Div. . .	„ Queen's Bench Division.
Qu. . . .	„ *Quære.*
R. C. . . .	„ Rural Council.
R. D. C. . .	„ Rural District Council.
R. S. A. . .	„ Rural Sanitary Authority.
R. S. C. . .	„ Revised Statutes of Canada.
R. S. C. . .	„ Rules of the Supreme Court, 1883.
Refd. . . .	„ Referred.
Regn. of Trade Mk.	„ Registration of Trade Mark.
Regr. of Trade Mks.	„ Registrar of Trade Marks.
Resp. . . .	„ Respondent.
Restg. . . .	„ Restoring.
Revsd. . . .	„ Reversed.
Revsg. . . .	„ Reversing.
Ry. Co. . .	Rail. Co. or Railway Co.
	„ Same Case.
S. C. (name of colony following)	„ Supreme Court of a Colony.
S. E.	„ Settled Estates.
S. E. & C. Ry. Co. . . .	„ South Eastern & Chatham Railway Co
S. E. Ry. Co. . . .	South Eastern Railway Co.
S. P.	„ Same Point.
S.S.	„ Steamship.
Sched.	„ Schedule.
Sci. fa.	„ *Scire facias.*
Sect.	„ Section.
Set. Land Act . . .	„ Settled Land Act.
Settlmt.	„ Settlement.
Soc.	„ Society.
Soc. Anon.	„ Société Anonyme, etc.
Solr.	„ Solicitor.
Trade Mk.	„ Trade Mark.
Tram. Co.	„ Tramways Company.
U. C.	„ Urban Council.
U. D. C. . . .	„ Urban District Council.
U. S. A. . . .	„ United States of America.
Union Assmt. Com. . .	„ Union Assessment Committee.
Urban S. A.	„ Urban Sanitary Authority.
V.-C.	„ Vice-Chancellor.
Workmen's Comp. Act . .	Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES

INCLUDING CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND DOMINIONS BEYOND THE SEAS.

A.

	PAGE
——— *p.* (1858)	... 386
——— *v.* ——— (1868)	... 266
——— *v.* Longley (1794)	46, 49
A., *Re*, B. *v.* C. (1893)	... 126
— (otherwise B.) *v.* A. (1901)	... 486
— *v.* A. (Can.)	... 339
— *v.* — (sued as B.) (Ir.) ...	... 266
— *v.* A. & K. (Can.)	323, 376
— (falsely called B.) *v.* B. (1853)	... 361
— *v.* B. (1868)	... 270
— *v.* — (N.Z.)	... 266
— (falsely called B.) *v.* B. (N.Z.)	... 343
— *v.* B. (Scot.)	426, 427
— *v.* M. (1884)	... 433
— *v.* — (otherwise A.) (1888)	... 528
A. B., *Re* (N.Z.)	226, 326
——— *v.* C. B. (Scot.)	... 57
——— *v.* C. D. (Scot.)	269, 539
Abbott *v.* Abbott (Can.) ...	... 349
Abdy, *Re*, Rabbeth *v.* Donaldson (1895)	... 546
——— *v.* Abdy (1896)	245, 246
Abel, *Ex p.* (Can.)	... 443
Abergavenny (Marquis) *v.* Sugden (1886) ...	... 261
Abraham *v.* Abraham & Harding (1919) ...	... 112
——— (or Kennesley) *v.* Bird (1699) ...	... 359
——— *v.* Hacking (Can.)	... 41
Abrahams (M.) Sons & Co. *v.* Buckley (1924)	... 179
——— *v.* Hoffe-Miles (1923)	207, 208
Acason *v.* Greenwood, *Re* Grey's Settlements (1887)	206, 207
Ackerman *v.* Ackerman (Can.)	103, 105, 109, 113
Acton *v.* White (1823)	... 421
Adair *v.* Adair (Scot.)	... 107
Adam's Policy Trusts, *Re* (1883)	... 75
Adames' Trusts, *Re* (1885)	... 150
Adams *v.* Adams (1914)	... 85
——— *v.* Adams & Colter (1867)	... 569
——— *v.* Adams & Guest (1873)	... 475
——— *v.* Adams & Ward (1920)	... 439
——— *v.* Adams' Trustees (Scot.)	452, 453, 454, 455, 456, 463, 475, 476
——— *v.* Archibald (Can.)	... 84
Adamson, *Re*, Public Trustee *v.* Billing (1913)	... 90
——— *v.* Adamson (1907) ...	116
——— *v.* Adamson & Hammond (1873) ...	229, 318, 326
——— *v.* Hammond (1873)	... 144
Addington (falsely called Mellor) *v.* Mellor (1884)	... 144
Adelkind *v.* Adelkind (Can.)	... 528
Adolf *v.* Adolf (Can.)	... 406
Advance Rumely Thresher Co., Incorporated *v.* Manske (Can.)	258, 259
Ady *v.* Harris (Can.)	209, 210
	... 90

	PAGE
Afford *v.* Afford (1861)	... 477
Aguilar *v.* Aguilar, Lousada (1820) ...	154, 157
Ahier *v.* Ahier (1885)	... 494
Ah Lie, *Re* (Can.)	38, 43, 61
Ailesbury (Marquis) & Iveagh (Lord), *Re*, Riddell *v.* Riddell (1893)	127
Aires *v.* Aires (1891)	... 469
Aitken *v.* Macree (Scot.)	... 342
Akersten *v.* Akersten (N.Z.)	... 337
Aldis *v.* Chapman (1810)	... 200
Aldrich *v.* Aldrich (Can.)	76, 337
Aldridge, *Ex p.* (1858) ...	308, 555, 559
——— *v.* Aldridge (otherwise Morton) (1888) ...	226, 230, 326
Aleson *v.* Aleson (1728)	270, 426
Alexander *v.* Alexander (Scot.)	39, 265, 339
——— *v.* Alexander & Amos (1860)	295, 402
——— *v.* Barnhill (Ir.)	... 174
——— *v.* Young (1848)	... 109
Alexandre *v.* Alexandre (1870)	323, 337, 481
Allanson (Doe d.) *v.* Canfield (1838)	254
Allardice *v.* Allardice (N.Z.) ...	445, 501, 502
Allardyce (falsely called Gordon) *v.* Mitchell (falsely called Gordon) (Aus.)	39
Allcard *v.* Walker (1896)	... 530
Allen *v.* Allen (1894)	421, 422, 423
——— *v.* ——— (Can.)	77
——— *v.* ——— (N.Z.)	546
——— *v.* Allen & Bell (1894)	421, 422, 423, 432, 434, 493
——— *v.* Allen & D'Arcy (1859)	282, 293, 327, 329, 332, 339, 341, 356, 388, 401, 402, 419, 420, 544
——— *v.* ——— (1860)	538, 539, 540
——— *v.* Humphreys, *In the Goods of* Humphreys (1882)	98
——— *v.* Lumb (1893)	213
——— *v.* Wood (1834)	48
Alleyne *v.* Grey (1689)	176
Allison *v.* Allison (Can.)	408, 409
——— *v.* Smith (Can.)	135
Allom *v.* Allom (No. 2) (N.Z.)	302
Allport *v.* Allport (1909)	416
Allumuddy *v.* Braham (Ind.)	254
Alton *v.* Alton (1920)	396
Ambler *v.* Ambler & Hoghton (1862)	377, 379, 382, 458
Amer *v.* Rogers (Can.)	215
Amey *v.* Card (Can.)	135
Ancelle *v.* Ancelle (Can.)	310, 545
Anderson *v.* Anderson (1868)	416
——— *v.* Hay (Lady) (1890) ..	99, 499
——— *v.* McLaren (Can.)	254
——— *v.* McLeod (Can.)	198
——— *v.* Sanderson (1817)	187
Andreas *v.* Andreas (1737)	62
Andrewes *v.* Uthwatt (1886)	69, 70, 71

PAGE

Andrews, *Re*, Edwards *v.* Dewar (1885) ... 128
——— *v.* Andrews, *Re* D'Angibau (1880) 139
——— *v.* Andrews & Chalmers (1924) ... 298
(1888) ... 465
——— (Doe d.) *v.* Taylor (Can.) 183, 184
Anghinelli *v.* Anghinelli (1918) 553, 554
Angier *v.* Angier (1718) ... 241, 244
Angle *v.* Angle (1848) 332, 341
Angliss *v.* Angliss (1893) 547
Anichini *v.* Anichini (1839) ... 368, 369
Ann, *Re*, Wilson *v.* Ann (1894) ... 145
Annesley *v.* Annesley (Ir.) ... 401, 443
Anon. (1638), Cro. Car. 513 215
——— (1639), W. Jo. 440 80
——— (1718), 2 Eq. Cas. Abr. 135 ... 192
——— (1792), 3 Hag. Ecc. 82, n. ... 296
——— (1839), 4 Jur. 5 257
——— (1843), 1 L. T. O. S. 383 ... 57
——— (1853), 17 Jur. 628 270
——— (1857), Dea. & Sw. 295 370, 404, 426
——— (1857), 3 Jur. N. S. 839 ... 257
——— (1858), 30 L. T. O. S. 278 ... 386
——— (1861), 2 Sw. & Tr. 249 ... 480
——— (1868), 32 J. P. 743 266
——— (1875), 20 Sol. Jo. 122 ... 34
——— (1875), *Times*, Nov. 10 ... 262
———, [1876] W. N. 22 34
——— (1919), *Times*, Nov. 1 293
(1919), *Times*, Nov. 28 ... 295
Anquez *v.* Anquez (1866) 278, 403
Anstey *v.* Manners (1818) 204
Anthony *v.* Anthony (1860) ... ...
Appleyard *v.* Appleyard & Smith (1875) ... 394
Apthorpe *v.* Apthorpe (1887) 546
Archard *v.* Coulsting (1843) 239, 240
Archdeacon *v.* Howe (Can.) 248
Archer *v.* Archer (1886) 564
Archibald *v.* Flynn (Can.) 200
Argar *v.* Holdsworth (1758) 50
Arkley *v.* Arkley (1821) 370
Arkwright *v.* Arkwright (1895) 5 530, 533
Armistead *v.* Armistead (1922) 362
Armitage, *Ex p.* (1858) 386
——— *v.* Armitage (1866) 70
——— *v.* Coates (1865) 109
Armitage's Divorce, *Re* (1858) 386
Armstrong, *Re*, *Ex p.* Gilchrist (1886) 136, 142
——— *v.* Parkinson (1851) 94
Armytage *v.* Armytage (1898) ... 264, 459
Arnold *v.* Arnold (Ind.) 300
v. Kayess, *Re* Taber (1882) 103
v. Woodhams (1873) 114, 118
Ascroft *v.* Trevor (otherwise Foley) (1906) 272, 452
Ash *v.* Ash (1893) 466, 471
Ash's Case (1702) 40
Ashcroft *v.* Ashcroft & Roberts (1902) 501, 502, 552
Asher *v.* Wallis (1707) 261
Ashley *v.* Ashley (1861) 381
Ashton (Lady) *v.* Ashton (1650) 75
Ashton *v.* Ross, *Re* Ross (1900) 118
Ashworth *v.* Outram (1877) 91
Asprey, *Ex p.*, Moore *v.* Moore (1844) .. 115
Asser *v.* Wilks (1707) 261
Astley *v.* Astley (1828) 299
Astrope *v.* Astrope (1859) 319
Atchinson *v.* Baker (1796) 27, 32
Atkin's Trusts, *Re*, Smith *v.* Atkin (1909) .. 250
Atkins *v.* Atkins & Urquhart (1913) 518
v. Curwood (1837) ... 190, 194, 195
v. Far (1738) 24
Atkinson, *Re*, Waller *v.* Atkinson (1899) ... 84
——— *v.* Atkinson (1825) 435

PAGE

Atkinson *v.* Atkinson (N.Z.) 419
——— *v.* ——— (No. 1) (N.Z.) ... 243
——— *v.* ——— (No. 2) (N.Z.) ... 432
——— *v.* ——— (No. 3) (N.Z.) 534, 535
——— *v.* Littlewood (1874) ... 232, 236
Atkinson's Policy Trusts, *Re* (1895) 152
Atkyns *v.* Pearce (1857) ... 193, 195, 202, 205
A.-G. *v.* Akers (1872) 58, 59
——— *v.* Clements (1871) 58
——— *v.* Lucas (1843) 59
——— *v.* ——— (1848) 58, 59
——— *v.* Mullay (1828) 58
——— *v.* ——— (1844) 58
——— *v.* Parnther (1793) 148
——— *v.* Read (1871) 58, 59
——— *v.* Riddle (1832) 213
——— *v.* Severne (1844) 58, 59
——— *v.* ——— (1845) 58, 59
——— *v.* Staff (1833) 143
——— *v.* Teather (1881) 59
——— *v.* Willshire (1875) 59
A.-G. for Province of Alberta Intervenant, Board *v.* Board (Can.) 262
A.-G. for Saskatchewan Intervener, B. *v.* B. (Can.) 285
A.-G. of Queensland *v.* Holland (Aus.) 485, 486
Attwood (otherwise Pomeroy) *v.* Attwood (1903) 528, 533
Atwood *v.* Atwood (1718) 78, 79
——— *v.* Chichester (1878) 252
Aubourg *v.* Aubourg (1895) 288, 343
Audley's (Lord) Case (1631) 261
Aughtie *v.* Aughtie (1810) 465
Augustin *v.* Augustin (Ind.) 289
Auld *v.* Auld (Scot.) 430, 490
Auster *v.* Holland (1846) 239, 240
Austin *v.* Austin (1871) 380
Avery *v.* Avery (Can.) 465
Avila *v.* Avila (1861) 402
——— *v.* ——— (1862) 496
Axford *v.* Reid (1889) 119
Aylesworth *v.* Patterson (Can.) ... 175, 176
Ayling *v.* Goldring (1845) 491
Ayres *v.* Ayres (1901) 545
Aytoun *v.* Aytoun (1892) ... 170, 171, 172

B.

B. *v.* B. (1892) 219
— *v.* — (1894) 418
— (otherwise H.) *v.* B. (1901) 269, 427
— *v.* B. (1907) 437
— (otherwise W.) *v.* B. (1909) ... 426
v. B. (1911) 290
v. — (1924) 536
— *v.* —, (Can.) 287, 400
— *v.* —, A.-G. for Saskatchewan Intervener (Can.) 265
— *v.* C., *Re* A. (1893) 126
— *v.* L. (falsely called B.) (1869) ... 427, 513
B——— *v.* B——— & T——— (1921) 536
——— (falsely called C———) *v.* C——— (1863) 427,
B———n *v.* B———n (1854) 265, 351
——— *v.* M———e (falsely calling herself B———n) (1854) 265, 351
Babbage *v.* Babbage (1870) 431
Babineau *v.* Babineau (Can.) 294
Babu *v.* Musammat Kokla (Ind.) 276
Back *v.* Andrews (1690) 163

PAGE

Bacon, *Re*, Toovey *v.* Turner (1907) 85, 135
——— *v.* Bacon (1866) 536
——— *v.* ———, *Re* Waddington (1897) ... 136
——— *v.* Bacon & Ashby (1877) ... 334, 335
——— *v.* Bacon & Bacon (1859) ... 434, 452
——— *v.* ——— (1860) 516, 517
v. Young (Nfld.) 189
Badcock *v.* Badcock & Chamberlain (1858) 474
Baddeley *v.* Baddeley (1878) 160
——— *v.* Mortlock (1816) 31, 35
Badham *v.* Badham & Gorst (1890) ... 356, 372
Baggett *v.* Meux (1844) 115, 116
——— *v.* ——— (1846) 102, 103, 105, 115, 116
Bagley *v.* Humphries (Can.) 178
——— *v.* Maple & Co., Ltd. (1911) 130, 132, 254, 255
Bagnall *v.* Bagnall & Hobbs (1910) 461
Bagot *v.* Bagot (1890) 386
——— *v.* Oughton (1717) 154, 157
Bagshaw *v.* Bagshaw (Can.) 285
Bahin *v.* Hughes (1886) 218
Bai Sari *v.* Sankla Hirachand (Ind.) ... 273
Baigent *v.* Baigent (N.Z.) 234, 235
Bailey *v.* Bailey (1884) 547
——— *v.* ——— (Can.) 282
——— *v.* ——— (Ind.) 389
——— *v.* Bailey & Hodgson (1909) 438
— *v.* Calcott (1840) 201
Baillie *v.* Chalmers (Scot.) 215
Baily *v.* Baily & Della Rocca (1861) ... 441
——— *v.* ——— (1862) ... 551
Bain *v.* A.-G. (1892) 74
——— *v.* Bain (1824) 413
Baker *v.* Baker (1863) 316, 434
——— *v.* ——— (1880) ...
——— *v.* ——— (1908) ... 388, 398, 473
——— *v.* ——— (1919) 281
——— *v.* ——— (Can.) 355
——— *v.* Baker & Dwyer (1908) 388, 398, 473
——— *v.* Baker & Grigg (1867) 540
——— *v.* Bradley (1855) ... 104, 105, 108
——— *v.* Cartwright (1861) 32, 33
——— *v.* Newton (1839) 105
——— *v.* Sampson (1863) 200
v. Smith (1651)
— *v.* Trusts & Guarantee Co. (Can.) ... 77
v. Wilson (Can.) 429, 430
Balcombe *v.* Balcombe (1908) .. 239, 344
Baldwin *v.* Baldwin & Stowell (1919) 462, 477
Balfour *v.* Balfour (1919) 210
——— *v.* Carpenter (falsely called Balfour) (1810) 61
——— *v.* Carpenter (falsely called Balfour) (1811) 55, 56, 61
Ballard *v.* Money (Can.) 81
Bancroft *v.* Bancroft & Rumney (1864) 324, 400
——— *v.* ——— (1865) ... 473
Banister & Wife *v.* Thompson (1908) ... 42
Bank of Montreal *v.* Holoboff (Can.) 210, 211
——— *v.* Stuart (1911) ... 168, 169
Bankes, *Re*, Reynolds *v.* Ellis (1902) ... 110
——— *v.* Ayres (S. Af.) 81
Banks, *Re*, Weldon *v.* Banks (1912) ... 211
Bannister *v.* Bannister (N.Z.) ... 324, 325
——— *v.* Bannister & Davis (1860) ... 380
——— *v.* Thompson (Can.) 81
Barber, *Re*, Hodgson *v.* Williamson (1880) 144, 183, 205
——— *v.* Barber (1896) 388
——— *v.* Gregson (1880) 121
Barbour *v.* Barbour (1920) 366
Barcroft *v.* Barcroft (1921) 441
Barker, *Ex p.* (1783) 57
——— *v.* Barker (1824) 330

PAGE

Barker *v.* Barker (1905) 562, 563
——— *v.* ——— (1907) ..
Barlee *v.* Barlee (1822) .. 258, 276, 369, 372
Barnes *v.* Barnes (Can.) 265
——— *v.* Barnes & Beaumont (1867) ... 419
——— *v.* ——— (1868) 360, 468, 493, 494
——— *v.* Barnes & Grimwade (1867) 328, 334, 335, 336, 484, 486
——— *v.* Jarrett (1838) 190
——— *v.* Winkler (1826) 200, 201
Barnett *v.* Barnett (1859) 437
——— *v.* ——— (1861) 242
——— *v.* Howard (1900) 121
Barnum *v.* Henry (Can.) 30
Baron *v.* Baron (1908) 293
Barr *v.* Neilson (Scot.) 215
Barrack *v.* M'Culloch (1856) 93, 94, 95, 162, 166
Barratt *v.* Barratt & Fox (1920) 452, 453, 454, 455, 456, 463, 475, 476
Barrett *v.* Barrett (1903) 286
——— *v.* ——— (Can.) 234
——— *v.* Barrett & Vaughan (1913) 481, 482
Barron *v.* Willis (1899) 167, 168, 169
——— *v.* ——— (1900) 142, 167, 168, 169
Barrow *v.* Barrow (1853) ... 465, 470
——— *v.* ——— (1854) ... 521, 522
——— *v.* Williams (1854) ... 521, 522
Barry *v.* Barry (1901) 420
——— *v.* ——— (1902) 275
Barrymore *v.* Ellis (1836) 108
Bartelot *v.* Hawker (1790) 305
Bartholomew's Estate, *Re* (1870) ...
Bartlett *v.* Bartlett (1918) 510
——— *v.* Bartlett & Balmanno (1864) ... 382
——— *v.* Gillard (1827) 170
——— — (falsely called Rice) *v.* Rice (1894) ... 38
Barton *v.* Briscoe (1822) 111
Barwell *v.* Brooks (1784) 198
Baseley *v.* Forder (1868) 205
Bashall *v.* Bashall (1894) 161, 259
——— *v.* ——— (1897) 503, 529
Basing *v.* Basing (1864) ... 315
Bass *v.* Bass (1915) 416, 417
Bateman *v.* Bateman (otherwise Harrison) (1898) 40, 552
——— *v.* Bateman (1901) 275, 280, 392, 393
(Lady) *v.* Faber (1898) 113, 114
——— *v.* Ross (Countess) (1813) ... 241, 245
Bates *v.* Bates (1888) 542, 543
——— *v.* Kesterton (1896) 117
Batger *v.* Batger (N.Z.) 422
Bathe *v.* Bank of England (1858) 100
Batt *v.* Batt & Hughes (Can.) ... 77, 429
Batt's Settled Estates, *Re* (1897) 133
Battie *v.* Brown (Ind.) 553
Bauld *v.* Reid (Can.) 176
Bavin *v.* Bavin (Can.) 347
Bawden *v.* Bawden (1862) 324
Bayard *v.* Morphew (1815) 40
Bayley *v.* Bayley (1922) 511
Baylis *v.* Baylis, Teevan & Cooper (1867) 358, 359, 434
v. Watkins, *Re* Hooper (1864) 207, 209
Baynon *v.* Batley (1832) 35
Baynton *v.* Collins (1884)
Bazeley *v.* Forder (1868) 30, 3
Beachey *v.* Brown (1860) 197, 198
Beale *v.* Arabin (1877) 59, 62
Beamish *v.* Beamish (1861) 251, 255
Beasley *v.* Roney (1891)
Beattie *v.* Mutton (Can.) ... ...
Beatty, *In the Estate of*, Trustees, Executors & Agency Co., Ltd. *v.* Johnston (Aus.) ... 68

PAGE

Beatty *v.* Beatty (Can.) 66, 67
Beauchamp, *Re, Ex p.* Beauchamp (1904) 253
——— *v.* Beauchamp & Watt (1904) 524, 525, 526, 528, 529
Beauclerk *v.* Beauclerk (1891) 289, 349, 350
——— *v.* ——— (1894) 352
——— *v.* ——— (1895) ... 350, 352, 354, 355
Beaumont *v.* Beaumont (N.Z.) 310
——— *v.* Kaye (1904) ... 214, 215, 218
Beaupre's Trusts, *Re* (Ir.) 85
Beauraine *v.* Beauraine (1808)
Beavan *v.* Beavan (1862) 358, 373, 408, 421
Bebb *v.* Bebb & Ross (1920)... 363, 483, 487
Beck *v.* Pierce (1889) 176
Beckett *v.* Beckett & Jones (1901) 382, 383
v. Tasker (1887) 121, 122
Beddington *v.* Beddington (1922) ... 559, 564
Beeby *v.* Beeby (1799) ... 338, 339, 341, 342
Beecham, *Ex p., Re* Petition for Judicial Separation (1901) 379
v. Beecham (1903)... 489, 496, 500
Beecham & Lunacy Comrs., *Re* (1901) 379
Beecher *v.* Major (1865) 93, 166
Beechey *v.* Brown (1860) 31
Beer *v.* Beer (1906) 277, 466
Beeton *v.* Beeton & Robertson (1921) ... 539
Beevor *v.* Beevor (1809) 465, 469
Belcher *v.* Belcher (1836) 465
——— *v.* ——— (1919) 365, 3
Bell *v.* Bell (1883) ... ...
—— *v.* —— (1889) 331
—— *v.* —— (Can.) 302, 470
—— *v.* —— (S. Af.) 332, 339
—— *v.* Bell & Anglesey (Marquis) (1859) 453, 454, 456
—— *v.* Giberson (Can.) 35
—— *v.* Light (Can.) 248
—— *v.* Murray (Scot.) 432
—— *v.* Petry (N.Z.) 249
—— *v.* Riddell (Can.) 249
—— *v.* Stocker (1882) 175, 176
—— *v.* Wetmore (Can.) 119
Bellamy *v.* Robertson (Can.) 33
Bellingay *v.* Bellingay & Thomas (1866) ... 538
Belyea, *Ex p.* (Can.) 293
Bench *v.* Merrick (1844) 31
Bennet Clark *v.* Bennet Clark (Scot.) ... 463
Bennett *v.* Bennett (Can.) 421
——— *v.* Edmonton (Can.) 249
——— *v.* Jones (Can.) 199
——— *v.* Lawrence (Can.) 176
Benning & Grange (Can.) 27
Bensaude *v.* Hastings, *Re* Tatham (1892) ... 540
Benson & Port Hope, Lindsay, & Beaverton Ry. Co., *Re* (Can.) 146
Bent *v.* Bent & Footman (1861) 397, 398, 460, 462, 5 04, 537, 552
Bentley *v.* Griffin (1814) 185, 190
Benton, *Re*, Smith *v.* Smith (1882) 104
Benyon *v.* Benyon (1890) 529, 530
——— *v.* Benyon & O'Callaghan (1876) . 247, 522, 523, 529, 531
Beresford *v.* Armagh (Archbp.) (1844) ... 171
Berlyn *v.* Berlyn & Watt (1919) 348
Bernard *v.* Minshull (1859) 140
Bernstein *v.* Bernstein, Turner & Sampson (1893) ... 304, 305, 337, 341, 342, 390, 475
Berry *v.* Berry (S. Af.) 443
——— *v.* Berry & Carpenter (1898) 292
——— *v.* Da Costa (1866) 34, 35
——— *v.* Nevys (1623) 214
——— *v.* Zeiss (Can.) 249
Berthon *v.* Cartwright (1796) 81

PAGE

Bertie *v.* Chesterfield (Lord) (1723) 83
Besant *v.* Wood (1879) 220, 234, 238, 239, 241, 244, 278, 326, 350
Bessela *v.* Stern (1877) 29
Best *v.* Best (Lady) (1814) ... 348, 349, 352
—— *v.* —— (1823) 299, 300
Bethune *v.* Bethune (1891) 284, 288
Betton-Bright *v.* Betton-Bright (1920) 463, 471, 472
Betts *v.* Betts & Brodrick (1917) 431
Bevan *v.* Bevan (1859) 324
——— (falsely called M'Mahon) *v.* M'Mahon (1861) 52
——— *v.* McMahon & Bevan (falsely called McMahon) (1859) 440, 443
Bevir *v.* Armstrong, *Re* Illingworth (1909) 138
Bewes *v.* Bewes (N.Z.) . 332
Beynon *v.* Jones (1846) 176
Bickenden *v.* Williams (1869) 140
Bicknell *v.* Bicknell (1908) 440
Biedermann *v.* Biedermann (1896) 550
Biffin *v.* Bignell (1862) 196, 229
Biggs *v.* Biggs (1791) 410, 496
——— *v.* Isenberg (Can.) 147
Bigwood *v.* Bigwood (1888) 318
Bikker *v.* Bikker & Whitewood (1892) 455, 456
Bilby *v.* Bilby (1902) 476
Bilsland *v.* Bilsland (Can.) 487
Bindley *v.* Mulloney (1869) 221
Binford *v.* Bawden (1792) 256, 257
Binney *v.* Binney (1893) ... ...
Birch, *Re* (1853) 56
——— *v.* Birch (1873) 286, 287, 288, 290
Bird *v.* Argent (1887) 25
——— *v.* Barstow (1892) ..
——— (*alias* Bell) *v.* Bird (1753) ... 410, 465
v. Bird (1754) 410, 500, 501
v. Bird (Can.) 375
v. Jones (1828) 199
Birendra, etc. *v.* Hemlata, etc. (Ind.) ... 265
Birkett *v.* Birkett (1908) 96
Birmingham Excelsior Money Society *v.* Haywood (1904) 120
Birmingham Excelsior Money Society *v.* Lane (1904) 120
Birt *v.* Barlow (1779) 71
Bischoff's Trustee *v.* Frank (1903) 167, 168, 169
——— *v.* ——— (1911) 167, 168, 169
Bishop *v.* Bishop (1897) 237, 238, 489, 502, 536
——— *v.* ——— (1901) ... 400
——— *v.* Rowe (N.Z.) ... 566, 567
——— *v.* Wall (1876) ... 118, 140
Bjorkman *v.* Bjorkman (1910) ... 543
Blachford *v.* Woolley (1863) ... 143, 144
Black *v.* Duncan (Scot.) 80
Blackbell *v.* Blackbell (Aus.)... 383, 384
Blackborne *v.* Blackborne (1867) ... 416
... 405
Blackburn *v.* Blackburn (1907) ... 451
Blackett *v.* Blackett (1884) 532
v. Blackett & Frail (1902) ... 421
Blackhall *v.* Blackhall & Clarke (1888) ... 485
Blackledge *v.* Blackledge (1913) 556, 561, 568, 570
Blackmore *v.* Ley (1700) 186
——— *v.* Mills (falsely called Blackmore) (1868)... 410
Blackmore & Thorp *v.* Brider (1816) 41, 43
Blackwell *v.* Blackwell (1920) 318
Blades *v.* Free (1829) 189, 213
Blake, *Re*, Blake *v.* Power (1889) 159
——— *v.* Blake (1772) 57
Bland *v.* Bland (1866)... ... ...
——— *v.* ——— (1875) 391

PAGE

Bland *v.* Bland & Stormont (1868) 292
Blandford *v.* Blandford (1883) 338, 343, 347
v. (1892) 418, 420, 533, 537
Blaquiere (Lady) *v.* Blaquiere (1820) 497
Blatchford *v.* Woolley (1863) 143, 144
Bletsow *v.* Sawyer (1684) 95
Bliss *v.* Ætna Life Insurance Co. (Can.) ... 149
Blomfield (Doe d.) *v.* Eyre (1846) 137
(1848) 137
Blood *v.* Blood (1902) ... 519, 521
Blundell, *Re* (1901) ... 127
Board *v.* Board (Can.) 571
——— *v.* Board, A.-G. for the Province of Alberta Intervenant (Can.) 262
Boardman *v.* Boardman (1866) 289, 480
Boddington *v.* Boddington & Nossiter (1858) 294, 475
Boddy *v.* Boddy & Grover (1858) 399
(1860) 303, 304, 462
— *v.* (1861) 399, 551
Bodman *v.* Bodman (otherwise Perry) (1913) 46
Boeck *v.* Boeck (Can.) 541
Boger *v.* Boger (1908) 387, 388
Bolitho & Co., Ltd. *v.* Gidley (1905) ... 123
Bolster *v.* Bolster (Ir.) 106
Bolton *v.* Prentice (1744) ... 199
Bonaparte *v.* Bonaparte (1891) 295, 377, 381
v. (otherwise Megone) (1892) ... 333
v. Megone (falsely called Bonaparte) (1892) 333
Bond *v.* Taylor (1861) 139
Bonner & Co. *v.* Lyon (1890) 182
Bonsor *v.* Bonsor (1897) 412, 499, 500, 511
Boode *v.* Boode (1847) 439
Boone *v.* Boone (1756) 243
Borden *v.* James (Can.) 118
Boreham *v.* Boreham (1866) 359, 382
——— *v.* Boreham & Brown (1870) ... 378
Borham *v.* Borham & Brown (1870) 378
Boscawen *v.* Wyndham, *Re* Sutton (1921) ... 139
Bose *v.* Shumsoonnissa Begum (Ind.)
Bostock *v.* Bostock (1858) 286, 345
——— *v.* Hume (1844) ... ...
Boston *v.* Boston (1904) 211
Bosvile *v.* Bosvile & Craven (1888) ... 525, 526
Bosworthick *v.* Bosworthick (1901) ... 290, 306
Boucher *v.* Boucher & Judd (1892) ... 363
Boughey *v.* Boughey & Foan (1917) ... 73
Boulting *v.* Boulting (1864) 327, 329, 350, 494
Boulton *v.* Boulton (1918) ... 298, 438
——— *v.* ——— (1922) 321
——— *v.* Boulton & Page (1862) 483, 484
Bourne *v.* Bourne (1913) ... 230, 344
Boustead *v.* Whitmore (Can.) ... 249
Bowden *v.* Bowden (1917) ... 298, 299
Bowen, *Re*, James *v.* James (1892) ... 134
— *v.* Bowen (1908) 311, 312, 555, 563
——— *v.* Bowen & Evans (1864) 481
Bower *v.* Smith (1871) 142
Bowers *v.* Bowers (Can.) 246
Bowman *v.* Bell (1847) 257
Bown, *Re*, O'Halloran *v.* King (1883) ... 102
———, *Re*, ——— *v.* ——— (1884) 102, 104, 105, 110
Bowron *v.* Bowron (1925) 307, 561
Bowyer *v.* Peake (1697) 186
Bowzer *v.* Ricketts (falsely calling herself Bowzer) (1795) 405
Boyd *v.* Boyd (N.Z.) 396, 550
——— *v.* Boyd & Collins (1859) 460, 474
Boyer *v.* Boyer (S. Af.) ... 307, 308
Boyes *v.* Baillie (1821) 297
Boyle *v.* Boyle (1688) 272

PAGE

Boyle *v.* Boyle (Ind.) 466
Boynton *v.* Boynton (1858) 418, 460, 461, 523, 527
v. (1861) 460, 461, 523, 527
Bracey *v.* Sherwin, *Re* Charleton (1911)
Braddock *v.* Braddock (1910) ... 343
Bradford *v.* Bradford (Aus.) ... 310, 311
Bradley *v.* Bradley (1878) 510, 512
(1882) 505, 510
— *v.* — (Can.) ... 406
Bradshaw *v.* Bradshaw (1897) 309, 313, 554, 555, 556
Bradt (Doe d.) *v.* Hodgins (Can.) ... 132, 133
Brady, *Ex p.* (1840) ... ...
Bragg *v.* Bragg (1925) 565
Brailey *v.* Brailey (1922) 234
Bramwell *v.* Bramwell (1831) 283, 340, 341, 345
Brandon *v.* Hughes, *Re* Hughes (1898) 101, 145
Branton Day *v.* Branton Day & Erskine 518, 526
Braunstein *v.* Lewis (1891) 182
Bray *v.* Bray (1828) 291
Breadalbane Case, Campbell *v.* Campbell (1867) ... ...65, n., 67, 68
Breakey (Doe d.) *v.* Breakey (Can.) ... 61
Brealy (falsely called Reed) *v.* Reed (1841) 48, 433
Breen *v.* Breen (Can.) 57
Bremner *v.* Bremner & Brett (1864) ... 474, 543
Brend *v.* Brend (1683) 158
Brennan (otherwise Roberts) *v.* Brennan (1902) 550
Brereton *v.* Edwards (1888) 178
Breton's Estate, *Re*, Breton *v.* Woollven (1881) 160, 161
Brettle, *Re*, Jollands *v.* Burdett (1864) ... 114
Brewis *v.* Brewis (1893) 549
Brewster *v.* Brewster (Can.) 244
Brickenden *v.* Williams (1869) 140
Bridges *v.* Bridges & Barnett (1867) ... 468
Bridgett *v.* Bridgett (Ir.) 236
Bridgman *v.* Bridgman & Puckrin (1869) ... 442
Bridgwater *v.* Crutchley (1823) ... 53, 55
Briggs *v.* Morgan (1820) 271, 272
v. Ryan, *Re* Wheeler's Settlement Trusts (1899) 111, 122
Brinckman, *Ex p.* (1895) 50, 51
Brinkley *v.* A.-G. (1889) 74
——— *v.* — — — (1890) 74
Brinton *v.* Lulham, *Re* Lulham (1885) . 146
Brisco *v.* Brisco (1820) 413
——— *v.* — — (1824) 380
Brittain *v.* Brittain & Camp (1859) 380, 402, 403, 465, 477
Britten *v.* Britten (1846) 257
Brittlebank *v.* Gray-Jones, Gray-Jones, Claimant (Can.) 84
Brizard *v.* Heyne (Can.) 81
Brizard & Brizard, *Re* (No. 2) (Can.) ... 343
Broad *v.* Broad (1898) 557
Broadfoot *v.* Broadfoot (1902) 433
Broadwood *v.* Broadwood & St. Albans (1864) 428
Brocas *v.* Brocas (1861) 444
Brock *v.* Patterson & Allen (Can.) 186
Brockelbank *v.* Brockelbank & Borlase (1911) 474
Brodie *v.* Brodie (1917) 223
Brodrick *v.* Stillwell, *Re* Stillwell (1916) ... 541
Bromfield *v.* Bromfield (1871) 382
Bromley *v.* Bromley (1794) 306
Brook *v.* Brook (1858) 63
v. ——— (1861) ... 63
v. ——— (1886) 292, 400
— *v.* Turner (1677) ... 139

PAGE

Brooke *v.* Brooke (1858) 95
(1912) ... 348, 377, 482, 483
Brooke & Fremlin's Contract, *Re* (1898) ... 133
Brookes *v.* Brookes (1858) 315
Brooking-Phillips *v.* Brooking-Phillips (1913) 369, 401, 406
Brooks' Divorce Bill, *Re* (1847) 353
Brougham *v.* Brougham (1895) 349
Brown, *Re*, Ingall *v.* Brown (1904) 57
v. Ackroyd (1856) 206
v. Audley (1620)
v. Bamford (1842) 107, 108, 109
v. ——— (1846) 107, 108, 109
v. Brown (1828) 266, 267, 272, 408
— *v.* (1848) 294, 376, 403
— *v.* (1850) ... 465, 477
— *v.* (1864) ... 440, 441
— *v.* (1865) 287, 289, 414
— *v.* (1866)
— *v.* (1868) 228, 341
(1898) 554, 555, 564, 565, 570
v. (1915) 432
(Aus.)
— *v.* (Can.) 75, 262, 406, 494, 495
(S. Af.) 409
v. Brown & Paget (1874) 431
v. Brown & Robey (1869) 329, 357, 468
v. Brown & Shelton (1874) . 326, 404
v. Brown & Simpson (1863) 408
v. Dimbleby (1904) 121
v. Fullerton-Smith (N.Z.) 132
v. Holloway (Aus.) 214
v. Leech (1924) ... 297. 298
v. Pocock (1833) ... 110
v. ——— (1834) ... 110
Browne *v.* Like (1807) 107
Browne's Policy, *Re*, Browne *v.* Browne ... 152
Browning *v.* Browning (1911) ... 290
Brownsword *v.* Edwards (1751) ... 443
Bruce, *Ex p.* (1881) 378, 379
——— *v.* Bruce & Laing (1881) 378, 379
——— *v.* Burke (1825) 403, 404
Brudo *v.* Chamberlain (S. Af.) ... 195
Bruere *v.* Bruere (1837) ... 408, 412
Brunton *v.* Dixon (1892) 219
Bryant *v.* Bryant (1914) ... 564, 568
v. Bull (1878) ... 254
Brydges *v.* Brydges & Wood (1909) 444, 474, 541
Bryson *v.* Ontario & Quebec Ry. Co. (Can.) 179
Buchanan *v.* Buchanan (Ir.) 167
Bucke *v.* Bucke (Can.) 470, 471
Buckland *v.* Buckland (1900) .. 87, 88
Buckley *v.* Buckley (1912) 393
Buckmaster *v.* Buckmaster (1869) 311
Buckton *v.* Hay, *Re* Ridley (1879) 102
Buie *v.* Gordon (Scot.) 192
Bull *v.* Bryant (1878) 254
—— (otherwise Moore) *v.* Bull (1891) ... 519
—— *v.* Smith, *Re* Smith (1901) 162
Bullens Case (1632) 214
Bulley *v.* Bulley (Can.) 178
Bullick *v.* Bullick (Can.) 228
Bullivant *v.* Bullivant (1902) 564
Bullock *v.* Bullock (1910) ... 347, 348, 363, 365
——— *v.* Bullock & Strong (1872) ... 246, 247
Bullus *v.* Bullus (1910) 548
Bunyard *v.* Bunyard (1863) 380
Burchell, *Re*, Burchell *v.* Hawes, *Re* Hawes (1892) 146, 172, 173
Burd *v.* Burd (S. Af.) 234
Burdett *v.* Horne (1911) 216, 218
Burdon *v.* Burdon (1901) 365, 487
Burge *v.* Jones (1828) 199

PAGE

Burges' Policy, *Re*, Lee *v.* Scottish Union & National Insurance Co. (1915) 151
Burgess *v.* Burgess (1817) 301, 369
Burgess, etc. Claimants, Pope *v.* Bushell & Co. (1888) ... ...
Burgess' Policy, *Re* (1915) 151
Burkardt *v.* Burkardt (N.Z.) 468, 469
Burke *v.* Scribner (Can.) 32
Burmester *v.* Burmester (1913) . 507, 549
Burnard *v.* Haggis (1863) 217
Burne *v.* Burne & Helvoet (1920) 456, 463, 475
Burnet *v.* Mann (1748) 136
Burnett *v.* Burnett & Purdy (1922) ... 384
Burnham *v.* Bennett (1845) 137, 138
(1847) 137, 138
Burns *v.* Burns (Can.) 522
Burrell *v.* Burrell (1863) 401
——— *v.* Burrell & Blake (1900) 384
——— *v.* Strong (1672) 27
Burrett *v.* Booty (1818) 197, 198
Burroughs *v.* Burroughs (1861) . 276, 369
——— *v.* ——— (1862) . 428, 451
v. Burroughs, Burroughs *v.* Burroughs & Silcock (1862) 404, 470, 472
Burrows *v.* Burrows (1867) 409
Bursill *v.* Tanner (1884) .. 119, 253, 254
Burslem *v.* Burslem (1892) 438
Burtanshaw *v.* Martin (1859) 111
Burton *v.* Sturgeon (1876) 97
Bury's Case (1598) 265, 266
Busby *v.* Busby & Vine (1861) 544
Busch *v.* Busch (N.Z.) 276, 565
Busfield *v.* Busfield (N.Z.) 376, 377
Bush *v.* Bush (N.Z.) 298, 299, 388
Busk *v.* Milnes (1794) 172
Butchart *v.* Butchart & Hill (1901) 494
Butcher *v.* Vale (1891) 224
Butland *v.* Butland (1913) 277, 372
Butler, *Ex p.*, Jay *v.* Amphlett (1862) 177
———, *Re*, Joyce *v.* Brew (Ir.) ... 42
——— *v.* Butler (1752) 415
——— *v.* ——— (1885) 210
— *v.* ——— (1889) ... 413, 414, 463, 478
— *v.* ——— (1890) 332, 464, 465, 466, 489
— *v.* ——— (1894) 299, 325
——— *v.* ——— (1917) 322
——— *v.* Butler, Butler *v.* Butler & Burnham (1890) 335, 422, 465, 466, 478, 486
——— *v.* Butler & Burnham (1889) 413, 414, 463, 478
——— *v.* Gastrell (1723) 41
——— *v.* Standard Fire Insurance Co. (Can.) 169
——— *v.* Wynne (1892) 256
Butlin's Trust, *Re* (1870) 88
Buttanshaw *v.* Martin (1859) 111
Butterfield *v.* Butterfield (Ind.) ... 533, 552
Butterworth *v.* Butterworth & Englefield (1920) ... 452, 453, 454, 455, 456, 463, 475, 476
Byrne *v.* Carew (Ir.) 223

C.

C. *v.* C. (1905) 306, 461
— *v.* — (otherwise H.) (1911) 268
— (otherwise H.) *v.* C. (1921) 268
— *v.* C. (Can.) 295, 301
— *v.* C. & M. (1910) 399, 400
— *v.* M. (Scot.) 271
C.'s Case, *Re* Homestead Act (Can.) ... 77, 78
C.'s Settlement, *Re* (1887) 126

PAGE

C- v. C- (1854) 283, 287
v. — (1862) 427, 449
C. D. v. A. B. (Scot.) 536
Cadogan (Lord) v. Cadogan (Lady) (1796) ... 296
Cahill v. Cahill (1883) 229
Caines v. Smith (1847) 28
Calcraft v. Harborough (Earl) (1831) 402, 456
Cale v. James (1897) 208, 568
Callaby v. Callaby & Perowne (1920) ... 548
Callot v. Nash (1923) 185, 193, 194, 195
Callwell v. Callwell & Kennedy (1860) ... 456, 457, 527
Calverly v. Plummer (1671) 183
Camelford (Lord) v. Smith (1795) ... 169, 170
Cameron v. Heighs (Can.) 253, 254
——— v. Sparks (Can.) 34
——— v. Walker (Can.) 146
Campbell, *Ex p.*, Campbell v. Corley (1862) 272
(Can.) 299
v. Campbell (1857) ... 343, 352, 429, 439
v. (1887) ... 539, 540
v. (1922) 514
v. (Can.) ... 407, 429
[illegible]
——— v. Campbell, Breadalbane Case (1867) ... 65, n., 67, 68
——— v. Campbell & Davis (1895) ... 547
——— v. Carr (Can.) 305
——— v. Corley (1856) 63, 64, 72
——— v. ———, *Ex p.* Campbell (1862) ... 272
——— v. Shorey (Can.) 90
Campion v. Cotton (1810) 147, 166
Canadian Bank of Commerce v. Woodcock (Can.) 252
Canham v. Howard (1887) 195
Cantello v. Cantello (1896) 304
Capel v. Powell (1864) 215, 216
Capell v. Capell (Can.) 541
Capstick v. Capstick, Furness & Winder (1864) 408
Capua (Prince) v. De Ludolf (Count) (1836) 50
Car v. King (1700) 201, 212
Carbery Divorce Bill (Ir.) 441
Cardross' Settlement, *Re* (1878) ... 138, 139
Carew v. Carew (1891) 417
——— v. ——— (1894) 390
Cargill v. Cargill (1858) 315, 562
Carlin v. Carlin (1906) 65
Carmichael v. Carmichael (1925) 332
Carnegie v. Carnegie (1874) 169, 174
Carpenter, *Re*, Carpenter v. Disney (1884) ... 163, 164
——— v. Welch (1615) 215
Carr v. Carr (Can.) 406
——— v. Duncan (1858) 177
Carroll v. Fitzgerald (Can.) 93
Carryer v. Carryer & Watson (1865) ... 385
Carstairs v. Carstairs & Dickenson (1864) ... 475, 517
Carter v. Anderson (1830) 170
——— v. Carter (1860) 419
——— v. ——— (1896) 549
——— v. ——— (1909) 479
——— v. ——— (1910) 487
——— v. ——— (1919) 438
Cartledge v. Cartledge (1862) ... 381, 383
Cartlidge v. Cartlidge (1862) 419
——— v. ——— (1863) 493
Cartwright v. Cartwright (1853) ...
Case v. Case (1860) 433, 435
Castle v. Castle (S. Af.) 273
Castleden v. Castleden (1861) ... 351, 352
Catherwood v. Caslon (1844) ... 59, 68, 71

PAGE

Caton v. Caton (1849) ... 295, 297, 298
——— v. Rideout (1849) 171
Catterall v. Catterall (1847) 391
——— v. Kenyon (1842) 215
Cavendish v. Cavendish (1913) 505, 508, 512
(1926) 425
——— v. Cavendish & Rochefoucauld (1866) 443, 491
——— v. Cavendish & Rochefoucauld (1868) 530
Cesale v. Cesale (Can.) 292
Chaddock v. Chaddock, *Ex p.* Verax (1860) 388
Chaldecott v. Chaldecott & Carpenter (1920) 470
——— v. Chaldecott & Cartwright (1873) 468, 472
Chalmers v. Chalmers (1892) ... 509, 520
Chamberlain v. Chamberlain & Hartwell (1907) 382
——— v. Williamson (1814) 27
Chambers v. Caulfield (1805) ... 305, 491
— v. Chambers (1810) 296, 370, 371
v. — (1870) 459
v. (1889) ... 430
Chancellor v. Brown, *Re* Shelton (1891) ... 87
Chandler v. Chandler (1858) 393, 394
Chantler v. Chantler (Aus.) 561
Chaplin & Co., Ltd. v. Brammall (1908) ... 168, 169
Chapman v. Biggs (1883) 123
——— v. Chapman (N.Z.) 284
——— v. Chapman & Buist (1910) ... 392
——— v. Guest (1887) 232
v. Scott (Can.) ... 24
— v. Wood, *Re* Smith (1884) ... 108
Chapple v. Cooper (1844) ... 83
Charles v. Charles (1866) 264, 501
Charlesworth v. Holt (1873) 232, 236
Charleton, *Re*, Bracey v. Sherwin (1911) ... 82
Charlton v. Coombes (1863) 217
Charter v. Charter (1889) 382, 383
——— v. ——— (1901) ... 311, 316, 556
——— v. Ferguson, *Re* Phillips, *Re* Howard (1919) 43
Chase, *Ex p.* (Can.) 262
Cheale v. Cheale (1828) ... 462, 463, 539
Cheek v. Bootle (1834) 98
Chellammal v. Ranganatham Pillai (Ind.) ... 70
Cherrington v. Cherrington (Can.) 347
Cherry v. Cherry (1858) 451
Chesnutt v. Chesnutt (1854) ... 283, 287, 288, 290
Chettle v. Chettle (1821) 367
Chetwynd v. Chetwynd (1865) ... 472, 521, 522, 534, 535, 536
Chichester v. Chichester (1885) ... 392, 393
——— v. Mure (falsely called Chichester) (1863) 442, 553
Child v. Child (1864) 397
——— v. Hardyman (1730) 201, 202
Childers v. Childers (otherwise Burford) (1899) 413
Chillcott v. Chillcott & Smith (1873) ... 397
Chinham v. Preston (1759) 55
Chippendale v. Ivory, *Re* Ivory (1886) 67, 69
Chisholm's Settlement, *Re*, *Re* Hemphill's Settlement, Hemphill v Hemphill (1901) 142
Chizek v. Tripp (Can.) 30
Cholawczuk v. Cholawczuk (Can.) 466
Chrimes, *Re*, Locovich (or Lucovich) v. Chrimes (1917) 124
Christ's Hospital v. Budgin (1712) 165
Christian v. Christian (Ind.) 333
——— v. Whitaker, *Re* Whitaker (1887) 87
Christofferson v. Christofferson (Can.) 220, 221, 244

PAGE

Chrystal's Trustee *v.* Chrystal (Scot.) 151, 152
Chubb *v.* Stretch (1870) 177
Chudley *v.* Chudley (1893) 309, 312
Church *v.* Christie (Can.) 518
Churchill *v.* Churchill & Abbott (1868) ... 544
Churchward *v.* Churchward (1910) 520
— *v.* Churchward & Holliday (1895) 334
Churner *v.* Churner (1912) 321
Cibber *v.* Sloper (1738) 454
Ciocci *v.* Ciocci (1854) 290
Clapham *v.* Clapham & Guest (1868) ... 485
Claremont *v.* Wilmot (1885) 181
Clark, *Re* (1905) 375
—— *v.* Clark (1860) 416, 417
—— *v.* —— (1885) 279, 280
(1921) ... 446, 458
—— *v.* Clark & Bouck (1861) 537, 552
—— *v.* Clark & Saldji (1906) ... 470
—— *v.* Clark, Perrin & Cumins (1865) 470, 471
—— *v.* Field (1885) 208
—— *v.* Jaques (1838) ... 110, 111, 112
—— (falsely called Stier) *v.* Stier (1896) ... 38
Clarke *v.* Clarke (1862) 406
... ... 543
... ... 38
v. —— (1925) 332
v. Clarke & Clarke (1865) 359, 360, 483
v. —— (1873) 546
v. Clarke & Lindsay (1911) ... 520, 531, 532, 536
v. (No. 1) (1913) 536
v. Creighton (Can.) 178
v. Hankin (1814) 56
Clarke's Trusts, *Re* (1882) 103, 104, 113
Claydon *v.* Finch (1873) 128
Clayton *v.* London (Can.) 193
Cleaver *v.* Cleaver (1884) 487, 488
—— *v.* Mutual Reserve Fund Life Assocn. (1892) 152
Clegg *v.* Clegg & Bishop (1919) 428
Cleland *v.* Cleland & McLeod (1913) ... 366
Clement *v.* Beard (1699) 41
Clements *v.* Clements & Thomas (1864) 480, 481
—— *v.* Wood, *Re* Smith's Estate (1887) 134
Clench, *Re*, Draper *v.* Clench (1894) 232
Clerke *v.* Menzies, *Re* Wombwell's Settlement (1922) 457, 458
Clews *v.* Bathurst (1734) 273
Clifford *v.* Burton (1823) 187
—— *v.* Clifford (1884) 247
—— *v.* Laton (1827) 191, 199
—— *v.* Washington, *Re* Smith's Estate (1879) 218
Clinton *v.* Clinton (1866) 412
—— *v.* Hooper (1791) 154, 157
Clive *v.* Carew (1859) ... ...
—— *v.* Clive (1872) 102
Cloborn *v.* Cloborn (1630) 286, 287
Clough *v.* Lambert (1839) ... 219, 224, 225
Clout *v.* Clout & Hollebone (1861) ... 461, 536
Clowes *v.* Jones (falsely calling herself Clowes) (1842) 50, 51, 52
—— *v.* Jones (falsely calling herself Clowes) (1843) 405
Clues *v.* Bathurst (1734) 273
Clutterbuck *v.* Clutterbuck (1913) 513, 514
v. Clutterbuck & Luce (1915) 365
Coates *v.* Coates (Ir.) 236
—— *v.* Stevens (1834) 163
Cobb *v.* Cobb (1900) ... 554, 558, 563
Cobbe *v.* Cobbe (1909) . 566, 567
Cobbett *v.* Wood (1908) 208
Cochran *v.* Graham (1811)

PAGE

Cochrane, *Re* (1840) 78, 79, 80
—— *v.* Cochrane (1910) 283, 284
—— *v.* —— (Can.) ...
Cock *v.* Cock (1864) 317
—— *v.* Richards (1805) 23, 27
Cockburn *v.* Garnault (1792) 51
Cocksedge *v.* Cocksedge (1844) 223, 370, 372
—— *v.* —— (1845) . 219, 223
Codd *v.* Codd (Ind.) 480
Codrington *v.* Codrington & Anderson (1864) 381, 400, 419, 489
—— *v.* —— (1865) 381, 400, 464, 475, 493
Coe *v.* Coe (Can.) 569
Coenod *v.* Leslie (1909) 216
Coffey *v.* Coffey (1898) 306
Coghill *v.* Coghill & Lauriero (1865) ... 397
Cohen *v.* Cohen (1876) 403
—— *v.* —— (1897) 262
Cole *v.* Cottingham (1837) 24, 27
—— *v.* De Trafford (1917) 217
Colegrave, *Ex p.* (1838) 57
Coleman *v.* Coleman (1866) 365
v. Coleman & Simpson (1920) 445, 541
Collard *v.* Armstrong (Can.) 32
—— *v.* Collard (Ind.) ... 303
Collett *v.* Collett (1838) ... 284, 287, 289, 293
—— *v.* —— (1843) 392
Collier *v.* Brown (1862) 197
Collins, *Ex p.*, *Re* Ross' Trust (1851) ... 108
—— *v.* Bishop (1878) 66, 67, 68
—— *v.* Collins (1884) 338, n., 343, 346, 367
—— *v.* —— (1910) 506
—— *v.* Collins & Deal (1916) 302
—— *v.* Collins & Harrison (1920) 452, 453, 454, 455, 456, 463, 475, 476
—— *v.* Collins & Smith (1881) 486
—— *v.* Cory (1901) 205
Colman (otherwise Hankey) *v.* Colman (1921) 268
Colmer *v.* Colmer (1729) 75, 78
Colohan *v.* Condrin, *Re* Condrin (Ir.) ... 163
Colquhoun *v.* Colquhoun (Scot.) 548
Colyer *v.* Colyer (1904) 382
—— *v.* Isaacs (1897) 123
Comyn *v.* Comyn & Humphreys (1860) ... 453
Conch, *Ex p.*, R. *v.* Smith (Aus.) 196
Condrin, *Re*, Colohan *v.* Condrin (Ir.) ... 163
Confederation Life Assocn. *v.* Kinnear (Can.) 135
Conger *v.* Kennedy (Can.) 83
Connelly *v.* Lawson (1876) 195, 200
Connemara *v.* Connemara (1892) 389
Conolan *v.* Leyland (1884) 179
Conradi *v.* Conradi & Flashman (1866) ... 464, 474, 478
—— *v.* Conradi, Worrall & Way (1868) 299, 324, 325, 362, 367, 480
Consolidated Bank of Canada *v.* Henderson (Can.) 252
Constable *v.* Constable (1869) ... 416, 417
Constantinidi *v.* Constantinidi & Lance (1903) 348, 364
—— *v.* Constantinidi & Lance (1904) ... 520, 531, 532
—— *v.* Constantinidi & Lance (1905) 348, 364, 518, 520, 522, 523, 529, 531, 532
Cood (otherwise Coode) *v.* Cood (otherwise Coode) (1838) 352
Cook, *Re*, *Ex p.* Holmes (1892) 193
—, *Re*, *Ex p.* Vernall (1892) 192
—— *v.* Cook (1885) 544
—— *v.* —— (Can.) 406, 410, 411
—— *v.* Cook & Quaile (1858) ... 391, 394
Cooke *v.* Cooke (1812) 496, 497

PAGE

Cooke *v.* Cooke (1863) 281, 337, 338, 345, 350, 533, 535
——— *v.* ——— (1864) 540
v. Cooke & Allen (1864) ... 472, 478
v. Cooke & Lucy (1859) 428
v. Cooke & Quaile (1859) 391, 396, 397, 439, 440
v. Fuller (1858) 100, 111
v. Gibson, *Re* Crawford's Settlement (1905) 520
Coombs *v.* Coombs (1866) ... 409
——— *v.* ——— (N.Z.) ... 317
v. Coombs & Hopkins (1903) ... 483
Cooper *v.* Cooper (1864) ... 446
——— *v.* ——— (1875) 311
——— *v.* Crane (1891) ... 37, 39
——— *v.* Hunchin (1804) 176
——— *v.* Lloyd (1859) ... 202, 203
——— *v.* Macdonald (1877) ... 117, 118
——— *v.* Martin (1803) 205
v. Witham (1668) ... 216, 217
Cope *v.* Barber (1872) 59
—— *v.* Burt (falsely calling herself Cope) (1809) 50, 52
—— *v.* Burt (falsely calling herself Cope) (1811) 50, 52
—— *v.* Steers (1849) 200
Copner *v.* Copner (1852) 187
Coppin *v.* Gray (1842) 183
Coppinger *v.* Coppinger & Lutwyche (1918) 354, 355
Copps *v.* Follon (1794) 46
Copsey *v.* Copsey (1905) . 338, 346
Corbally *v.* Grainger (Ir.) 169
Corbett *v.* Corbett (1888) 503, 504, 508
Cork *v.* Baker (1717) 24
Corkum *v.* Corkum (Can.) 430
Cornall *v.* Cornall (1910) 557
Cornish *v.* Cornish (1890) 386
Cornwall *v.* Halifax Banking Co. (Can.) 149
Corpataux *v.* Corpataux & Staub (1875) 381
Corrance *v.* Corrance & Lowe (1868) 531
Corrie *v.* Cleaver (Can.) 118, 119
Costard *v.* Winder (1600) 59
Costello *v.* Hunter (Can.) 29
Cotton *v.* Cotton & Kinnis (1862) ... 380
Couch *v.* Couch (Can.) 421 466
Coulter & Smith, *Re* (Can.) 133
Coulthart *v.* Coulthart & Gouthwaite (1859) 358, 373
Courtney *v.* Courtney (Ir.) ... 220, 229, 230
——— *v.* ——— (N.Z.) 302
Cousen *v.* Cousen (1865) 288
Covell *v.* Covell (1872) 495, 499
Coverdale *v.* Coverdale (1913) 363
Coward & Adam's Purchase, *Re* (1875) ... 100
Cowie *v.* Cowie (Can.) 541
Cowing *v.* Cowing & Wollen (1863) ... 454, 456
Cowley *v.* Cowley (1897) 430, 432
——— (Earl) *v.* Cowley (Countess) (1901) ... 553
——— *v.* Cowley (1913) 429, 430
——— *v.* Poulton (1616) 215
Cowper's (Countess) Case (*circa* 1720) 165
Cowx *v.* Foster (1860) ... ..
Cox *v.* Bennett (1891) 129
—— *v.* Cox (1826) 414
. 332, 333
v. (1889) 395
. 357, 401
—— *v.* Cox & Warde (1906) ... 304, 305, 370
—— *v.* Cox, Reade & Tobin (1871) 428
—— *v.* Kitchin (1798) 202
Coxen *v.* Rowland (1894) 140
Coxhead *v.* Mullis (1878) ...
Coxon *v.* Rowland (1894) ... 140

PAGE

Coxsedge *v.* Coxsedge (1844)
Crabb *v.* Crabb (1868) 228, 278, 317
Cragg *v.* Bowman (1704) 202
Craig *v.* Craig (Can.) 495
v. ——— (N.Z.) 433
Cramp *v.* Cramp & Freeman (1920) ... 338, 339, 341
Crampton *v.* Crampton & Armstrong (1863) 411, 412, 416
Crane (otherwise Cooper) *v.* Crane (1891) ... 37
Cranwell *v.* Cranwell (1868) 420
Craston *v.* Craston & Seaman (1917) ... 431
Craven *v.* Craven & Robinson (1909) ... 367
Crawford *v.* Crawford & Dilke (1886) 294, 390,

Crawford's Settlement, *Re*, Cooke *v.* Gibson (1905) 520
Craxton *v.* Craxton (1907) ... 320, 555, 556
Creagh *v.* Creagh (1896) 525
Cresswell *v.* Cosins (1815) 56
Creswick *v.* Creswick (1916) 366, 367
Crewe *v.* Crewe (1800) 301, 329, 331, 333, 334, 335
Crickitt *v.* Crickitt (1902) 130, 131
Cridland *v.* Cridland (1889) 397
Crisp *v.* Crisp (1872) 519
Crocker *v.* Crocker (1920) 338
——— *v.* ——— (1921) 338
——— *v.* Napper (1867) 196
——— *v.* Sowden (Can.) 178
Croft *v.* Croft (1830) 432
Cromarty *v.* Cromarty (Can.) 497
Cronk *v.* Cronk (Can.) 565, 566
Crook's Settlement, *Re*, *Re* Glasier's Settlement, Crook *v.* Preston (1923) ... 85, 86
Cropley (otherwise Ingersoll) *v.* Cropley (1920) 425
Crosby's Trusts, *Re*, Smith *v.* Metherell (1919) 42
Crosland *v.* Wrigley (1895) 151
Cross *v.* Cross (1880) 414
Crothers *v.* Crothers (1868) 403, 442
Crouch *v.* Crouch (1912) 236, 237
v. Waller (1859) 220, 235
Croughton's Trusts, *Re* (1878) 103
Crowden *v.* Crowden (1906) 484
Crumbie *v.* McEwan (Can.) 251
Cubley *v.* Cubley & Smith (1861) ... 459
Cudlipp *v.* Cudlipp (1858) 312
Cudmore *v.* Cudmore (Can.) 545
Cuenod *v.* Leslie (1909) 216
Cufley *v.* Cufley & Loveck (1865) 311, 373
Cummins *v.* Perkins (1899) 255
Cunliffe *v.* Cunliffe (Can.) 433
Cunningham *v.* Cunningham (1897) ... 444
——— *v* ——— (Can.) ... 407
Cunninghams *v.* Cunninghams (1814) 65, 67, 69
Cunnington *v.* Cunnington & Noble (1859) 356, 357, 358
Cuno, *Re*, Mansfield *v.* Mansfield (1889) ... 134
——— *v.* Cuno (1873) 271, 350, 351, 352, 470
Curling *v.* Curling (1888) 387
Currey, *Re*, Gibson *v.* Way (1886) ... 102, 117
———, *Re*, ——— *v.* ——— (No. 2) (1887) 118, 127
——— *v.* Currey (Can.) 281
Currie *v.* Stairs (Can.) 61
Curtis, *Re*, Hawes *v.* Curtis (1885) 175
——— *v.* Curtis (1846) 303
——— *v.* ——— (1858) ... 285, 343, 450
v. ——— (1859) ... 285, 343, 450
.. 442, 446
v. ——— (1905)
Cyr *v.* Dufault (Can.) ... 24

D.

PAGE

D. *v.* D. (1909) 425, 484
— *v.* — (1911) 425
— *v.* — (otherwise P.) (1913) 268
D. (falsely called F.) *v.* F. (1865) 271
D——e *v.* A——g (falsely calling herself D——e) (1845) 267
Dacey *v.* M'Carter (1839) 71, 176
Dagg *v.* Dagg (1882) 373, 374
D'Aguilar *v.* D'Aguilar (1794) 281, 285, 286, 287, 290, 337, 339, 341, 406, 407, 408, 464, 465, 470
Daines *v.* Daines (1888) 275
D'Albedyhll *v.* D'Albedyhll (N.Z.) ... 169, 170
Dale *v.* Dale & Macdonell (1867) 457
Daley (Doe d.) *v.* Daley (1846) ... 259, 260
Dallas *v.* Dallas (1874) 322
D'Alton *v.* D'Alton (1878) ... 533, 534, 536
Dame *v.* Slater (Can.) 83
Dance *v.* Dance (1799) 339
D'Angibau, *Re*, Andrews *v.* Andrews (1880) 139
Daniel *v.* Bowles (1826) 24
——— *v.* Uply (1626) 136
Danyel *v.* Ubley (1626) 136
Darbishire *v.* Darbishire & Baird (1890) 452, 453, 454, 455, 456
Darby *v.* Evans (1844) 200
Darkin *v.* Darkin (1853) ... 93, 94, 173, 174
Darley *v.* Hodgson, *Re* Hodgson (1899) ... 145
Darling *v.* Rice (Can.) 252
Darracott *v.* Harrison (1886) 123
Dart *v.* Dart (1863) 458, 495
Dasent *v.* Dasent (1850) 391
Dashwood *v.* Bulkeley (Lord) (1804) ... 57
Davenport, *Re*, Turner *v.* King (1895) 84, 85, 88, 142
——— *v.* Marshall (1902) 99
Davenport Handley *v.* Davenport Handley & Wroughton (1891) 536
Davey *v.* Davey (Can.) 457, 466
Davidson *v.* Davidson (1856) 295, 297, 426
——— *v.* ——— (Scot.) 44
——— *v.* Wood, *Re* Wood's Estate (1863) 203, 205
Davies, *Re*, Harrison *v.* Davis (1897) ... 89
v. Burgess, *Re* Safford's Settlement (1915) 138
— *v.* Davies (1859) 534
— *v.* ——— (1866) 462, 549
... ... 570
... ... 562
v. Davies & Dalby (1862) 544
- *v.* Davies & Hughes (1863) 373
- *v.* Davies & M'Carthy (1868) 525, 526
- *v.* Springfield, *Re* Springfield (1922) 42
v. Stanford (1889) 218
- *v.* Tagart, *Re* Weston (1900) ... 227
v. Treharris Brewery Co. (1894) ... 132
Davies' Policy Trusts, *Re* (1892) ... 150
Davis *v.* Artingstall (1880) ... 146
——— *v.* Ballenden (1882) 252, 253
——— *v.* Bomford (1860) ... 33
——— *v.* Davis (1789) ... 422
——— *v.* ——— (1863) ... 500
... 437
(1889) ... 534
(1918) ... 277
(1920) 310, 319
——— *v.* Davis & Hughes (Aus.)
Davison *v.* Davison (1909) ... 390, 486
Davisson *v.* Sage (Can.) 135
Davy *v.* Davy (No. 1) (Can.) ... 499
(Can.) ... 422

PAGE

Davy *v.* Myers (Can.) 28
Dawes *v.* Creyke (1885) 99
v. Dawes (1916) 483
Dawson *v.* Bank of Whitehaven (1877) 156
——— *v.* Dawson (1802) 496
——— *v.* ——— (Scot.) 457
v. Dawson & Reilly (1907) ... 435
Day *v.* Harrison, *Re* Harrison (1920) 165
Dayrell-Steyning *v.* Dayrell-Steyning (1922) 511
Days *v.* Jarvis (1814) 56
Deakin *v.* Lakin, *Re* Shakespear (1885) .. 180
Dean *v.* Dean (1923) 494, 495, 496
—— *v.* Dean & Hargreaves (1921) ... 360, 483
Deane *v.* Deane (1847) 294, 300
——— *v.* ——— (1858) ... 406, 429, 436, 437
——— *v.* Thomas (1829) 73
Deans' Judicial Factor *v.* Deans (Scot.) 65, 66
Deare *v.* Soutten (1869) 205
Dearman *v.* Dearman (Aus.) 315, 316
Dearmer, *Re*, James *v.* Dearmer (1885) 89, 90, 91 173
Debenham *v.* Mellon (1880) ... 184, 191, 193, 200
Debenham's, Ltd. *v.* Perkins (1925) 187
De Bensaude *v.* De Bensaude (1887) ... 243
De Blaquiere *v.* De Blaquiere (1830) 497, 498, 499
De Bretton *v.* De Bretton (Ind.) 552
Debtor, A, *Re*, *Ex p.* The Debtor (1904) ... 253
De Burgh Lawson, *Re*, De Burgh Lawson *v.* De Burgh Lawson (1885) 138
De Burgh Lawson, *Re*, De Burgh Lawson *v.* De Burgh Lawson (1889) 144
Deck *v.* Deck (1858) ... ...
De Crespigny *v.* De Crespigny (1853) ... 234
Deeble *v.* Deeble (1887) 302
De Gasquet James (Countess) *v.* Mecklenburg-Schwerin (Duke) (1914) ... 73, 393
De Greuchy *v.* Wills (1879) 175
De Gruchy *v.* Bruyeres (1850) 199
——— *v.* ——— (1851) 199
Delaforce *v.* Delaforce & Driscoll (1892) ... 468
De Laubenque *v.* De Laubenque (1899) 306, 307, 309, 311
De Lisle *v.* De Lisle (1904) 263
De Lossy *v.* De Lossy (1890) 542
De Montmorency (Viscount) *v.* De Montmorency (Viscountess) (1844) 410
Dempsey *v.* Dempsey (N.Z.) ... 557, 558
Dempster *v.* Dempster (1861) ... 343
De Niceville *v.* De Niceville (1868) ... 391
Denning *v.* Denning (*circa* 1886) ... 466
... 316
Dennis *v.* Dennis (1815) 383
——— *v.* McKenzie (1871) 33, 34
Denniss *v.* Denniss (1808) 327, 369
Denny *v.* Ashwell (1717) 41
Dennys *v.* Dennys & Crossman (1912) ... 432
—— *v.* Sargeant (1834) 193
Dent *v.* Dent (1865) 339, 346, 381
—— *v.* —— (1866) 540
—— *v.* Scott (1648) 193
De Pontès *v.* Kendall (1861) 251, 252
Derbishire *v.* Home (1853) 112, 113
Derby *v.* Derby (Can.) 498, 499
De Ricci *v.* De Ricci (1891) 509
Dering *v.* Dering & Blakeley (1868) 356, 484, 485, 487, 552
Desmarest *v.* Desmarest (1861) 446
D'Etchegoyen *v.* D'Etchegoyen (1908) 41, 467, 502, 536, 537
De Thoren *v.* A.-G. (1876) ... ... 67, 71, n.
Devaskayam *v.* Devamony (Ind.) 501
De Witt *v.* De Witt (Can.) 497
Dick *v.* Dick (1863) 396
—— *v.* Lambert (Can.) 249

PAGE

Dickason *v.* Dickason (Aus.) 262
Dickens *v.* Dickens (1859) 539, 542
Dickenson *v.* Dickenson & Clement (1862) ... 380
Dickenson & North American Life Assurance Co., *Re* (Can.) 149
Dickinson *v.* Dickinson (1889) 316
——— *v.* ——— (otherwise Phillips) (1913) 268
Dickison *v.* Holcroft (1673) 23
Dicks *v.* Dicks (1899) 393
Dickson *v.* Hook (1866) 113
Diddear (falsely called Fawcit, otherwise Savill) *v.* Faucit (1821) ... 46, 49, 60, 65
Diebert *v.* Diebert (Can.) 411
Digby (Earl) *v.* Howard (1831) 148, 166, 167
Dillon, *Re*, Lowe *v.* Harling (Ir.) ... 105, 106
——— *v.* Dillon (1842) 283, 291, 294, 295, 341, 370, 402, 435
v. Dillon, Lester & Chamberlain (1920) 397
Dilts *v.* Warden (Can.) 264
Dingley *v.* Robinson (1856) ... 256
Dingman *v.* Austin (Can.) 84
——— *v.* Harris (Can.) 183
Ditch *v.* Ditch (Can.) 228, 229
Ditcham *v.* Worrall (1880) 25
Ditchfield *v.* Ditchfield (1869) 466, 467
Divorce Marriage Licences (1895) 50, 51
Dix *v.* Brookes (1717) 80
Dixon, *Re*, Dixon *v.* Smith (1886) ... 87
(1887)
Re, Heynes *v.* Dixon (1900) 147, 173, 212
v. Dixon (1838) ... ...
v. ——— (1859) 465
v. ——— (1871) 445
v. ——— (1878) 171, 172
— (1892 349, 350, 359
— *v.* Hurrell (1838) 198, 199
— *v.* Smith, *Re* Dixon (1886) 87
— (1887) 87
Dobbyn *v.* Corneck (1812) 49
Dobson *v.* Dobson & Paxton (1916)
Docwra, *Re*, Docwra *v.* Faith (1885) ... 133
Dodd *v.* Acklom (1843) ... 184, 185
——— *v.* Dodd (1906) 319, 320
——— *v.* ——— (1920) 568, 569
v. Wake (1852) ... 132
Dodson *v.* Dodson (1905) 365
Doe d. Hamilton (Duchess) *v.* Atherly (1741) 257
d. Gibson *v.* Barton (1837) 67
— d. Smith *v.* Bird (1833) ... 137, 138
— d. Breakey *v.* Breakey (Can.) ... 61
— d. Allanson *v.* Canfield (1838) ... 254
— d. Peterson *v.* Cronk (Can.) ... 146
— d. Daley *v.* Daley (1846) 259, 260
— d. Merigan *v.* Daly (1846) 259, 260
— d. Blomfield *v.* Eyre (1846) ... 137
— d. ——— *v.* ——— (1848) ... 137
d. Vansickler *v.* Fairwell (Can.) ... 135
d. Fleming *v.* Fleming (1827) 68
d. Egremont (Earl) *v.* Grazebrook (1843) 71, 72
— d. Park *v.* Henderson (Can.) 135
— d. Bradt *v.* Hodgins (Can.) ... 132, 133
— d. Vincent *v.* Murray (Can.) 146
— d. Andrews *v.* Taylor (Can.) ... 183, 184
— d. McDonald *v.* Twigg (Can.) 135
Doidge *v.* Mimms (Can.) 248
Dolby *v.* Dolby & Hewitt (1861) 323
Don *v.* Don (Scot.) 425, 430
Donald *v.* Donald (Scot.) 458
Donaldson *v.* Rutter, *Re* Rutter (1907) ... 54
Donegan *v.* Short (Can.) 29
Donellan *v.* Donellan (1795) 300
Doneraile (Lady) *v.* Doneraile (Lord) (1734) 237, 436

Dongi *v.* Dongi (N.Z.) ... ...
Donnelly *v.* Donnelly (1886) 258, 259
Donoghue *v.* Marshall (1875) 27
Dooley *v.* Dooley (1911) 548, 549
Dorion *v.* Laurent (Can.) 426
Dormer (otherwise Ward) *v.* Ward (1901) 519, 521
Dormer (falsely called Williams) *v.* Williams (1838) 53
Dorsett *v.* Dorsett (Can.) 281, 304
Dotzauer *v.* Dotzauer (1925) 331
Douglas *v.* Douglas (1896) ... 524, 531, 533
(N.Z.) 322
v. Douglas & Trevor (1897) 532
v. Hutchison (Can.) ... 254
Douglas Gardiner & Mill *v.* Mackintosh's Trustees (Scot.) 254
Doull *v.* Doelle (Can.) 149
Dow *v.* Dibblee (Can.) 118
v. Dow (1866) ... 549
Dowling *v.* Dowling (1898) 344
Downe *v.* Fletcher (1888) 178, 254
Downes *v.* Timperon (1828) 136, 137
D'Oyley *v.* D'Oyley & Baldie (1859) 415, 512
Doyley *v.* White (1613) 176
Draper *v.* Clench, *Re* Clench (1894) ...
——— *v.* Draper (1837) 323, 352
——— *v.* Fulkes (1609) 214
Draycott *v.* Harrison (1886) ... 119, 123
Drexel *v.* Ellis (1905) 131
Drew *v.* Drew (1842) 330
——— *v.* ——— (1888) 310, 319
——— *v.* ——— (1891) 319
——— *v.* Martin (1864) 164
v. Nunn (1879)
Drexel *v.* Drexel (1916) ... 233, 240, 241
Driffield *v.* Driffield (1891) 511
Drinkwater *v.* Drinkwater (1889) 388
Drogheda (Countess) *v.* Drogheda (Earl) (1921) 396
Droney (falsely called Archer) *v.* Archer (1815) 56
Drummond, *Re* (Scot.) 96
——— *v.* Drummond (1861) 335, 336, 359, 367, 368, 382, 479, 480
——— *v.* ——— (1868) 155
——— *v.* ——— (1893) 493
Drummond & Davies' Contract, *Re* (1891) 133
Dryden *v.* M'Gibbon (Scot.) 93
Drysdale *v.* Drysdale, Corbet & Gane (1867) 273, 404
Duberley *v.* Gunning (1792) 331
Duckworth, *Re* (1889) 315
Dudgeon *v.* Dudgeon & Parsons (Can.) ... 149
Duff *v.* Duff (N.Z.) 354
——— *v.* Duff & Lindsay (otherwise Tracy) (1888) 436
Duffield *v.* Scott (1789) 233
Duggan *v.* Duggan (1859) 460, 462
Duins *v.* Donovan (otherwise Duins) (1830) 352
Dummer *v.* Pitcher (1833) 163
Du Moulin *v.* Druitt (Ir.) 63
Dunbar *v.* Dunbar (1909) 165
Dunbar (otherwise White) *v.* Dunbar (1909) 501, 502
Duncan, *Re* (N.Z.) 564
——— *v.* Cashin (1875) 93
——— *v.* Duncan (1815) 75
Dunn *v.* Dunn (1817) 336, 358
——— *v.* ——— (1818) 336, 358
——— *v.* ——— (1888) 413
Dunning *v.* Dunning (1911) 570
Dunstall *v.* Dunstall & Williamson (N.Z.) ... 429
Dunstan *v.* Dunstan (1897) ... 551
Duplany *v.* Duplany (1892) ... 374, 375, 382

PAGE

Durand *v.* Durand (1789) 220
Durant *v.* Durant (1824) ... 289, 337, 341, 490
——— *v.* ——— (1825) ... 289, 337, 341
——— *v.* ——— (1828) 503, 505
——— *v.* Titley (1819) 222
Durnford *v.* Baker (1924) 207
Durrant *v.* Durrant (1895) 366
——— *v.* Holdsworth (1886) 188
Du Terreaux *v.* Du Terreaux (1859) ... 373
Dutton *v.* Dutton (1715) 75
Duvall, *Re*, Duvall *v.* Craddock (1892) 65, 69, 71
Dyer *v.* East (1669) 190, 201
Dysart *v.* Dysart (1847) ... 282, 283, 290, 293
Dysart Peerage Case (Scot.) 65

E.

E. *v.* C. (Can.) 267
— *v.* E. (otherwise T.) (1902) ... 269, 528
— *v.* ——— (1903) ... 269, 528
— *v.* E. (1907) 399, 426
— *v.* E., P. & N. (1908) 509, 510
E—— *v.* E—— (Can.) 77, 562
E—— *v.* T—— (falsely called E——) (1863) 351, 352
Earle *v.* Kingscote (1900) 214, 216
Early *v.* Stevens (1785) 46
Earnshaw *v.* Earnshaw (1896) 557, 558, 559, 570
Eastland *v.* Burchell (1878) ... 196, 197, 200, 201
Easton *v.* Bartlett (1903) 192
Eaton, *Re*, *Re* Marriage Act (Can.) 50
——— *v.* Eaton (1870) 409
Eddowes *v.* Argentine Loan & Mercantile Agency Co., Ltd. (1890) 181, 182
Eden *v.* Eden & Batterick (1908) 73
Edgar *v.* Edgar (Scot.) 340, 341
——— *v.* Lamont (Scot.) 248
Edinburgh Life Assurance Co. *v.* Ferguson (Can.) 133
Edmonds *v.* Edmonds (Can.) 282, 301
Edmunds *v.* Edmunds (1904) ... 546, 547
Edward *v.* Cheyne (No. 2) (1888) 170, n., 171, 172
Edwardes, *Re*, *Ex p.* Edwardes (1895) ... 91
Edwards, *Re*, *Ex p.* Harvey (1895) 91
——— *v.* Abrey (1846) 148, 149
——— *v.* Clapham (Can.) 267
——— *v.* Crock (1801) 436
——— *v.* Dewar, *Re* Andrews (1885) ... 128
——— *v.* Edwards (1868) 410
——— *v.* ——— (1893) 314
——— *v.* ——— (1905) 312
——— *v.* Edwards & Doncaster (1900) 353, 354
——— *v.* Edwards & Francis (1894) 355, 356, 372, 506, 552
——— *v.* Edwards & Wilson (1897) 385, 386
——— *v.* ——— (1899) 434, 481, 487
——— *v.* Porter (1923) 214
——— *v.* ——— (1925) ... 214, 216, 217
——— *v.* Towels (1843) 196
Edwards' Policy Trusts, *Re* (1879) 150
Egers *v.* McNamara (Can.) 249
Egremont (Earl) (Doe d.) *v.* Grazebrook (1843) 71, 72
Ehlers *v.* Ehlers (1915) 344
Eldred *v.* Eldred (1840) 370, 404
Elford *v.* Elford (Can.) 161
Eliot *v.* Eliot (1776) 299
Elkowech *v.* Elkowech (Can.) 449
Ellam *v.* Ellam (1889) 437

PAGE

Ellaytt *v.* Ellaytt, Taylor & Halse (1864) 467, 468, 475, 493
Ellerton *v.* Gastrell (1719) 41
Elliott, *In the Goods of* (1871) 100, 101, 560
——— *v.* Bussell (Can.) 169
——— *v.* Elliott (1901) 274
——— *v.* Elliott & Bowers (1921) 347, 348, 487
——— *v.* Gurr (1812) 40, 43, 265, 266
——— *v.* Totnes Union (1892) ... 67, 69
Ellis *v.* Ellis (1793) 259
—— *v.* —— (1883) 415, 458, 553
—— *v.* —— (1896) 560, 561
—— *v.* Ellis & Smith (1865) 341
—— *v.* Johnson, *Re* Glanvill (1886) 129
Ellis' Trusts, *Re* (1874) 103, 113
Ellmers *v.* Ellmers (N.Z.) 76
Ellworthy *v.* Ellworthy & Ledgard (1920) 452, 453, 454, 455, 456, 463, 475, 476
Ellyatt *v.* Ellyatt, Taylor & Halse (1864) 467, 468
Elrington *v.* Elrington (1859) ... 256, 257
Elsam *v.* Faucett (1797) 436
Elsley *v.* Elsley, Beacham & Bagshaw (1863) 395, 428
Elwes *v.* Elwes (1794) 296
Elworthy *v.* Bird (1825) 220, 226
Elyett *v.* Elyett, Taylor & Halse (1864) 467, 468
Emanuel *v.* Parfitt, *Re* Tucker (1885) ... 85
Embree *v.* Wood (Can.) 35
Emerson *v.* Blonden (1794) 187
Emery *v.* Emery (1827) 200
Emery's Trusts, *Re* (1884) 101
Emmett *v.* Norton (1838) ... 191, 198, 200, 202
Emrick *v.* Sullivan (Can.) 84
England *v.* England (Can.) ... ...
English, *Re* (Can.) ... ...
——— *v.* English (Can.) 76
Enticknap *v.* Rice (falsely called Enticknap) (1865) ... ...
Equitable Life Assurance Society of United States Policy & Mitchell, *Re* (1911) 151, 152
Eskell *v.* Eskell (1919) 299
Essex *v.* Atkins (1808) 168
Essex's (Countess) Case (1613) 266, 267, 270
Esten *v.* Esten (Can.) 301
Etherington *v.* Parrot (1703) ... 190, 191, 193, 199, 201
Euclid Avenue Trusts Co. *v.* Hohs (Can.) ... 211
Euston *v.* Smith (falsely called Euston) (1884) 425
Evans *v.* Carrington (1860) ... 227, 228, 237
v. Chester (1837) 176
v. Edmonds (1853)
v. Evans (1790) ... 281, 282, 288
v. — (1843) 287, 288, 340, 345, 347
v. —— (1844) ..
v. —— (1858) .. . 376, 377
v. —— (1859) .. 387, 434, 448
v. —— (N.Z.) ..
v. —— (No. 2) (N.Z.) 450
v. (No. 3) (N.Z.) 474
v. Evans & Bird (1865) . 537, 538
v. Evans & Blyth (1904) . 430, 532
v. Evans & Elford (1906) 348, 361, 366
v. Evans & Platts (1899) . 455, 456
— *v.* Evans & Robinson (1858) . 323, 324, 450
v. ——— (1859) . 465, 471, 473
v. Morgan (1832) . 69, 176
v. Pughe (1872) . 162, 163
Evered *v.* Evered & Graham (1874) ... 518, 525
Everett *v.* Everett (Can.) ... ...
——— *v.* Everett & McCullum (1919) 368, 369
v. Paxton (1891) ... 182
Evershed *v.* Evershed (1882) ... 235, 242

PAGE

Ewart *v.* Chubb (1875) 100, 257
Ewens *v.* Tytherleigh (falsely called Ewens) (1863)... 351
Ewer *v.* Ewer & Charlton (1920) 454
Ewers *v.* Hutton (1800) 199
Ewing *v.* Wheatley (1814) 37, 51, 52
Eykyn's Trusts, *Re* (1877) 164
Eyre-Williams, *Re*, Williams *v.* Williams (1923)... ... ...

F.

F. (falsely called D.) *v.* D. (1865) ... 271
F. *v.* F. (otherwise P.) (1911)... ... 268
— *v.* — (Can.) 492, 493
— *v.* P. (falsely called F.) (1896) 269
— *v.* — (otherwise F.) (1911) ... 268
F——, *Re* (1863) 209
Failes *v.* Failes (1906)... ... ... 320, 321
Fairfax *v.* Fairfax & De La Cruz (1909)... 473
Fairhurst *v.* Liverpool Adelphi Loan Assocn.

Fakirgauda *v.* Gangi (Ind.) 273
Faraday, *In the Goods of* (1861) 560
Farman *v.* Farman (1924) 298
Farmer *v.* Farmer (1884) 308, 313, 314, 316, 319
Farnham *v.* Farnham (1925)... 297
Farraday, *In the Goods of* (1861) 560
Farrell *v.* Farrell (1896) 389
Farrington *v.* Farrington & Schooles (1886) 529, 532
Farrow *v.* Farrow (Scot.) 313
Farulli *v.* Farulli & Pederzoli (1917) 300, 333, 435
Faulkes *v.* Faulkes & Stainton (1891) ... 353
Faussett *v.* Faussett (1849) ... 296, 297, 299
Favard *v.* Favard (1896) 543, 544
Fealy *v.* Public Trustee (N.S.W.) (Aus.) ... 422
Fearon, *Re*, Hotchkin *v.* Mayor (1896) ... 109
——— *v.* Aylesford (Earl) (1884) 230, 231, 236, 239
Fellowes *v.* Stewart (1815) 49
Fendall (otherwise Goldsmid) *v.* Goldsmid (1877) 49, 553
——— *v.* O'Connell (1885) 252
Fengl *v.* Fengl (1914) 220, 563, 564
Fenton *v.* Livingstone (Scot.) ... 40, 41
Fenwick *v.* Fenwick (1922) ... ...
——— *v.* Gravenor (1702) 259
Fenwick's Case (1702)... 259
Ferguson *v.* Clayworth (1844) 215
——— *v.* Ferguson (Can.) 545
Ferrers (Lady) *v.* Ferrers (Lord) (1791) .. 337
Ferris *v.* Ferris (Can.) 77, 316
——— *v.* Hamilton (Can.) 83
Fettiplace *v.* Gorges (1789) 93
Field *v.* Evans (1846) 108
—— *v.* Field (1888) 274
—— *v.* Field & Denton (1887) 478
—— *v.* McArthur (Can.) 249
v. Serres (1804) 236
Field's Marriage Annulling Bill (1848) .. 39
Fielding *v.* Fielding (N.Z.) 278, 279
Fieldwick, *Re*, Johnson *v.* Adamson (1909)... 145, 181, 182
Filmer *v.* Lynn (1835)... 188
Filschie *v.* Hogg (Can.) 248
Finch & Finch *v.* Minnie (Can.) 193
Finegan *v.* Finegan (otherwise McHardy) (1917)... 269
Finlay *v.* Chirney (1888) 27, 28, 35

PAGE

Finlay *v.* Finlay & Rudall (1861) 473
Finney *v.* Finney (1868) ... 324
——— *v.* ——— (1870) ... 540
Firebrace *v.* Firebrace (1878)... 392
Firman *v.* Firman (1915) ... 364
- *v.* Royal (1925) 564
Firminger *v.* Firminger & Ollard (1869) ... 405
Fisher *v.* Fisher (1861) 500, 501, 506
——— *v.* ——— (N.Z.) ... 317
——— *v.* Graham (Can.) 26
Fisk *v.* Fisk (1862) 500
—— *v.* —— (1920) 277
Fitchett *v.* Fitchett (Can.) 77
Fitzer *v.* Fitzer (1743)... ... ... 224, 225
Fitzgerald *v.* Chapman (1875) 97
——— *v.* Fitzgerald (Lady) (1754) ... 465
——— *v.* ——— (1756) 441, 541, 542
v. Fitzgerald (1862) 304
v. ——— (1864) 440, 441, 493
307, 309, 311, 312, 313
v. (1874) 307, 309, 311, 312, 313, 549, 550
——— *v.* Green (S. Af.) 67, 68
Fitzpatrick *v.* Dryden (Can.)... ... 101, 104
Fitzrandolph *v.* F. (Can.) 264
Flack *v.* Ashton (1845) 108
Flamank, *Re*, Wood *v.* Cock (1889) ... 171, 174
Fleming (Doe d.) *v.* Fleming (1827) 68
Fletcher *v.* Fletcher (1788) 241, 242
——— *v.* ——— (1862) 408
——— *v.* ——— (1900) 561, 562
——— *v.* Fletcher & Hobson (1915) ... 277
——— *v.* Fletcher & Laviolette (Can.) ... 262
——— *v.* Grant (Scot.) 31
Fleury *v.* Campbell (Can.) 425
Flood's Trusts, *Re* (Ir.) 126, 127
Flower *v.* Buller (1880) 121
——— *v.* Flower (1871) ... 231, 243, 244, 326
——— *v.* ——— (1873) 469
——— *v.* ——— (1893) 484
Fluister *v.* Fluister & Hutton (1897) 427, 491
Foden *v.* Foden (1894) ... 406, 410, 415, 552
Foley *v.* Peterborough (Lord) (1785) ... 329
Foote *v.* Hayne (1824) 30
Forbes *v.* Forbes (Scot.) 435
Forbes-Smith *v.* Forbes-Smith & Chadwick (1901)... ... ... 428, 473, 474, 489
Ford, *Re* (1863) ...
—— *v.* De Pontès (1859) . 251, 252
—— *v.* ——— (1861) . 251, 252
v. Ford (1867) 439
— *v.* Stier (1896) . 38, 39
Forde *v.* Forde (1867)... 407
Forget *v.* Forget (Can.) 282
Forman *v.* Forman & Davis (1863) 377, 379, 382
Forrest *v.* Forrest & Morton (Can.)
Forrester *v.* Forrester (1884)... 371, 487
(Can.) 545
Forristall *v.* Lawson (1876) . 195, 200
Forster *v.* Forster (1790) 355, 356, 370
——— *v.* ——— (1910) . 563, 570
—— *v.* ——— (Scot.) 43
—— *v.* Forster & Berridge (1862) ... 398
—— *v.* ——— (1863) 473, 482, 487, 537, 538, 541
—— *v.* ——— (1865) 457, 538
—— *v.* Forster & Evans (1858) ... 378, 539
—— *v.* Forster & Nanni (1912) 484
—— *v.* Forster & Thomas (1862)... ... 412
Forsyth *v.* Forsyth (1891) ... ...
——— *v.* Forsyth, Eccles & Foster (1890) 371, 372

PAGE

Forth (Viscountess) *v.* Forth (Viscount) (1861) 336
v. Forth (1867) ... 291, 494
Forty *v.* Reay (1855) 115
Fosdike *v.* Fosdike & Hillier (1925) ... 295
Foster *v.* Foster (1921) ... 290, 490
——— *v.* Foster & Thomas (1862) ... 377
Foulkes *v.* Foulkes (1893) 569
v. Sellway (1800) 32
Fowle *v.* Fowle (Ind.) 307
Fowler *v.* Fowler (1861) ... 550
Fowles *v.* Dinely (1739) ... 203
Fox *v.* Bearblock (1881) 68, 70
—— *v.* Fox (1925) ... 511, 512
—— *v.* Hawks (1879) 160
Frampton *v.* Frampton (1841) 224, 225, 244, 246
Frank *v.* Carson (Can.) 62, 295
——— *v.* Muzeen, *Re* Wormald (1890) ... 116
Frankfort *v.* Frankfort (1850) 541
Frankfort de Montmorency (Viscount) *v.* Frankfort de Montmorency (Viscountess) (1844) 497
Frankland *v.* Nicholson (1805) ... 36, 44, 49
Franklin *v.* Franklin (1842) 347
——— *v.* Franklin & Minshall (1921) 422, 424, 431, 469
Franks *v.* Franks (1861) 499, 500
Fraser *v.* Fraser (1846) 430
——— *v.* ——— (Can.) 352
——— *v.* ——— (N.Z.) 556
Frazier *v.* Frazier (Can.) ... 421
Frederick *v.* A.-G. (1874) ... 74
——— *v.* Hartwell (1785) ... 141
Freegard *v.* Freegard, Cowper & Lucas (1883) 366
Freeman *v.* Freeman & Freeman (1911) 374, 552
——— *v.* More (1728) 230
Freer *v.* Freer (1910) 429
Freestone *v.* Butcher (1840) ... 185, 186, 191, 194
Fremantle *v.* Fremantle & Bois (1915) ... 364
French *v.* French (1914) 389
——— *v.* Gething (1922) 166
——— *v.* Howie (1906) 187
French-Brewster *v.* French-Brewster & Gore .. 314, 315
Frith *v.* Frith & Paice (1896) 435
Frost *v.* Knight (1872) 27
Froud *v.* Froud (1920) .. 325, 554, 561
Frowd *v.* Frowd (1904) .. 308, 322, 556
Fry *v.* Fry (1890) 384
Fuller *v.* Alford (1883) .. . 45, 46, 61
Fullerton *v.* Fullerton (1922) 320
——— *v.* ——— (Scot.) 295
Fulton *v.* Fulton (Scot.) 287
Furlonger *v.* Furlonger (1847) .. 290, 291
Fussell *v.* Dowding (1872) 97
——— *v.* ——— (1884) 97
t *v.* Bowerman (1790) .. 383, 384
Fyffe *v.* Fyffe (1920) 510, 532
Fyler *v.* Fyler (1856) 465, 469

G.

G. *v.* G. (falsely called K.) (1908) . 266, 268, 376, 429
— *v.* — (1912) 266, 268, 467
— (otherwise R.) *v.* G. (1920) 427
— *v.* G. (1924) 266, 267
.. 404, 405
v. — (Scot.) 266, 268, 312
v. G. & M. (Can.) 356

PAGE

G. *v.* M. (1885)), n., 270, 271, 351, 370, 488
G— *v.* G- (1871) ... 265, 266
G— -s (falsely called T——e) (1854) 269
Gabry *v.* Gabry (1669) 177
Gadbury, *Re* (1863) 164
Gaetz *v.* Jarvis (Can.) 190
Gaffee, *Re* (1850) . 109, 110, 112
Gage *v.* Lister (1705) 95
Gajja Nand & Kirpa Ram *v.* R. (Ind.) ... 57
Gale *v.* Gale (1852) 289
Gales *v.* Dunboyne (Lord) (1854) 143
Gallagher *v.* Gallagher (Can.) 421
Galley *v.* Galley (Can.) 541
Gallini *v.* Gallini (*circa* 1815) 418
Galloway *v.* Craig (Scot.) 153
——— *v.* Galloway (1914) 224
Galmoye *v.* Cowan & Brown (1889) 119, 123
Gamble *v.* Sales (1920) ...
Gandy *v.* Gandy (1882) ... 237, 238, 498
——— *v.* ——— (1885) ... 234, 240, 498
Gapp *v.* Gapp & Leverson (1859)
Garcia *v.* Garcia (1888) ... 308, 309, 314, 319
Gardiner (otherwise Phillips) *v.* Gardiner (1920) 505
(Douglas) & Mill *v.* Mackintosh's Trustees (Scot.) 254
Gardner *v.* A.-G. (1889) 73, 74
——— *v.* Gardner (1859) 174
——— *v.* Gardner & Bamfield (1901) . 455
Garlinge *v.* Garlinge (Ind.) 422
Garner *v.* Garner (1920) 293
Garnett, *Re*, Richardson *v.* Greenep (1905) . 554
——— *v.* Garnett (Can.) 161
v. Garnett & Calderon (1919) . 490
Garratt *v.* Garratt & Garratt (1922) . 521
Garstin *v.* Garstin (1865) 398
Garston *v.* Garston (*circa* 1869) 466
Gascoigne *v.* Gascoigne (1918) 161, 162, 163
Gaskell's Trusts, *Re* (1865) 105
Gaskill *v.* Gaskill (1921) 298
Gaston *v.* Gaston (1865) 402
Gatehouse *v.* Gatehouse (1867) 318
Gates *v.* Wiggins (1854) 143
Gayer *v.* Gayer (1917) 438, 439
Gaynor *v.* Gaynor (Ir.) 259
——— *v.* Gaynor & Degliantoni (1862) ... 407, 408, 417
Gearing, *Re* (Can.) 90
Gee *v.* Smart (1857) 155, 157
Geering *v.* Geering & Mockford (1921) ... 448
Geeves *v.* Marks (Ir.) ... 80
Geils *v.* Geils (1848) 276, 277, 282, 283, 286, 306, 369, 372
v. (1851) 276, 277, 282, 283, 286, 306, 369, 372
(Scot.)
George *v.* George (1867) 409
(1869)
v. Peart (Can.) 200
v. Thomas (Can.) 70
——— *v.* Thyer, *Re* Shephard (1904) 64, 65, 66, 67, 71, 72
Georgetti *v.* Georgetti (N.Z.) 499
Georgucopulas *v.* Georgucopulas (Ind.) ... 421
Gerard (Lord), *Re*, Oliphant *v.* Gerard (1888) 142
Gethin *v.* Gethin (1861) 333, 334
——— *v.* ——— (1862) 333, 334, 491, 492, 493
Getty *v.* Getty (1907) 301
Ghazanfar Ali Khan *v.* Kaniz Fatima (Ind.) 70, 71
Gibbings *v.* Gibbings (1864) 530
Gibbons, *Re* (Can.) 83
——— *v.* Moulton (1678) 136

PAGE

Gibbs *v.* Gibbs & Heathcote (1920) 464, 475, 476
——— *v.* Harding (1870) ... 226, 233, 242
v. Hume (1861)... 447
Gibson (Doe d.) *v.* Barton (1837) ... 67
——— *v.* Gibson (1859) ... 312, 451
——— *v.* ——— (1920) 264
v. Gibson & West (1906) ... 452, 454
——— *v.* Way, *Re* Currey (1886) ... 102, 117
——— *v.* ——, *Re* ——— (No. 2) (1887) 118, 127
Gifford's Divorce Bill (1886) 395
Gilbert *v.* Gilbert (Can.) 77, 408
——— *v.* Harben, *Re* Harvey's Estate (1879) 144
Gilchrist, *Ex p.*, *Re* Armstrong (1886) 136, 142
——— *v.* McPhee (Can.) 149
Giles *v.* Giles (1900) 263, 384, 391
—— *v.* Giles & Quartley (1863) 434
Gill *v.* Gill (1889) 386
—— *v.* —— (1917) 280
—— *v.* Gill & Hogg (1863) 532
Gillet *v.* Gillet (1889) 423, 424, 548
Gilling, *Re*, Procter *v.* Watkins (1905) ... 232
Gilmore *v.* Dewar (Can.) ...
Gilpin *v.* Gilpin (1804) ... 328, 329
Gilroy *v.* Gilroy (1914) ... 421, 487
Ginger *v.* Ginger (1865) 303
Ginn *v.* Ginn (1869) 446
Giorgi, *Re*, Giorgi *v.* Wood (1901) 125, 126
Gipps *v.* Gipps & Hume (1863)
—— *v.* ——————— (1 291, 327, 328, 449, 458
v. : (1861)... 447
Girdhari Lal *v.* Crawford (Ind.) 183
Gladstone *v.* Gladstone (1875) 422, 463, 484
——— *v.* ——— (1876) 506, 529, 530
——— *v.* ——— (1877)
Glaister *v.* Hewer (1803) ... 161, 173
Glanvill, *Re*, Ellis *v.* Johnson (1886) ... 129
Glasier's Settlement, *Re*, Crook *v.* Preston, *Re* Crook's Settlement (1923) ... 85, 86
Gleen *v.* Gleen (1900) ... 304
Gleig *v.* Gleig (1906) 280
Glennie *v.* Glennie (Can.) 462
——— *v.* Glennie & Bowles (1862) ... 329, 330, 433, 450
——— *v.* ——————— (1863) 329, 330, 433, 450, 463, 471, 489
Gliksten *v.* Gliksten & Deane (1917) ... 295
Gloucestershire Banking Co. *v.* Phillipps (1884) 251
Glyn *v.* Baster (1827) 107, 108
Goatley *v.* Jones (No. 1), Goatley *v.* Jones (No. 2) (1909) 142, 143
Goddard *v.* Goddard (1915) 365
Goderich *v.* Goderich (1873) ... 535
v. Lara, Forder & Kelsey (1868) ... ...
Godfrey, *Re*, Thorne-George *v.* Godfrey (1894) 130, 132
———, *Re*, Thorne-George *v.* Godfrey (1895) 129, 130, 132
——— *v.* Harben, *Re* Harvey's Estate (1879) 144
Godrich *v.* Godrich (1872) 457
——— *v.* ——— (1873) 535
Goggin *v.* Kidd (Can.) 90
Gold *v.* Gold (1908) 446
—— *v.* Rutland (1719) 93
Goldney *v.* Goldney (1862) 400
Goldsmid *v.* Bromer (1798) 62
Goldsmith *v.* Goldsmith, Dalrymple, Nicolls & Wooley (1862) 436
Goldstone *v.* Goldstone (1922) 64, 65, 272
——— *v.* Smith (otherwise Goldstone) (1922) ... 64, 65, 272

PAGE

Goldstone *v.* Tovey (1839) ... 185
Gomme *v.* Franklin (1859) ... 212
Gompertz *v.* Kensit (1872) 47, 48
Gooch *v.* Gooch (1851) ... 148
(1893) 368, 369
Goodden *v.* Goodden (1892) 495, 497
Goode *v.* Goode & Hamson (1861) 362, 467, 474
Goodeve *v.* White (Can.) 251
Goodfriend *v.* Goodfriend (Can.) 308
Goodheim *v.* Goodheim & Frankinson (1861) 411
Goodman *v.* Goodman (1859) ... 67, 68, 72
——— *v.* Goodman & Pinfield (1920) ... 438
Goodwin *v.* Goodwin (1887) 568
——— *v.* ——— (1897) 541
Goodyear *v.* Part (1897) 195
Gordon *v.* Gordon (1903) ... 419, 543
——— *v.* ——— (1904) . 128, 131, 132, 489, 543
v. – (1905) 531
v. – (1912) ... 547, 549
v. – (Can.) 236
v. Merricks (1885)
v. Warren (Can.) 179
Gore *v.* Gardiner (1850) .. 200, 205
—— *v.* Knight (1705) 93
Gorge's Case (1598) 40
Goslin *v.* Clark (1862) 232
Gosling *v.* Gosling (1855) 165
Gott *v.* Gott (Can.) 541
Gough *v.* Farr (1827) 28, 29, 35
——— *v.* Gough & Baynton (1863) 428
——— *v.* ——————— (1864) ... 421, 478
——— *v.* Jones (1865) 60, 61
Gough & Cartwright *v.* Jones (1863) 60, 61
Gould *v.* Gould (1856) 137, 141
(Can.) 345
Goulder *v.* Camm (1859) . 105, 115
Govier *v.* Hancock (1796) . 75, 76, 202
Gow *v.* Gow (N.Z.) ... 309, 382, 383
Gower *v.* Gower (1872) 331
Gracey *v.* Gracey (Can.) 76
Gracey & Toronto Real Estate Co., *Re* (Can.) 133
Grafton *v.* Grafton (1872) 411
——— *v.* ——— (1873) 401
Graham *v.* Brettle (1851) 213
——— *v.* Graham (1923) 391, 392
– *v.* Londonderry (1746)
——— *v.* Pattinson, *Re* Pattinson (1885) 165
——— *v.* Reith (or Graham) (1924) 266, 267
Grainger, *Re*, *Ex p.* Grainger (1871) ... 174
Grange *v.* Grange & Arendt (1892) ... 398, 473
Grant *v.* Budd (1874) 232, 233
——— *v.* Cornock (Can.) 26, 31
——— (falsely called Giannetti) *v.* Giannetti (1913) 551, 55
——— *v.* Grant (1839)
——— *v.* ——— (1865)
——— *v.* ——— (Scot.)...
——— *v.* Grant & Bowles & Pattison (1862) 443, 444, 531, 552
——— *v.* Taylor (Can.) 135
Graves *v.* Graves (1842) 304, 399, 405
——— *v.* ——— (1864) 310, 313, 316
Gray *v.* Dowman (1858) . 155, 157
—— *v.* Gee (1923) 82
—— *v.* Gray (1861) 480
—— *v.* —— (1862) 300
—— *v.* Quinn (Can.) 305, 306
—— *v.* Vesey (Can.) 201, 205
v. Wylie (Scot.) 209
Gray & Jackson *v.* Mewhinney
Gray (Miss), Ltd. *v.* Cathcart (Earl) (1922) 192, 193,

PAGE

Gray-Jones, Claimant, Brittlebank *v.* Gray-Jones (Can.) 84
Greatorex *v.* Greatorex (1864) 381
v. Wynne (1892) 256
Greaves *v.* Greaves (1872) ... 53
Green, *Re*, Green *v.* Meinall (1911) ... 42
——— *v.* Carlill (1877) ... 174, 175
——— *v.* Dalton (1822) 49
——— *v.* Forbes (Ir.) 27
——— *v.* Green (prior to 1737) ... 62
(1840) 258
— (1864) 283, 379
277, 369
v. (1873) 345, 347
v. Meinall, *Re* Green (1911) 42
Greene *v.* Greene (1916) 273, 277
Greenhill *v.* Greenhill (1836) 540
Greenstreet (falsely called Cumyns) *v.* Cumyns (1812) 265
Greenway *v.* Greenway (1848) 287
Greenwood *v.* Greenwood (1862) 499
Gregory *v.* Lockyer (1821) 83
v. Parker (1808) ... 187
Gregory's Case, R. *v.* Brooke & Fladgate (1766) 79
Gresse *v.* Gresse (1780) 413
Grey's Settlements, *Re*, Acason *v.* Greenwood (1887) 103, 105, 109, 113
Gribbon *v.* Gribbon (1907) ... 440
Grice *v.* Grice & Penfold (1863) 397
Grieve *v.* Grieve (1893) 390
Griffin *v.* Patterson (Can.) 188
Griffin's Divorce Bill (1896) 433
Griffith *v.* Griffith (1864) 379
——— *v.* Patterson (Can.) 200, 201
Griffiths *v.* Fleming (1909) 149, 151
——— *v.* Griffiths (1909) 569
——— *v.* ——— (1912) ... ...
Griffiths' Policy, *Re* (1903) 150, 151
Grindell *v.* Godmond (1836) 209
Grinham *v.* Grinham & Pascoe (1916) 408, 423
Grocock *v.* Grocock (1920) 565
Grose *v.* Grose (1897) 386
Grossi *v.* Grossi (1873) 368, 494
Grosvenor *v.* Grosvenor (1885) ... 363
Grove, *Re*, Public Trustee *v.* Dixon (1919) 127, 128
——— *v.* Grove (1878) 555, 559
——— *v.* ——— (1896) 557
Grover *v.* Grover (1836) 296, 297
Groves *v.* Groves (1906) 567
v. Groves & Tompson (1859) ... 357
Guest *v.* Guest (N.Z.) ... 376, 377
——— *v.* Neames (1884) 257
——— *v.* Shipley (falsely calling herself Guest) (1820) 325, 352
Gullan *v.* Gullan (otherwise Goodwin) (1913) 501, 505, 509
Gunston *v.* Maynard (1883) 253
Guth *v.* Guth (1792) 241, 242
Guy *v.* Guy & Foster (1900) 486
— *v.* Livesey (1618) 80
Gyte *v.* Gyte & Mullineaux (1885) 537

H.

H. (otherwise G.) *v.* G. (1900) 427, 436
H. *v.* P. (falsely called H.) (1873) ... 267
H. (falsely called T.) *v.* T. (N.Z.) ... 266
H. *v.* W. (1857) 332, 334
H—— (falsely called C——) *v.* C— (1861) 351

PAGE

Habra *v.* Habra & Habai (1914) 363
Hadden *v.* Hadden (Can.) 547, 548
Haddon *v.* Fladgate (1858) 98
——— *v.* Haddon (1887) ... 565, 568, 570
Hadley *v.* Reynolds (*circa* 1835) 47
Haffey *v.* Haffey (Can.) 421
Hagarty *v.* Hagarty (Can.) 495, 496
Haigh *v.* Haigh (1869) 494, 497
Haines *v.* Jeffreys (1696) 43
——— *v.* Joscott (1696) 43
Hairman *v.* Crawley (S. Af.) 68
Hakewill *v.* Hakewill (1860) 409, 411
Haldane *v.* Haldane (N.Z.) 224, 228
Hale *v.* Hale (1915) 362, 366
—— *v.* Ruthven (1869) 25
—— *v.* Sheldrake (1889) 170, 174
Halfen (otherwise Boddington) *v.* Boddington (1881) 266, 551
Hall *v.* Castleden (1861) 351
—— *v.* Gates (1709) 201
—— *v.* Hall (1849) 294
v. (1863) 369
v. (1864) 281, 323, 324, 539
v. (1908)
v. (1909) . 430, 431
v. — (1911) . 156, 157
v. — (1915) 506
v. (Aus.) 313
v. (N.Z.) 247, 357, 458
v. Hall & Kay (1891) ... 336, 339, 471
v. Hall & Richardson (1879) 325
v. Wright (1859) 32
Hallam *v.* Hallam (1903) 390
Halldorson *v.* Holizki (Can.) 147
Hallett *v.* Hastings, *Re* Hastings (Lady) (1887) 183, 211, 212
Halliday *v.* Halliday (Can.) 541
Halligan *v.* Halligan (N.Z.) 345
Hallman *v.* Hallman (Can.) 39
Hallows *v.* Holmes, *Re* Holmes (1892) ... 110
Halpen (otherwise Boddington) *v.* Boddington (1881) 266, 551
Halpenny *v.* Pennock (Can.) 189
Halton *v.* May (1876) 106
Ham *v.* Toovey (1807) 202
Hamblin *v.* Great Northern Ry. Co. (1856) 34
——— *v.* Shelton (1862) 71
Hamer *v.* Boreham (1858) 384
——— *v.* Tilsley (1859) 147, 148
Hamerton *v.* Hamerton (1827) 414
——— *v.* ——— (1828) 296
——— *v.* ——— (1829) 296
Hamilton (Duchess) (Doe d.) *v.* Atherly (1741) 257
Hamilton *v.* Hamilton (1887) 419
——— *v.* Hamilton & Pralormo (1893) ... 533
——— *v.* Hamilton & Riding (1875) 551, 552
——— *v.* Hector (1871) 234, 242
——— *v.* ——— (1872) 234, 242
——— *v.* Wyllie (Scot.) 265
Hamlin *v.* Great Northern Ry. Co. (1856) ... 34
Hammond *v.* Keachie (Can.) 257
Hampden *v.* Hampden (1850)
Hampson *v.* Hampson (1908) 379, 459, 553
——— *v.* ——— (1914) 362, 482, 483
Hanbury *v.* Hanbury (1892) 293, 324
——— *v.* ——— (1895) 504, 511
Hancock *v.* Hancock (1888) 87
——— *v.* Hancock & Smith (1867) 445, 446
v. Peaty (1867) ... 477
Handford *v.* Handford (1890) 461
Handley *v.* Handley (1891) 536
Hankinson *v.* Hayter, *Re* Wheeler (1904) ... 182
Hanlan, *Re* (Can.) 78
Hanselman *v.* Gezy (Can.) 306

	PAGE
Hansen *v.* Dixon (1906) ...	29, 30
Harbord *v.* Edgington (1844)	
Harden *v.* Harden (1919) ...	... 363
Hardie *v.* Grant (1838) ...	202, 203
——— *v.* Hardie (1901) ...	392, 393
——— *v.* ——— (Can.) ...	... 264
Harding *v.* Harding (1886) ...	... 318
——— *v.* Harding & Lance (1862)	417, 540
——— *v.* ——— (1865)	434, 485
v. Sutton (1888)	... 134
Harding-Cox *v.* Harding-Cox (1908)	380, 383
Hardy *v.* Watson (1844) ...	... 305
Hare *v.* Hare (1862)	... 427
—— *v.* Hare & Davidson (1920)	329, 357
v. White (1692)	... 215
Harford *v.* Morris (1776) ...	... 38
Harker *v.* Harker (1868) ...	415, 416
Harkness & Allsopp's Contract, *Re* (1896)	133, 134
Harle *v.* Jarman (1895)	... 229
Harling *v.* Harling (1896) ...	562, 563, 570
Harmar *v.* Harmar (1857)	... 499
Harnett *v.* Harnett (1924)	275, 276
——— *v.* Macdougall (1845)	... 108
Harper *v.* Alexander (Can.)	... 178
Harraden *v.* Harraden & Bohan (1904)	... 481
Harries *v.* Harries & Gregory (1901)	480, 481
Harriman *v.* Harriman (1909) ...	321, 479
Harrington *v.* M'Dowell (1828) ...	... 188
Harris (otherwise Ball) *v.* Ball (1790)	266, 352
——— *v.* Bradbury & Halladay (1862)	... 254
v. Harford (1888) ...	... 125
— *v.* Harris (1813)	283, 285, 286
— *v.* ——— (1828)	... 412
— *v.* ——— (1829)	300, 370
— *v.* ——— (1866)	... 314
— *v.* ——— (1890)	... 419
— *v.* ——— (Can.)	... 77
— *v.* Harris & Lambert (1862) .	... 336
— *v.* Harris & Milton (1870) .	... 436
— *v.* Harris & Woodden (1872)	237, 343
— *v.* Hicks (1693)	... 443
— *v.* Lee (1718)	192, 204
— *v.* Meyers (Can.)	52, 53
— *v.* Morris (1801) ...	199, 200, 202
— *v.* Taylor (1914)	... 306
— *v.* ——— (1915)	306, 398
Harris' Settled Estates, *Re* (1884) ...	... 133
Harrison, *Re*, *Re* Little's Will (1887)	... 127
———, *Re*, Day *v.* Harrison (1920)	...
———, *Re*, Harrison *v.* Harrison, *Re* Little (1889)	125, 127
——— *v.* Burwell (1670)	... 41
——— *v.* Cage (1698) ...	24, 26, 28, 30
Davies (1897)	... 89
v. Douglas (Can.)	... 89
v. Grady (1865) ..	191, 195, 200
v. Hall (1832)	
v. Harrison (1842)	270, 426, 427
v. (1864)	... 353, 354
v. (1887)	... 506, 511
v. (1888)	105, 106, 181, 510, 546
v. (1910)	224, 318, 319
v. (N.Z.)	 274
v. , *Re* Little, *Re* Harrison (1889)	... 125, 127
v. , *Re* Little's Will (1887)	127
v. Southampton Corpn. (1853)	56, 64, 70
Harrison & Ingram, *Re*, *Ex p.* Whinney (1900)	153
Harrison's Estate, *Re* (Can.)	
Harrod *v.* Harrod (1854)	36, 40, 62, 63, 64, 65
Harrop *v.* Harrop (1899) ...	387, 389, 390
——— *v.* Howard (1845)	107, 108
Hart *v.* Hart (1855)	347
——— *v.* ——— (1881)	227, 230, 234, 241, 242, 447, 448
Harting & Son *v.* White (1892) ...	... 182
Hartland *v.* Smithies (1884)	... 119
Hartley *v.* Hartley & Fleming (1919)	... 300
——— *v.* Owen (1876)	... 252
Hartopp *v.* Hartopp & Akhurst (1899)	523, 525
——— *v.* Hartopp & Cowley (Earl) (1902)	400
Harvey, *Ex p.*, *Re* Edwards (1895)	91
——— *v.* Ashley (1748) ...	40
——— *v.* Boomer (Can.) ...	249
——— *v.* Farquhar (Scot.) ...	96
——— *v.* Harvey (Lady) (1686)	160
——— *v.* ——— (1923) ...	
——— *v.* Johnston (1848) ...	
——— *v.* Lovekin (otherwise Harvey) (1884)	425, 426
——— *v.* Mountague (1682)	160
——— *v.* Norton (1840)	186, 205
v. Watson (1844)	305
Harvey's Estate, *Re*, Gilbert *v.* Harben (1879)	144
—— —, *Re*, Godfrey *v.* Harben (1879)	144
Hastings (Lady), *Re*, Hallett *v.* Hastings (1887)	183, 211,
Haswell *v.* Haswell & Gilbert (1881) ...	52
——— *v.* Haswell & Sanderson (1859)	373, 374, 434
Hatton *v.* May (1876)	
Haupt *v.* Haupt (S. Af.)	39
Haviland *v.* Haviland (1863)	311, 312, 412
v. Mortiboy (1859)	67, 70, 72
Hawes, *Re*, *Re* Burchell, Burchell *v.* Hawes (1892)	146, 172, 173
— *v.* Curtis, *Re* Curtis (1885)	... 175
— *v.* Hawes (1886)	... 549
Hawke (Lord) *v.* Corri (1820) .	59, 272
Hawkes *v.* Hawkes (1828)	... 411
——— *v.* Hubback (1870)	... 112
Hawkins *v.* Hawkins (1885)	... 357
Hawks *v.* Fox (1879)	... 160
——— *v.* Hawks & Fenwick (1876)	444, 539
Hawksley *v.* Barrow (1866)	... 137
Hawley *v.* Ham (Can.)	... 212
Haworth *v.* Bostock (1840)	
——— *v.* ——— (1842)	
Hay *v.* Gordon (Ind.)	264
Hay's Trusts *v.* Hay (Scot.)	151
Haydon *v.* Haydon & Cooke (1860)	448
Hayes *v.* Hayes (Can.)	333
Haynes, *Re*, Haynes *v.* Carter (1906)	66, 69
Hayward *v.* Hayward (1858)	323, 410, 411, 412, 413, 451
——— *v.* ——— (1859) ...	220
Head *v.* Briscoe (1833)	... 216
Head-Patrick *v.* Patrick (Can.) ...	... 541
Heal *v.* Heal (1867)	469, 470
Healey *v.* Healey (1915)	... 259
Heard *v.* Heard (1896)	... 561
Hearle *v.* Greenbank (1749)	... 138
Heath *v.* Wickham (Ir.)	... 142
Heathcoat *v.* Heathcoat (1864) ...	... 420
Heathcote's Divorce Bill (Scot.) ...	... 298
Heatley *v.* Thomas (1809)	145, 146
Heaviside *v.* Lardner (prior to 1860)	... 456
Heaviside's Divorce Bill, *Re* (1845) ...	... 354
Hebblethwaite *v.* Hebblethwaite (1869)	... 430
Hebden *v.* Rutter (1664)	... 27
Hechler *v.* Hechler & Bennett	... 476
Hedderwick *v.* Morison (Scot.)	... 97
Hedge *v.* Morrow (Can.) ..	64, 71

PAGE

Hedgely, *Re*, Small *v.* Hedgely (1886) ... 119
Heffer *v.* Heffer (1812) 49
Heimbs *v.* Newcastle Co-operative Society (1897) 258
Heinamann Estate *v.* Heinamann (S. Af.) ... 40
Hellings *v.* West End Drapery Stores, Ltd. (1899) 251
Hellon *v.* Hellon (Scot.) 354, 355
Hemingway *v.* Braithwaite (1889) ... 122, 179
Hemmings *v.* Smith (1784) 71, 436
Hemphill's Settlement, *Re*, Hemphill *v.* Hemphill, *Re* Chisholm's Settlement (1901) 142
Henderson *v.* Dawson (Scot.) 179
——— *v.* Henderson (Can.) 77
——— *v.* ——— (N.Z.) ... 346, 396
——— *v.* Weis (Can.) 69
Hensley *v.* Hensley & Nevin (1920) ... 431
Henslow *v.* Henslow & Beardsley (1871) ... 382
Henty *v.* Henty (1875) 310
Hepworth *v.* Hepworth (1860) 399
——— *v.* ——— (1861) 420, 442, 450, 465, 540, 542
Herbert *v.* Herbert (1692) 95
——— (Lady) *v.* Herbert (Lord) (1819) ... 440
Hernando, *Re*, Hernando *v.* Sawtell (1884) ... 118
Hervey *v.* Hervey (1773) 66
Heseltine *v.* Murray (Lady Augusta) (1794) 457
Hesse *v.* Albert (1828) 232
Hetherington *v.* Hetherington (1887) ... 569
Hewison *v.* Negus (1853) 210
Heyes *v.* Heyes & Mason (1887) . 358, 490
——— *v.* ——— (1888) . 358, 490
Heynes *v.* Dixon, *Re* Dixon (1900) 147, 173, 212
Hick *v.* Hick & Kitchen (1864) 475
——— *v.* Hick & Kitchin (1863) . 412, 416
Hickey *v.* Campion (Ir.) 24, 29
Hicks, *Re*, Hicks *v.* Hicks (1917) 165
——— *v.* Harris (1693) 443
Higgin's Case (1606) 80
Higgins, *Re* (Can.) 135
——— *v.* Butcher (1606) 80
——— *v.* Higgins (1910) 487
——— *v.* ——— (1924) 332
——— *v.* King's Proctor (1910) ... 479, 487
Higgs *v.* Higgs (1830) 417
——— *v.* Higgs & Hopkins (1862) ... 399, 540
Highley *v.* Highley (1924) 377
Hilbinger *v.* Hilbinger (1908) 486
Hiliard *v.* Phaly (1723) 67
Hill *v.* Ailesbury (Lady) (1894) 122
v. Cooper (1893) 101, 102, 111, 116, 255, 560
——— *v.* Good (1674) 41
——— *v.* Hibbit (1870) .. 66, 68
——— *v.* Hill (1861) .. 440, 492
——— *v.* ——— (1864) 322, 403, 411
——— *v.* ——— (1902) 559
——— *v.* ——— (1916) 260
——— *v.* ——— (Ind.) 308, 368, 404
——— *v.* Mathie, *Re* Whitfield (1911) 42
——— *v.* Schwarz, *Re* Parkin (1892) 136
Hilliker, *Re* (Can.) 134
Hills *v.* Hills & Easton (1915) 435
Hind *v.* Whitmore (1856) ... 258
Hindley *v.* Westmeath (Marquis) (1827) 201, 221, 222
Hindmarsh *v.* Hindmarsh & Hussey (1865) 398
Hines *v.* Hines & Burdett (1918) ... 348, 361
Hinks *v.* Harris (1693) 443
Hinton *v.* Hudson (1677) 188, 189
Hipwell *v.* Hipwell (1892) 533
Hitchcock *v.* Hitchcock (1867) ... 379, 427
Hitchings *v.* Hitchings (1892) 461
Hoar *v.* Hoar (1801) 327, 331
Hoare *v.* Hoare (Ir.) 223

PAGE

Hoare *v.* Niblett (1891) ... 183
Hobbs *v.* Hobbs (1920) 396, 436
v. Hull (1788) 226
Hobday *v.* Peters (No. 2) (1860) ... 136, 143
Hobson, *Ex p.* (1894) 377, 439
Hobson's Settlement, *Re*, Webster *v.* Rickards (1885) 85
Hodge *v.* Cooper (1841) ... 184, 191, 192
Hodges *v.* Hodges (1795) 327, 330
——— *v.* ——— (1796) 200
——— *v.* ——— (1882) 125, 146
——— *v.* Windham (1791) ... 305, 326, 329
Hodgins *v.* McNeil (Can.) 43
Hodgkinson *v.* Fletcher (1814) ... 197, 198
v. Wilkie (1795) 52, 53, 55, 56, 57
Hodgson, *Re*, Darley *v.* Hodgson (1899) ... 145
——— *v.* Hodgson & Turner (1905) 359, 375
——— *v.* Williamson, *Re* Barber (1880) 144, 183, 205
Hodgson Roberts *v.* Hodgson Roberts & Whitaker (1906) 523, 526
Hogg *v.* Hogg (1860) 450
——— *v.* ——— (Can.) 76
Hoggan *v.* Craigie (1839) ... 66, 68
Holcroft *v.* Dickenson (1673) ... 23, 27
Holdby, *Re* (1862) 540
Holden, *Re*, *Ex p.* Holden (1863) 500, 540
——— *v.* Holden (1810) ... 283, 285
——— *v.* ——— (1863) 540
v. Holden & Pearson (1910) 490, 564
——— *v.* King (1876) ... 80, 81
v. Waterlow (1866) ... 250
Holder *v.* Cope (1846) ... 198
——— *v.* Dickeson (1673) ... 22
Hole *v.* Bethune, *Re* James (1910) . 140, 141
Holland *v.* Holland (1865) 542
——— *v.* ——— (1918) ... 348, 483, 488
——— *v.* ——— (1925) 298
(Can.) 345
Hollington *v.* Dear (1895) 131
Hollis' (Lord) Case (1689) 210
Holmes, *Ex p.*, *Re* Cook (1892) 193
———, *Re* (Ind.) 533, 534
———, *Re*, Hallows *v.* Holmes (1892) ... 110
——— *v.* Brierley (1888) 26
——— *v.* Holmes (1755) 464, 465
——— *v.* ——— (1757) 372, 375
——— *v.* ——— (Can.) 76
v. Holmes & Bawls (1909) ... 378
——— *v.* Simmons (falsely called Holmes) (1868) 44, 54, 55
Holroyd *v.* Holroyd (1920) ... 229, 318, 326
Holt *v.* Brien (1821) 189, 193
——— *v.* Everall (1876) 149, 150
——— *v.* Holt (1908) 322, 556
——— *v.* Holt & Davis (1868) 407, 413
——— *v.* ——— (1869) 476
——— *v.* Holt & Fleeming (1858) 409, 423, 467
——— *v.* Ward (1732) 25, 27, 28
Holtby, *Re* (1889) 120, 121, 255
v. Hodgson (1889) ... 120, 121, 255
Holway *v.* Holway (Can.) 498
Homanuke *v.* Homanuke (Can.) 64
Home, *Re*, *Ex p.* Home (1885) ... 209, 210
Homestead Act, *Re*, C.'s Case (Can.) 77, 78
Homewood *v.* Beaton (Can.) .., ... 81
Honyman *v.* Campbell (Scot.) 65
Hood *v.* Hood (1858) 439, 441
Hood Barrs, *Ex p.*, *Re* Lumley (1894) ... 130
——— *Ex p.*, *Re* ——— (1896) 102, 103, 123
——— *v.* Cathcart (1894) ... 123, 130
——— *v.* ——— (1895) ... 130, 132
——— *v.* ——— —, *Re* Lumley (1894) ... 130
v. Heriot (1896) ... 106, 107, 123, 250

	PAGE
Hood Barrs *v.* Heriot (1897) ...	130, 131
Hook *v.* Hook (1858)	... 387
—— *v.* —— (Scot.	... 432
—— *v.* Hook & Brown (1917) ...	348, 483
Hooke *v.* Hooke (1858)	... 435
Hooper, *Re*, Baylis *v.* Watkins (1864)	207, 209
—— *v.* Hooper (1861)	447, 496
—— *v.* —— (1919)	... 514
Hope *v.* Carnegie (2) (1869)	... 566
—— *v.* Hope (1854) ...	... 256
	414, 418, 497
	221, 230
(1858)	... 369
v. (1869)	... 256
(1892)	... 84
v. – (1915)	... 570
v. Hope & Erdody (1874)	... 518
v. Hope & Johnson (1924)	476, 485, 486
Hope Johnstone, *Re*, Hope Johnstone *v.* Hope Johnstone (1904) ...	
Hopkins *v.* Bulbeck (1920) ...	... 566
—— *v.* Hopkins (1914) ...	... 561
Hopper *v.* Hopper (1858) ...	416, 417
Horam *v.* Humfreys (1772) ...	... 34
Horlock *v.* Horlock (1852) ...	116, 117
v. Wiggins (1888) ...	... 236
Horn *v.* Noel (1807)	62, 73
Hornbuckle *v.* Hornbury (1817)	... 189
Horne *v.* Horne (1861) ...	531, 532
Horner *v.* Kerr (Can.)	... 101
—— *v.* Liddiard (otherwise Whitelock falsely calling herself Horner) (1799)	43, 55, 56
Horrell *v.* Horrell (1882)	... 210
Horseman *v.* Abbey (1819)	... 137
Horsley *v.* Horsley (N.Z.)	... 438
Horton *v.* Horton (1859)	... 281
Horwood *v.* Heffer (1811)	... 200
Hotchkin *v.* Mayor, *Re* Fearon (1896)	... 109
Hough *v.* Hough (1894)	... 466
Houghton *v.* Houghton (1903) ...	346, 550
Houlding *v.* Poole (Can.)	... 248
Houliston *v.* Smyth (1825) ...	200, 201, 203, 204
Howard, *Re*, Charter *v.* Ferguson, *Re* Phillips (1919)	... 43
—— *v.* Bank of England (1875)	88, 89, 135
—— *v.* Digby (Earl) (1834)	148, 166, 167
—— *v.* Howard (1897)	... 448
—— *v.* —— (1904)	... 304
—— *v.* —— (Ind.)	... 429
—— *v.* Howard & Drew (1903) ...	... 487
—— *v.* Salisbury (Chancellor) (1669) ...	41
Howarth *v.* Howarth (1884)	481, 492
—— *v.* —— (1886)	... 544
Howe *v.* Howe (1867)	473, 475
—— *v.* —— (Can.)	... 413
—— *v.* —— (Ind.)	... 381
—— *v.* Howe & Howe (1910) ...	... 487
Howell *v.* Hanforth (1775)	... 231
—— *v.* Howell & Walker (1920)	452, 453, 454, 455, 456, 463, 475, 476
Howes *v.* Bishop (1909)	168, 169
—— *v.* Howes (Can.)	206, 424
Howey *v.* Howey (Can.)	... 76
Howland, *Re* (Can.)	... 248
Hoyes *v.* Kindersley (1851)	161, 162
Hubbard (otherwise Rogers) *v.* Hubbard (1901)	... 520
—— *v.* Hubbard (N.Z.)	... 396
—— *v.* Lees & Purden (1866) ...	... 72
Hudson *v.* Carmichael (1854)	155, 156, 157
—— *v.* Hudson (1863) ...	283, 287, 292, 401
—— *v.* —— (1875)	479, 481
Hudston *v.* Hudston (otherwise Newbigging) (1922)	

	PAGE
Huggins *v.* Butcher (1606)	80
Hughes, *Re*, Brandon *v.* Hughes (1898)	101, 145
v. Hughes (1866)	359
—— *v.* —— (1908)	562, 563
—— *v.* Hughes & Williams (1915)	... 349
—— *v.* Jones (1863)	94
—— *v.* Shand (N.Z.)	29
—— *v.* Wells (1852)	218
Hughes' Trusts, *Re* (1885)	85
Hull *v.* Hull (falsely called M'Arthur) (1851)	39
Hulme *v.* Chitty (1846)	235
—— *v.* Hulme (1823)	
Hulse *v.* Hulse (1910)	226, 227
—— *v.* Hulse & Tavernor (1871)	367, 458, 481, 482, 485, 487
Hulton *v.* Hulton (1916)	503
— —— *v.* Hulton (1917)	228, 260
Humphery *v.* Humphery & Wake (1917) ...	470
—— *v.* Richards (1856) ...	93, 136, 140
Humphery & Humphery, *Re*, *Re* Married Women's Property Act, 1882 (1917) ...	260
Humphrey *v.* Williams (falsely calling herself Humphrey) (1860)	405
Humphreys, *In the Goods of*, Allen *v.* Humphreys (1882)	98
—— *v.* Allen (1882)	98
Hunt *v.* De Blaquiere (1829) ...	189, 204, 205
v. Hunt (1856)	206, 404
v. —— (1862)	220, 243, 244, 279
v. —— (1883)	536
v. —— (1884)	235, 250
v. —— (1897)	231
	91, 92, 174, 211
—— *v.* Hunt & Cooper (1894) ...	389, 538
—— *v.* Hunt & Duke (1862)	399
—— *v.* Hunt & Wright (1877)	
Hunter *v.* Dixon (Scot.) ...	231, 232, 233
—— *v.* Hunter (1905)	481, 482
.	536, 537
(Can.) .	... 284
(Scot.) .	... 332
– *v.* Hunter & Vernon (1858) ...	... 388
Huntington (Earl) *v.* Huntington (Countess) (1702)	15:
Huntly (Marchioness) *v.* Gaskell (1905) ...	131
Huntly-Gordon *v.* Huntly-Gordon (Nicholson cited) (1908)	466
Hurley *v.* Hurley (Ir.)	85
—— *v.* —— (N.Z.)	395
—— *v.* Hurley & Menzies (1891) ...	468, 472
Hurly's Divorce Bill (1908)	439, 441
Husband *v.* Wife (S.Af.)	312, 313
Hussey *v.* Hussey (1913)	317
Hutchings to Burt, *Re* (1888)	106
Hutchinson *v.* Hutchinson (N.Z.)	396
—— *v.* Hutchinson & Barker (1866)	39
– *v.* Standard Bank of Canada (Can.)	211
Hutton *v.* Harper (Scot.)	44
—— *v.* Hutton (No. 2.) (Can.)	410
—— *v.* Mansell (1705)	24
Huxtable *v.* Huxtable (1899)	309, 313, 555
Hyde *v.* Hyde (1859)	460, 461
— —— *v.* —— (1865)	546
—— *v.* Hyde & Fellgate (1888) ...	122, 434, 463, 464, 470
—— *v.* Price (1797)	232
—— *v.* Scyssor (1619)	80
Hyman *v.* Hyman & Goldman (1904)	342, 475, 476, 486
Hynes *v.* Hynes (N.Z.) ...	... 508
—— *v.* Hynes & Lake (1904)	... 367

I.

PAGE

I. C., *Ex p.* (1838) 57
Illingworth, *Re*, Bevir *v.* Armstrong (1909) 138
Ingall *v.* Brown, *Re* Brown (1904) 57
Inglis *v.* Inglis & Allen (1867) 298
Ingram *v.* Ingram (Can.) 421
——— *v.* Little (1883) 187
Insole, *Re* (1865) 99
Ioakimidis' Policy Trusts, *Re*, Ioakimidis *v.* Hartcup (1925) 152
Irving *v.* Greenwood (1824) ... 31, 35
Irwin, *Re* (Can.) 231
——— *v.* Irwin & Layard (1890) 53
Isaac, *Re*, Jacob *v.* Isaac (1885) 250
Ivens *v.* Butler (1857) 177
Ivimey *v.* Ivimey (1908) 547, 548
Ivory, *Re*, Chippendale *v.* Ivory (1886) 67, 69
Izard *v.* Izard (1889) 455

J.

J. (otherwise K.) *v.* J. (1908) 267, 528
Jack *v.* Smail (Aus.) 95
Jackman *v.* Jackman (Can.) ... 555, 556
v. Jackman & Willoughby (1889) ... 450
Jackson, *Ex p.* (1891) ... 79
-, *Re* (1891) 79
— *v.* Hobhouse (1817) 113, 114
v. Innes (1819) 158
(otherwise Macfarlane) *v.* Jackson (1908) 460, 471, 477
——— *v.* Jackson (1909) 570
——— *v.* ——— (1910) 479
——— *v.* ——— (1924) 308, 309, 312
——— *v.* ——— (Can.) 76
——— *v.* Robertson (Can.) 135
Jacob *v.* Isaac, *Re* Isaac (1885) 250
Jagger *v.* Jagger (1896) 563
——— *v.* ——— (1926) 507, 508
Jago *v.* Jago & Graham (1862) 493
James, *Re*, Hole *v.* Bethune (1910) ... 140, 141
——— *v.* Barraud (1883) 248
——— *v.* Biddington (1834) 34, 456
——— *v.* Dearmer, *Re* Dearmer (1885) 89, 90, 91, 173
v. Holmes (1862) 175
v. James (S. Af.) ... 308, 309
v. ———, *Re* Bowen (1892) ... 134
——— *v.* James & Smyth (1881) ... 63
——— *v.* Warren (1706) ... 199, 201, 204
Jardine *v.* Jardine (1881) 505, 508
Jarman *v.* Woolloton (1790) 89, 90
Jay *v.* Amphlett, *Ex p.* Butler (1862) ... 177
v. Robinson (1890) ... 119, 120, 178
Jayne *v.* Jayne & Prothero (1869) 381
Jeapes *v.* Jeapes (1903) ... 284
Jee *v.* Thurlow (1824) ... 9[illegible]
Jeffers *v.* Jeffers (1877) 388
Jefferson *v.* Paskell (1916) 32, 33
Jeffery, *Re*, Nussey *v.* Jeffery (1914) ... 92
Jeffree *v.* Jeffree & Nuttall (1910) 450
Jeffreys *v.* Jeffreys (1912) 387
——— *v.* Jeffreys & Smith (1864) 356
Jeffries *v.* Jeffries (1907) 535, 545
Jelly *v.* Jelly (N.Z.) 396
Jenkins *v.* Jenkins & Mitchinson (N.Z.) ... 570
Jenkinson *v.* Bullock (1891) 195
Jenner, *Ex p.*, Pratt *v.* Jenner (1866) 519, 532, 533
Jenner *v.* Hill (1858) ... 190
——— *v.* Morris (1861) 205
Jennings *v.* Jennings (1865)
Jenns *v.* Jenns (Can.) 541
Jensen *v.* Jensen (Can.) 437
Jenson *v.* Jenson (1898) 394
Jessop *v.* Blake (1862) 96, 97
v. Jessop (1861) 334, 335, 336, 484, 487
v. McLean (Can.)
Jetley *v.* Hill (1884) 188
Jewell *v.* Jewell (1862)
Jewsbury *v.* Newbold (1857) 186, 191, 212
Jinkings *v.* Jinkings (1867) 386
Jinks *v.* Jinks (1911) 446, 539
Jobson *v.* Jobson (N.Z.) 342, 480, 481
Jodrell *v.* Jodrell (1845) 167, 226, 227
v. ——— (1851) . 167, 233
John *v.* John (*circa* 1820) 405
Johnson *v.* Adamson, *Re* Fieldwick (1909) 145. 181, 182
v. Freeth (1836) ... 110, 111
v. Johnson (1861) 524
v. ——— (1887) ... 89, 135
v. ——— (1900) ... 567, 568
... 355, 384
——— *v.* Lander (1869) 99
Johnston *v.* Brown (Scot.) 39
——— *v.* Desaulniers (Can.) 174
——— *v.* Hazen (Can.) 68, 70
——— *v.* Johnston (Aus.) 306, 307
——— *v.* ——— (Can.) 146
——— *v.* ——— (Scot.) 433
v. Powell (S. Af.) 195
——— *v.* Sumner (1858) 196, 198, 199, 200, 201
Jollands *v.* Burdett, *Re* Brettle (1864) ... 114
Jolly *v.* Jolly & Fryer (1919) ... 295
—— *v.* Rees (1864) 192, 193, 195
Jones, *In the Goods of* (1904) 101
——— (1905) 101
v. Elderton (1884) 251
v. Gough (1865) 60, 61
v. James (1868) 32
v. Jones (1860) 289, 292
v. ——— (1872) 263, 264, 413, 463, 464, 465
v. ——— (1895) 315, 563
v. ——— (1896) 385, 386
v. ——— (1912) 543
v. ——— (1924) 556, 565
v. Jones & Phillips (otherwise Redfern) (1893) 454
v. Jones & Roosejones (1913) ... 451
v. McGrath (Can.) 210
v. Newtown & Llanidloes Guardians (1920) 76, 77, 202
——— *v.* Robinson (1815) 40
——— *v.* Salter (1815) ... 110, 111
——— *v.* Thompson (1834) 437
——— *v.* Waite (1839) 219
——— *v.* ——— (1842) 219
——— *v.* Williams (1865) ...
Jones' Divorce Bill (1899) 441
Jordan, *Re*, Kino *v.* Picard (1886) 125, 126
v. Jordan (Can.) ... 447
Jorey, *Ex p.*, *Re* Milsted (1868) ... 184
Joseph, *Re* (N.Z.) ... 162
——— (otherwise King) *v.* Joseph (1909) 260, 267, 528
——— *v.* Joseph (1915) 562, 564
——— *v.* Joseph & Burnhill (1897) ... 442
——— *v.* Joseph & Wentzell (1865) ... 366
——— *v.* Ramama (Ind.) 264
Joyce *v.* Brew, *Re* Butler (Ir.) 42
——— *v.* Joyce (1864) 480
Joynt's Divorce Bill (1888) .. 396

	PAGE
Judd *v.* Judd (1907)	292
Judkins *v.* Judkins (1897) ...	237, 238, 502, 536
Jump *v.* Jump (1883)	234, 247, 460
Jupp, *Re*, Jupp *v.* Buckwell (1888)	92

K.

K. *v.* K. (otherwise R.) (1910)	508, 510, 512
— *v.* — (Can.)	265, 268, 271, 506
Karch *v.* Karch (Can.) ...	76, 77, 409
Kay *v.* Kay (1904) ...	308, 309, 319, 320, 466
—— *v.* —— (1912)	560
Kaye *v.* Kaye (1858)	465
v. (1902) ...	524
Keane, *Re*, Lumley *v.* Desborough (1871) ...	128
—— *v.* Keane (1871)	490
—— *v.* —— (1873)	442
Keats *v.* Keats (1859)	407
—— *v.* Keats & Montezuma (1859)	336, 337, 338, 339, 478
Keech *v.* Keech (1868)	311
Keegan *v.* Smith (1826)	204
Keene, *Re*, (1865)	196
Keizer *v.* Keizer (Can.)	77
Keller *v.* Schultz (Can.)	147
Kelly *v.* Kelly (1854)	411
—— *v.* —— (1863) ...	407, 414, 417
—— *v.* —— (1870) ...	284, 285, 286, 288
—— *v.* —— (N.Z.) ...	311
v. Kelly & Saunders (Ind.)	461
Kemp-Welch *v.* Kemp-Welch & Crymes (1910)	442, 443
Kemp-Welch *v.* Kemp-Welch & Crymes (1912)	553
Kempe *v.* Kempe (1828)	496
Kendall *v.* Webster (1862)	
Kenealy *v.* Karaka (N.Z.)	213, 214
Kennard *v.* Kennard (1915)	486
Kennedy *v.* Kennedy (1907)	239, 280
. Kennedy & Schurch (1890) ...	356
Kennedy's Trustee *v.* Sharpe (Scot.)	150, 151
Kenney *v.* Kenney (1925)	561
Kenrick *v.* Kenrick (1831) ...	299, 303, 441
—— *v.* Wood (1869)	117
Kent *v.* Atkinson (1922)	396
—— *v.* —— (1923) ...	305, 306, 396
Kenworthy *v.* Kenworthy (1919)	387
Keown-Boyd *v.* Gilmour, *Re* Wilson-Stewart (1896)	126
Ker *v.* Ruxton (1852)	98
Kerfoot *v.* Marsden (1860)	34
Kerr *v.* Kerr (1897)	542
v. Stripp (Can.)	84
Kerridge *v.* Simmonds (Aus.) ...	220, 221
Kershaw, *Re*, Whitaker *v.* Kershaw (1890), 44 Ch. D. 296	250
—— *Re*, Whittaker *v.* Kershaw (1890), 45 Ch. D. 320	249
—— *v.* Kershaw (1887)	314
—— *v.* Kershaw & Berry (1907)	422, 469
Kerwick *v.* Kerwick (Ind.)	162, 163
Keslering *v.* Keslering & A.-G. for Saskatchewan (Can.)	355
Kettlewell *v.* Kettlewell (1880) ...	320, 381
—— *v.* —— (1898) ...	504, 507
Keweluk *v.* Keweluk (Can.) ...	432, 496, 497, 499
Key *v.* Bradshaw (1689)	38
Keys *v.* Keys (Ir.)	547
Keyse *v.* Keyse & Maxwell (1886)	453, 454, 455, 456
Keyworth *v.* Hill (1820)	214

	PAGE
Kidd *v.* Harris (Can.)	43, 71
Kieley *v.* Morrison (Can.)	199
Kiff *v.* Roberts, *Re* Roberts (1886)	250
King *v.* Bailey (Can.)	305
—— *v.* Gillett (1840)	33
—— *v.* King (1846)	406
—— *v.* —— (1847)	295
—— *v.* —— (1850)	426
v. —	304
(1915)	482
(Can.)	406
(Ind.)	345
v. King & Dent (1862) ...	377, 380, 399
v. King & Miller (1901)	304
v. Sansom (otherwise King) (1826)	63, 64, 230
v. Voss, *Re* Voss (1880)	
King's Proctor *v.* Carter (1910) ..	479, 487
Kingdon *v.* Bridges (1688)	163
Kingsley, *Re*, *Ex p.* Woolley (1858)	100
Kingsley's Trusts, *Re* (1858)	100
Kingsmill *v.* Kingsmill (Can.)	159
Kingston's (Duchess) Case (1776) ..	273, 554
Kinnear *v.* Blue (Can.)	254
Kinnoul (Earl) *v.* Money (1767)	157
Kino *v.* Picard, *Re* Jordan (1886) ..	125, 126
Kippax *v.* Kippax (1891)	545, 546
Kirby *v.* Kirby (1801)	405
Kirk *v.* Kirk (1902)	508
—— *v.* Murphy (Ir.)	119
Kirkaldy *v.* Kirkaldy (1864)	220
Kirkman *v.* Kirkman (1807) ...	281, 286, 291
Kirkwall (Lady) *v.* Kirkwall (Lord) (1818)	332
Kisch *v.* Kisch (1864)	380, 382
Kitchin *v.* Kitchin (1869)	244, 279
Knapp *v.* Knapp (1880)	320
—— *v.* —— (Can.)	409
Knight *v.* Chaplen (1658)	27
—— *v.* Knight (1865)	168, 287
Knowlton *v.* Knowlton (Can.) ...	
Knox, *Re* (Ir.)	62
—— *v.* Bushell (1857)	
Koch *v.* Koch (1899)	
Kondal, etc. *v.* Ranganayaki Ammal (Ind.)	
Konkle, *Re* (Can.)	
Krauss (otherwise Des Salles D'Epinoix) *v.* Krauss (otherwise Des Salles D'Epinoix) & Orbach (1919)	383
Kretzschmar *v.* Kretzschmar & Reinecker (1859)	449
Kuhler *v.* Kuhler (Can.)	230
Kunski *v.* Kunski (1898) ...	238, 239, 2
— *v.* Kunski & Josephs (1907)	343
Kuyper's Policy Trusts, *Re*	
Kynaston *v.* Hickman & Brown (1919)	

L.

L. (otherwise B.) *v.* B. (1895) ...	352
— (otherwise C.) *v.* C. (N.Z.)	391
— (falsely called H.) *v.* H. (1866)	270, 488
— *v.* L. (falsely called W.) (1882) ...	267
— *v.* — (otherwise M.) (1908) ...	451
— *v.* — (1911)	495
— *v.* — (Scot.)	435
— *v.* L. & K. (Can.)	356, 429, 492
— *v.* W. (falsely called L.) (1882)	267
L—— (falsely called H— — —) *v.* H —— (1865)	270
—— *v.* L—— (1911)	571
—— *v.* —— (otherwise D——	

PAGE

Lacey *v.* Lacey (1858)... 394, 395
—— *v.* —— (1919) ... 278
Ladd *v.* Lynn (1837) ... 209
Lafrance *v.* Lafrance (Can.) 406
Laidler *v.* Laidler (1920) 336
Laing *v.* Provincial Homes Investment Co., Ltd. (Scot.) 179
Lalonde *v.* Lalonde (Can.) 407
Lamb *v.* Lamb (N.Z.)... 316
Lambart *v.* Lambart (1907) 485
Lambert, *Ex p.*, *Re* Worsley (1901) ... 91
v. Lambert (1767) 228, 229
Lambert's Estate, *Re*, Stanton *v.* Lambert
Lancaster *v.* Evors (1846) 154, 155
—— *v.* —— (1847) ... 155
—— *v.* —— (1848) 154, 155
v. Lancaster (1896) 448
Lander *v.* Lander (1891) 355, 358, 506, 507, 552
Lane *v.* Goodwin (1843) 50, 52
—— *v.* Ironmonger (1844) 194, 195
—— *v.* Lane (1896) 556, 557
—— *v.* Oakes (1874) 89
Lang *v.* Lang (1915) 393
—— *v.* —— (Scot.) 265
Langford *v.* Tyler (1704) 186
Langham *v.* Thompson, *Re* Thompson (1904) 66, 67, 69
Langrick *v.* Langrick & Funnell (1920) 453, 454, 464, 475, 476
Langworthy *v.* Langworthy (1886) ... 459, 552
Lankester *v.* Lankester & Cooper (1925) 328, 357
Lapington *v.* Lapington (1888) 320, 378, 381
Laporte *v.* Costick (1874) 90, 91
Laraiti *v.* Ram Dial (Ind.) 568
Lardner *v.* Lardner (1905) 259
Lardner's Divorce, *Re* (1839)... 353
Larkin *v.* Marshall (1850) 215
Larner *v.* Larner (1905) 259
Lasbrook *v.* Tyler (1630) 75
La Terriere *v.* La Terriere & Grey (1921) ... 518
Latham *v.* Latham (1889) 125
—— *v.* Latham & Gethin (1861) 413, 415, 501, 537, 552
Latour *v.* Latour & Weston (1861) 367
Lauderdale Peerage (1885) ... 65, 67, 69, 70
Lautour *v.* Queen's Proctor (1864) . 367, 481
Law *v.* Harragin (1917) 224
Lawford *v.* Spicer (1857) 94
Lawless *v.* Chamberlain (Can.) 264
Lawrence, *Re*, Lawrence *v.* Lawrence (1916) 148
—— *v.* Johnson (1843)... 257
—— *v.* Landsberg (Can.) 249
—— *v.* Lawrence (1862) 310
518
—— *v.* Lawrence, *Re* Lawrence (1916) 148
Lawry *v.* Tuckett-Lawry (Can.) 305
Laws, *Re*, Laws *v.* Laws (Can.) 210
Lawson *v.* Laidlaw (Can.) 101
—— *v.* Powers, *Re* Murray Canal (Can.) 42
—— *v.* Shepheard (1829) 177
Lawton's Petition for Dissolution of Marriage, *Re* (1912) 428
Laxton *v.* Laxton (1861) 512
Laycock *v.* Pickslay (1850) 33
Lea *v.* Wallace (Can.) 179
Lea Bridge District Gas Co. *v* Malvern 179
Leach *v.* Way (1835) ... 112, 170, 171
Leader *v.* Barry (1795) .. 66, 68, 71
v. Leader (1863) 388
Leak *v.* Driffield (1889) 181
Leakim *v.* Leakim (Can.) 266
Learmouth *v.* Learmouth & Austin (1889) 476

PAGE

Leavis *v.* Leavis (1921) ... 442, 443, 542
Le Blanc, *Re*, Wilkinson *v.* Schneider (1870) 257
Le Couteur *v.* Le Couteur (1896) 288
Lee *v.* Hopkins (Can.)... 213
—— *v.* Lee (1872) 490
—— *v.* —— (Can.) 76, 545
—— *v.* Scottish Union & National Insurance Co., *Re* Burges' Policy (1915) ... 151
—— *v.* Sprange (1908) 118
Lee's (Lady) Case (1674) 80
Lee Shires *v.* Lee Shires (1910) 307
Leeds *v.* Cook (1803) 31, 32, 35
v. Leeds (1886) 528
Lees *v.* Lees (N.Z.) 312
Leete *v.* Leete (1862) 400
—— *v.* —— (1879) 414
Legey *v.* O'Brien (Ir.)... 64
Legge *v.* Dumbleton (falsely called Legge) (1845)... 40
Leicester (Lord) *v.* Leicester (Lady) (1737)... 367
Leigh, *Re* (Can.) 559
—— *v.* Winter (1638) 37
Leigh's (Lord) Case (1674) 80
Lellis *v.* Lambert (Can.) 305
Le Marchant *v.* Le Marchant & Radcliff (1876) 302
Lempriere *v.* Lempriere & Roebel (1868) 359, 372, 374, 382
Leonard *v.* Leonard (Can.) 161, 417
Leslie, *Re*, Leslie *v.* French (1883) 153
—— *v.* Leslie (1908) 318, 494, 496, 513, 514
—— *v.* —— (1911) 407, 410, 411, 495, 496
Lester Jones *v.* Lester Jones & Stirrett (1920) 490
Le Sueur *v.* Le Sueur (1877) ... 479
Letchford *v.* Letchford (1905) 484
Lett *v.* Commercial Bank (Can.) 89
—— *v.* Lett (1907) 321
Letts *v.* Letts (1869) 539
Levine *v.* Claflin (Can.) ... 90
Levy *v.* Levy (1904) 323
425
—— *v.* Levy & De Romance (1908) 473
Lewin *v.* Lewin (1891) 568
Lewis (falsely called Hayward) *v.* Hayward (1866)... 270, 351
— *v.* Lewis (1860) 381
— *v.* —— (1861) 342, 441
— *v.* —— (1892) 551
— *v.* —— (1902) 501
— *v.* Lewis & Neilly (1912) 431
— *v.* Lloyd (1849) 192
v. Nangle (1752) 154, 156, 157
—— *v.* Ponsford (1838) 78
Liddell *v.* Easton's Trustees (Scot.) ... 33, 34
—— *v.* Moss (falsely called Liddell) (Aus.) 41
Liddlow *v.* Wilmot (1817) 199
Lidstone *v.* Lidstone & Edmonds (1863) ... 399
Lieb *v.* Lieb (Can.) 77
Lieberman (otherwise Szapira) *v.* Lieberman (1899) 38
Lillwall's Settlement Trusts, *Re* (1882) ... 125
Limerick (Countess) *v.* Limerick (Earl) (1863) 63
Lindo *v.* Belisario (1795) ... 36, 62, 66, 73
—— *v.* —— (1796) ... 36, 62, 66, 73
Lindus *v.* Bradwell (1848) 189
Ling *v.* Ling & Croker (1858)... 428, 438, 467
—— *v.* —— (1865)... ... 519, 530
v. Ling & Prior (1866) ... 418
Lingham *v.* Lingham (1919) ... 367
Linton, *Re*, *Ex p.* Linton (1885) 541, 542
—— *v.* Linton (1885) ... 541, 542
Linzee's Settlement, *Re* (1856) 109, 139
Lipman *v.* Lipman (1916) ... 344, 345

	PAGE
Lister *v.* Lister (1889)... ...	507
——— *v.* ——— (1922)... ...	344
Lister's Case (1721) ...	79, 239
Little, *Re*, *Re* Harrison, Harrison *v.* Harrison (1889)	125, 127
Little's Will, *Re*, *Re* Harrison (1887) ...	127
——— *Re*, Harrison *v.* Harrison (1887)	127
Litton *v.* Litton (1924) ...	289
Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854)	217
Livingstone *v.* Livingstone (N.Z.) ...	334
Lloyd *v.* Lloyd (1839)...	407
——— *v.* ——— (1866)... ...	434, 435
——— *v.* ——— (1901)	374
——— *v.* ——— (Can.)	293
v. Lloyd & Chichester (185[illegible]	333, 433
v. Pughe (1872)...	162, 163
Lockwood *v.* Salter (1833)	177
Locovich *v.* Chrimes, *Re* Chrimes (1917) ...	124
Lodder *v.* Lodder (N.Z.)	501
Loder's Trusts, *Re* (1886)	116
Lodge *v.* Lodge (1890)	315
	... 393
——— *v.* Lodge & Dick (1921) ...	433
——— *v.* Lodge & Smythe (1863) ...	440
Loftus *v.* Heriot (1895) ...	106, 107
Logan *v.* Birkett (1833) ...	224, 227
——— *v.* Logan (Scot.)	95
——— *v.* Reckenburg (Can.) ...	90, 91
Loibl *v.* Fraser (1893)	182
London & Provincial Bank *v.* Bogle (1878)	119
London Chartered Bank of Australia *v.* Lemprière (1873)	109, 146
Long *v.* Long (1920)	483
——— *v.* Long & Johnson (1890)	294, 434, 473
Looker *v.* Looker (1918)	317
Lopez *v.* Lopez (Ind.)	41
Loraine *v.* Loraine & Murphy (1912)	515, 516, 521
Lord *v.* Hall (1849)	185
——— *v.* Lord (1900)	453, 454
Lorie *v.* Lorie (N.Z.)	313
Lorriman *v.* Lorriman & Clair (1908)	515, 516, 517
Louis *v.* Louis (1866)	496, 498
——— *v.* ——— (1871)	499, 541
Love *v.* Love (1863) ... ... [illegible]79	380, 383
Loveden *v.* Loveden (1810)	296
Lovell, *Re*, Sparks *v.* Southall (1920) ...	83
——— *v.* Lovell (Can.)	285
——— *v.* Newton (1878)	90, 91
Lovering *v.* Lovering (1792)	326, 327
Low *v.* Carter (1839)	164
Lowe *v.* Fox (1885)	251
——— *v.* ——— (1887)	251
——— *v.* Harling, *Re* Dillon (Ir.) ...	105, 106
——— *v.* Lowe (1855)	293
——— *v.* ——— (1899)	390
Lowenfeld *v.* Lowenfeld (1903) ...	449, 450
Lowry *v.* Derham (Ir.)	123
——— *v.* Robins (Can.)	30
Lucas, *Re*, Walker *v.* Lupton (1896) ...	530
——— *v.* Lucas & Georgetti (1909)	462
Lucovich *v.* Chrimes, *Re* Chrimes (1917) ...	124
Lulham, *Re*, Brinton *v.* Lulham (1885) ...	146
Lumbers *v.* Montgomery, *Re* Montgomery (Can.) ... ... [illegible], 83,	161
Lumley, *Re*, *Ex p.* Hood Barrs (1894) ...	130
———, *Re*, *Ex p.* ——— (1896)10	103, 123
———, *Re*, Hood Barrs *v.* Cathcart (1894)	130
——— *v.* Desborough, *Re* Keane (1871) ...	128
——— *v.* Victor (falsely called Lumley) (1871)	437
Lungworthy *v.* Hockmore (1698) 19	199, 201
Lutwyche *v.* Lutwyche & Cox (1859) ...	445
Lyle *v.* Ellwood (1874)	69
Lynch *v.* Knight (1861)	82
——— *v.* Lynch (1885)	542
Lyne *v.* Lyne & Blackney (1867)	397, 434, 450, 476
Lynn *v.* Ashton (1830)	137

M.

M., *Re* (Can.)	247
— *v.* B. (1874)...	549, 550
— (falsely called C.) *v.* C. (1872)	350
— (otherwise D.) *v.* D. (1885)	351, 352, 370, 430
— (falsely called De B.) *v.* De B. (1875) ...	421
— *v.* M. (otherwise A.) (1897)	428
— *v.* — (1906)	460
— *v.* — (otherwise H.) (1906)	354
— *v.* M. & A. (1910)	444
— (falsely called S——) *v.* S—— (Can.) ...	262
M—— (falsely called B——) *v.* B—— (1864)	352
——— (falsely called H——) *v.* H—— (1864)	270, 271
——— *v.* M—— (1861)	403
Macan *v.* Macan (1900)	246
M'Anerney's Case (Ir.)	61
Macara *v.* Wilson (Scot.)	211
Macarthur *v.* Macarthur (1889)	275
McArthur *v.* McArthur (Can.)	407, 413, 415
——— *v.* Tyas (Can.)	213
——— *v.* Webb (Can.)	246
McArthur's Petition, *Re* (1889)	275
Macartney *v.* Macartney (1866)	439
McCammon *v.* Beaupre (Can.)	135
McCandy *v.* Tuer (Can.)	248
McConville *v.* Bayley (Aus.)	432
McCord *v.* McCord, Ogle & Coxon (1875) ...	362
M'Cormack, *Ex p.*, *Re* Tench's Trusts (Ir.) ...	85
McCorquindale *v.* McCorquindale (Can.) ...	427
McCready *v.* Higgins (Can.)	178
McCulloch *v.* McCulloch (Can.)	77
McCullum, *Ex p.*, *Re* Macdonald (1920) ...	166
Macdonald, *Re*, *Ex p.* McCullum (1920) ...	166
———, *Re*, *Ex p.* Trustee (1920) ...	166
——— *v.* Macdonald (1859)	322
McDonald *v.* McDonald (Can.)	333
Macdonald *v.* Macdonald (Scot.) ...	342, 343
McDonald *v.* Sperry (N.Z.)	249
——— (Doe d.) *v.* Twigg (Can.) ...	135
McDougall's Estate, *Re* (Can.)	231
M'Dowell *v.* M'Neilly (Ir.)	165
McElroy, *Re* (Can.)	133
McFadden *v.* McFadden (Can.)	77
Macfadzen *v.* Olivant (1805)	80
Macfarlane *v.* Macfarlane (Scot.)	339
McFarlane *v.* Murphy (Can.)	249
M'Gaan *v.* M'Gaan (Scot.)	287
M'George *v.* Egan (1839)	188
McGrath *v.* McGrath (Can.)	406
McGregor *v.* McArthur (Can.)	35
——— *v.* McGregor (1888)	221, 227, 229, 230, 240
——— *v.* ——— (Can.) ...	259, 260
McHugh *v.* McHugh (1909)	571
M'Iver *v.* M'Iver (Scot.)	295
McKay *v.* Baker (Can.)	257
——— *v.* McKay (Can.)	561, 562
M'Kechnie *v.* M'Kechnie (1859)	438
Mackenzie *v.* Cunningham (Can.)	215
——— *v.* Mackenzie (1895)	322
——— *v.* ——— (1916)	387
McKeown *v.* Van Hoorde (Can.)	35
Mackie *v.* Mackie (N.Z.)	557

PAGE

McKillop *v.* Kennedy (Can.) 81
McKinlay *v.* McKinlay & McKinlay (N.Z.) 467
McKissock *v.* McKissock (Can.) 95
Maclean *v.* Cristall (Ind.) 63
M'Lean *v.* Longlands (1799) 158, 159
McLellan *v.* Assiniboia Municipality (Can.) 251, 252
McLennan *v.* White (N.Z.) 549
McLeod *v.* Craswell (Can.) 135
v. McLeod (Can.) 541
Macleod *v.* Macleod (Ind.) 460
M'Loughlin's Estate, *Re* (Ir.) 65
MacLulich *v.* MacLulich (1920) 403
Maclurcan *v.* Maclurcan (1897)
MacLure *v.* MacLure (Scot.) 78
MacMahon *v.* MacMahon (Ir.) 224
McMain *v.* McMain (Can.) 406
McMillan *v.* Jelly (Can.) 336
Macnaghten *v.* Paterson (1907) 233
McNair *v.* McNair (Can.) ... 408, 409, 500, 501
McNaught *v.* McNaught (1909) ... 161, 163
McNeall *v.* Hawes (1923) 214, 217
Maconochie *v.* Maconochie & Blake (1916) 444, 445, 463
McPhalen, *Re* (Can.) 422
McQuiban *v.* McQuiban (1913) 280
McWilliam *v.* McWilliam (N.Z.) 565
Madan *v.* Madan & De Thoren (1867) 407, 409
——— *v.* ——— (1868) 413, 424, 488
Maday *v.* Maday (Can.) 76
Maddison *v.* Chapman (1861) ... 174
Maggs *v.* Maggs & Creedy (1896) ... 363
Magowan *v.* Magowan (Ir.) ... 497, 498
Maguire *v.* Maguire (Can.) 81, 433
Mahoney *v.* M'Carthy (1892) ... 311, 566
Maidlow *v.* Maidlow (1914) 505
Mainwaring *v.* Leslie (1826) 196
Major *v.* McKenzie (Can.) 30
——— *v.* Makettra (S. Af.) 81
Malcolm *v.* Malcolm (Can.) 496
——— *v.* O'Callaghan (1835) 111
Malcolmson *v.* Givins (1873) 305
Mallalieu *v.* Lyon (1859) 196
Malley *v.* Malley (1909) 334
Mallinson *v.* Mallinson (1866) 314, 403, 533
Malo *v.* Malo (1786) ... 408, 410, 411, 412
Man's Case (1591) 41
Manby *v.* Scot (1663) 183, 201, 202
Mander *v.* Harris, *Re* March (1884) ... 92
Manders *v.* Manders (1890) ... 535, 536
(1897) ... 569
Mangey *v.* Hungerford (prior to 1734) ... 95
Mann *v.* Mann (1922) 279
——— *v.* ——— (No. 2) (1922) 513
Manning *v.* De Wolf (Can.) 78
Ma Noo *v.* Po. Thit (Ind.) 339
Mansfield (falsely called Cuno) *v.* Cuno (1873) 350
v. Mansfield, *Re* Cuno (1889) 134
Manton *v.* Manton and Stevens (1865) 475
Manues Case (1591) 41
Manwairing *v.* Sands (1726) ... 202
Marangos *v.* Harold (Can.) ... 81
March, *Re*, Mander *v.* Harris (1884) 92
——— *v.* March (1858) ... 438
——— *v.* March & Palumbo (1867) 517, 521, 522, 524, 527, 528, 535, 536
Marchmont *v.* Marchmont (1858) 449
Margetson *v.* Margetson (1865) 414
Marigold (otherwise Evans) *v.* Marigold (1911) 505, 507
Maritime Nail Co., Ltd. *v.* Gregory (Can.) 134
Marks *v.* Marks & Walton (1905) 467
Marlin *v.* Marlin (N.Z.) 472, 473
Marriage Act, *Re*, *Re* Eaton (Can.) 50

PAGE

Married Women's Property Act, 1882, *Re*, *Re* Humphery & Humphery (1917) 260
Marriott (falsely called Burgess) *v.* Burgess (1864) 352
Marris *v.* Marris & Burke (1862) 328, 332, 480
Marsh *v.* Marsh (1858) 287
——— *v.* ——— (1878) 521, 531
Marshal *v.* Crutwell (1875) 164, 165
Marshall (falsely called Hamilton) *v.* Hamilton (1864) 271
——— *v.* Marshall (1879) 220, 227, 262, 278, 279
(1909) 379, 459
——— *v.* ——— (Can.) ... 231, 238, 239
——— *v.* ——— (Scot.) 358
Marson *v.* Coulter (Can.) 304
Mart *v.* Mart (1925) 298
Martin *v.* Fitzgibbon (1880) 111, 120
——— *v.* ——— (1881) 111, 120
——— *v.* Martin (1860) 293
——— *v.* ——— (1898) 314
v. ——— (1919) 412, 497
v. Martin & Velleman (1898) ... 395
v. Murray (Scot.) 215
Martin's Divorce, *Re* (1847) 353, 354
Marven *v.* Marven & Turner (1919) 365
Marychurch *v.* Marychurch & Buckley (N.Z.) 379
Mason *v.* Mackerras (N.Z.) ... 135
——— *v.* Mason (1883) 353, 354
——— *v.* ——— (1889) 274, 277
——— *v.* ——— (1915) ... 393
v. Mitchell (1865) ... 100
Masper *v.* Brown (1876) ... 80
Massey *v.* Massey (1863) ... 381
Masson, Templier & Co. *v.* De Fries (1909) 92, 93
Masters *v.* Barnwell (1830) 491
——— *v.* Masters (1864) ... 449, 481, 485
Mather *v.* Ney (1807) 49
Mathieu, *Re* (Can.) 459
Matison *v.* Matison (1860) 401
Matiu *v.* Reweti (N.Z.) 422
Matthews, *Re* (1859) 220
——— *v.* Matthews (1860) 350
——— *v.* ——— (1912) . 564, 565
——— *v.* Whittle (1880) 175
Maud *v.* Maud (Aus.) 312
Maudslay *v.* Maudslay (1877) . 523, 526
Maughan *v.* Wilkes (Can.) ...
Mawford *v.* Mawford (1866) 401
Maxwell *v.* Maxwell (Can.) 409
——— *v.* ——— (Ir.) 71
Maxwell's Divorce Bill (1911) 288, 353, 354
May *v.* May (Can.) 262
—— *v.* —— (N.Z.) 345, 352
—— *v.* Skey (1849) 204
Mayd *v.* Field (1876) 109, 146
Mayhew *v.* Mayhew (1812) 49, 402
Mayne, *Ex p.* (1873) ... ...
Mayo (Lady) *v.* Brown (1753) ... 71
——— *v.* ——— (1757) ... 71
Mead *v.* Mead (1861) 511
Meager, *Ex p.*, *Re* Pellew (1885) ... 123
——— *v.* Pellew (1885) ... 119, 123
Meara *v.* Meara (1865) ... 405, 451
——— *v.* ——— (1866) 312
Mecredy *v.* Taylor (Ir.) 206
Meddowcroft *v.* Gregory (1816) ... 49
v. Huguenin (1844)
Medley *v.* Horton (1844) .. 108
v. Medley (1882) ... 507, 508, 509, 513
Medway *v.* Medway (1900) ... 556, 562, 570
Meek *v.* Chamberlain (1881) ...
Megson, *In the Goods of* (1899) ... 98
Mellin *v.* Taylor (1836) ... 491, 492

PAGE

Mellish *v.* Mellish (1808) 507
Mellor *v.* Mellor (Can.) 77, 406
Mellor's Policy Trusts, *Re* (1877) ... 150
Menzies *v.* Farnon (Can.) 438
Merchants Bank *v.* Carley (Can.) ... 90
Mercier *v.* Mercier (1903) ... 147, 173, 174
——— *v.* Williams (1882) 177, 178
Meredith *v.* Footner (1843) 187
——— *v.* Williams (Can.) ... ...
Meredyth *v.* Meredyth & Leigh (1895) 519, 526
Merigan (Doe d.) *v.* Daly (1846) ... 259, 260
Merry *v.* Ryves (1757) 57
Merryweather *v.* Jones (1864) ... 219, 223
Merton *v.* Merton (1900) 527
Messenger *v.* Clarke (1850) 95
Metcalf *v.* Roberts (Can.) 81
Metcalfe *v.* Shaw (1811) 185
Metcalfe-Smith *v.* Metcalfe-Smith (1901) ... 559
Mews *v.* Mews (1852) ... 94, 159, 160, 162
Meyern *v.* Meyern & Myers (1876) ... 537, 538
Meynell (falsely called Bull) *v.* Bull (1874) 549, 550
Meyrick's Settlement, *Re*, Meyrick *v.* Meyrick (1921) 224
Michael *v.* Michael (N.Z.) 377
Michaels *v.* Michaels (Can.) 211
Michell *v.* Michell (1891) 513
Michelson *v.* Michelson (1804) 329
Middleton *v.* Crofts (1736) 44
Midgeley (falsely called Wood) *v.* Wood (1859) 47, 48, 335, 336
Midland Ry. Co. *v.* Pye (1861) 560
Midwinter *v.* Midwinter (1892) 422, 515, 516, 517
——— *v.* ——— (1893) 422, 515, 516, 517
Miell *v.* English (1866) 217, 218
Mighell *v.* Johore (Sultan) (1894) 28
Miles *v.* Chilton (falsely calling herself Miles) (1849) 376, 404, 410
-- *v.* Miles (1896) ... 386
Milford *v.* Milford (1868) ... 281, 282
Millar, *Re* (Ir.) 127, 128
——— *v.* Millar (1883) ...
Millard *v.* Harvey (1864) 190
——— *v.* Millard & Bastone (1898) ... 356
Miller *v.* Major (Aus.) 43
——— *v.* Miller (1869) 470
——— *v.* ——— (1870) 129, 395, 470
——— *v.* ——— (1907) 294
——— *v.* ——— (Can.) 416
——— *v.* Miller & Fowler (1905) 302, 428
v. Miller & Hicks (1862) 491, 492
Millet *v.* Rowse (1802) 53, 58
Milliken *v.* Milliken (N.Z.) 345
Millington *v.* Loring (1880) 35
Millis *v.* Millis & Brown (1896) 359
Mills *v.* Assistant Resident Magistrate of the Cape (S. Af.) 41
——— *v.* Isaac (N.Z.) 132
——— *v.* Mills (1858) ... 438
——— *v.* ——— (1861) 439, 440
Millward *v.* Littlewood (1850) 25
v. Millward & Andrews (1887) ... 470
Milne *v.* Milne (1865) ... 391
——— *v.* Milne & Fowler (1871) 469, 470, 473, 516
——— *v.* Smith (Scot.) 215
Milner *v.* Milner (1861) 289, 427
Milner's Settlement, *Re*, Milner *v.* Milner (1891) 127
Milnes *v.* Busk (1794) 172
Milsom, *Re* (N.Z.) 150
Milsted, *Re*, *Ex. p.* Jorey (1868) 184
Milward *v.* Littlewood (1850) 25
Minaker *v.* Hadden (Can.) 90
Minet *v.* Hyde (1789) 256

PAGE

Mir-Anwaruddin, *Ex p.*, R. *v.* Hammersmith Superintendent Registrar of Marriages (1917) 54
Miss Gray, Ltd. *v.* Cathcart (Earl) (1922) ... 192
193, 194, 195
Mitchell *v.* Mitchell (1853) 406
v. ——— (1891) ... 513
v. Torrington Union (1897) ... 76
v. Weir (Can.) 134
Mizen *v.* Pick (1838) 198
Modera *v.* Modera & Barclay (1893) ... 382
Mogg *v.* Mogg (1824) 306
Molony *v.* Molony (1824) 275
Molyneux's Estate, *Re* (Ir.) 110, 111
Monaluk *v.* Elaschuk (Can.) ... 346
Money *v.* Money (1853) ... 206, 539
Monk *v.* Farlinger (Can.) ...
Monsell *v.* Monsell & Cain (1922) ... 444, 538
Montague *v.* ——— (1825) 195
——— *v.* Baron (1825) 195
——— *v.* Benedict (1825) ...185, 194, 195
——— *v.* Espinasse (1825) 195
——— *v.* Montague (1824) ... ...
Montgomery, *Re*, Lumbers *v.* Montgomery (Can.) 76, 83, 161
——— *v.* Zarifi (1918) 520
Moody *v.* Moody (Can.) 498, 500
Moon *v.* Moon (1859) 395
——— *v.* ——— (Can.) 289
Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum & Jodon (Ind.) 285
Moor *v.* Moor (1741) 60
Moorcroft, *Re* (1835) 56
Moore, *Ex p.*, *Re* Westrupp (1845) ... 206, 209
——— *Re*, Trafford *v.* Maconochie (1888) ... 82
——— *v.* Barber (1865) 96
——— (falsely called Bull) *v.* Bull (1891) ... 519
——— *v.* Flanagan (1920) 187
——— *v.* Jackson (Can.) 252, 254
——— *v.* Moore (1737) 167, 237
——— *v.* ——— (1840) ... 294, 295, 369
——— *v.* ——— (1844) ... 108, 115, 128
——— *v.* ——— (1864) 411, 498
——— *v.* ——— (1892) 366
——— *v.* ——— (1896) 536
——— *v.* ——— (1897) 536
——— *v.* ——— (Can.) 77
——— *v.* ———, *Ex p.* Asprey (1844) ... 115
——— *v.* Moore, Chadwick & Griffiths (1887) 318, 326
——— *v.* Mulligan (1884) 254
——— *v.* Robinson (1878) 89
——— *v.* Scarborough (1737) 167, 237
Moorsom *v.* Moorsom (1792) ... 327, 329, 331, 370
Moosbrugger *v.* Moosbrugger & Martin (1913) 263, 342
Moran *v.* Moran (Can.) 338
——— *v.* Place (1896) 131
Mordaunt *v.* Moncreiffe (1874) 293, 384
——— *v.* Mordaunt (1794) ... 352
——— *v.* ——— (1870) ... 384
More *v.* Freeman (1726) 230
——— *v.* More (1741) ... 60, 62
v. Scarborough (Earl) (1737) 167, 237
Morel Brothers & Co., Ltd. *v.* Westmoreland (Earl) (1904) ... ...
Morgan *v.* Chetwynd (1865) ... 193, 194, 195
——— *v.* Clements (Aus.) 197
——— *v.* Morgan (1841) 374
v. Morgan & Kirby (1923) ... 520
— *v.* Morgan & Porter (1869) 347, 360, 471
——— *v.* Sabourin (Can.) 135
Morley, *Re*, *Ex p.* Morley, Scott *v.* Morley (1887) 178, 180, 253

PAGE

Mornington (Countess) *v.* Mornington (Earl) (1849) 235, 236
——— (Countess) *v.* ——— (Earl) (1852) 235, 236
(Countess) v. (Earl) (1853) ... 235, 236
Morphett *v.* Morphett (1869) 289, 290, 467
Morrall *v.* Morrall (1881) ... 237, 502
Morrice *v.* Webber (1598) 265
Morris *v.* Churchward (Can.) 35
——— *v.* Freeman (1878) 258
——— *v.* Howes (1846) ... 138
——— *v.* Martin (1725) ... 202
——— *v.* Miller (1767) 71, 436
——— *v.* Morris (1861) 502, 503, 508
——— *v.* ——— (1915) 465, 486
(N.Z.) 275, 319
v. Morris & Morris (1867) ... 442
Morrison *v.* Shaw (Can.) 35
——— *v.* Tawse's Executrix (Scot.) ... 93
Morrissey *v.* Morrissey (1905) ... 527, 529
Morrow *v.* Morrow (Ir.) 301
Morse *v.* Morse (1846) 545
Mort *v.* Bradley (Aus.) ... 304
Mortimer *v.* Mortimer (1820) 300, 349, 369
Morton *v.* Fenn (1783) ... 26
——— *v.* Morton (1916) 364, 366
——— *v.* ——— (N.Z.) 459, 460
——— *v.* Withens (1692) ... 191
Moses *v.* Moses (Aus.) ... 463
Moss *v.* Moss (1897) ... 36 37, 38, 39, 40, 63, 265
v. - (1916) ... 336, 345, 347
v. - (Aus.) 315
v. & Bush (1867) 408, 412
Mourilyan *v.* Mourilyan & Fazil (1922) ... 432
Mozley Stark *v.* Mozley Stark & Hitchins (1910) 459
Mudge, *Re* (1914) 86
v. Adams (1881) ... 566
Muirhead *v.* Day (1896) 132
——— *v.* Muirhead (Scot.) ... 292
Mulcahy *v.* Collins (Can.) ... 178, 179
Mulherron *v.* Mulherron (Scot.) ... 308
Mulholland *v.* Misener (Can.) 424
Mulley *v.* Mulley & Shaw (1909) ... 374
Mulligan *v.* Thompson (Can.) ... 305
Mullineux, *Ex p.* (1858) 564
——— *v.* Mullineux (1858) ... 564
Mumby *v.* Mumby (1869) 416
Munro *v.* De Chemant (1815) 212, 213
——— *v.* Munro (Can.) 77
——— *v.* Smart (Can.) ... 134, 135
Munt *v.* Glynes (1872) ... 99, 111
v. Munt (1862) ... 545
Munzer *v.* Munzer & Swain (1912) 348, 363, 483
Murdoch *v.* O'Sullivan (Can.) 249
Murdock *v.* Aherne (Aus.) 175
Murphy *v.* Murphy (1862) 448
Murray, *Re* (Ir.) ... 57
——— *v.* Brown (Can.) 399, 424
——— *v.* Glasse (1853) 160
——— *v.* McCallum (Can.) 91
— *v.* Murray (Scot.) 303
Murray Canal, *Re*, Lawson *v.* Powers (Can.) 42
Musgrave *v.* Sandeman (1883) ... 125, 126
Muspratt *v.* Muspratt (1861) ... 386, 388
Musther *v.* Musther (1894) 570
Mycock *v.* Mycock (1870) 382
Myers *v.* Myers, Carpendale, Radford & Thom (1918) 263, 428
——— *v.* Ruport (Can.) 83, 84
Mytton *v.* Mytton (1831) 412, 496
——— *v.* ——— (1886) 285, 345

N.

PAGE

N. *v.* N. (1913) ... 404
(1862) 289, 306
r (falsely called M——e) *v.* M-e (1853) ... 270
Naden, *Ex p.*, *Re* Wood (1874) 224
Nail *v.* Punter (1832) 141, 143
Nairne *v.* Nairne (1901) 478
Naish *v.* Naish (1916) 503, 511
Napier *v.* Napier (1915) 268
Narayanan Chetty *v.* Jensen (Ind.) 179
Narracott *v.* Narracott & Hesketh (1864) ... 457, 493, 537
——— *v.* Narracott & Hesketh (1865) ... 457, 493, 537, 538
Nathan *v.* Woolf (1899) 55
National Provincial Bank of England *v.* Thomas (1876) 178
Naylor *v.* Naylor (1777) 369
——— *v.* ——— (1920) 274
Neal's Case (prior to 1691) 95
Neck *v.* Taylor (1893) 182
Nedby *v.* Nedby (1852) ... 141, 168, 169
Needham *v.* Bremner (1866) ... ...
Neeld *v.* Neeld (1831) 282, 284, 286, 290, 291
Neesom *v.* Clarkson (1842) 173, 174
——— *v.* ——— (1845) ... 147, 173, 174
Negus *v.* Forster (1882) ... 197, 245, 246
Nehemia *v.* Nehemia (N.Z.) 465
Neil *v.* Neil (1832) 498
Nelligan *v.* Nelligan (Can.) 77
Nelson *v.* Nelson (1868) 475, 476
——— *v.* ——— (Can.) 223
Nepean (otherwise Lee Warner) *v.* Nepean (1925) 519, 521
Nesbitt *v.* Armstrong (Can.) 254
Neumann *v.* Neumann (1913) 274
Nevill *v.* Nevill (1893) ... 523, 524, 525
Neville *v.* Baker (1888) 258
Nevins, *Re* (Can.) 203
Newall *v.* Newall & Platt (1898) 527
Newby *v.* Newby & White (1897) ... 453, 476
Newell *v.* Newell (N.Z.) 286
Newman *v.* Belsten (1884) 150, 151
——— *v.* Cheyney (1603) 214
——— *v.* Newman (1870) 354
Newsome *v.* Newsome (1871) 346
Newton, *Ex p.*, R. *v.* Wiseman (1805) ... 79
——— *v.* Boodle (1847) 215
——— *v.* Newton (1885) 549
507, 549
v. —— —— (Can.) ... 282, 285
v. Newton & Allen (1872) ... 417
v. Reid (1830) 105
v. Richards (1839) 105
v. Rowe (1847) 215
Ney *v.* Ney (Can.) ... 77
—— *v.* —— (No. 1) (Can.) 82
Nichol *v.* Gocher (Can.) 90
Nicholls *v.* Nicholls (1862) 544
Nicholson *v.* Drury Buildings Estate Co. (1877) 100
——— *v.* Nicholson (1873) 349
(1917) 557
——— *v.* Nicholson & Ratcliffe (1862) ... 413
——— *v.* ——— (1864) ... 467, 472
——— *v.* Squire (1809) 44, 46
Nicol *v.* Nicol (1886) 99, 245
Nicolas *v.* Nicolas (1899) ... 380, 387, 394, 395
——— *v.* Nicolas & Graham (1919) ... 531
Nicolson *v.* Nicolson & Fairley (1892) ... 429
Niland *v.* Niland (1913) 321, 375

PAGE

Noakes *v.* Noakes & Hill (1877) ... 518, 548
Noble *v.* Noble & Godman (1869) 366
Noblett *v.* Noblett & Kershaw (1869) ... 415
Noel *v.* Noel (1885) 523, 524, 525, 526
Nokes *v.* Milward (falsely calling herself Nokes) (1824) 376, 429
v. Nokes (1863) ... 416
Nolan, *Re* (Can.) 133, 134
——— *v.* Fox (Can.) 83
——— *v.* Nolan (Can.) 406
Nolle *v.* Nolle (Can.) 234
Norfolk's (Duchess) Case (1692) ... 293
Norman, *Re* (1849) 424
v. Norman (1908) ... 343, 344
——— *v.* Villars (1877) 458, 553
Norris *v.* Norris & Gyles (1858) 397, 518
——— *v.* Norris & Smith (1918) 463, 464, 475, 476
——— *v.* Norris, Lawson & Mason (1861) 346, 475
v. Seed (1849) ... 79, 80
Norsworthy *v.* Norsworthy (1909) 54
Northcote *v.* Doughty (1879) 25
Northledge *v.* Northledge (1894)
Northover *v.* Northover (1910) ... 365
Norton *v.* Fazan (1798) ... 188, 202
——— *v.* Lamb (1836) 439
——— *v.* Melbourne (Lord) (1836) 439
——— *v.* Seton (falsely called Norton) (1819) 266
v. Turvill (1723) ... 183
Norwood *v.* Stevenson (1738) 176
Notmann *v.* Notmann (N.Z.) ...
Nott *v.* Nott (1866) 317
——— *v.* ——— (1901) 559
Noverre *v.* Noverre (1846) ... 300, 301, 302, 435
Noyes *v.* Pollock (1886) 156
Nunn & Co. *v.* Tyson (1901) 130, 132
Nunneley *v.* Nunneley & Marrian (1890) ... 519
Nurse *v.* Craig (1806) 197
Nussey *v.* Jeffery, *Re* Jeffery (1914) 92
Nuttall *v.* Nuttall (1862) 395, 415
Nyerford *v.* Warren (Earl) (1293) ... 390

PAGE

Onslow *v.* Onslow, Jones & Campbell (1889) 427, 428, 448
Oppenheim *v.* Oppenheim & Ricotti (1884) 518
Oram *v.* Oram (1923) 494
Oranmore & Browne, *In the Goods of* (1861) 98
Orchard *v.* Cobb (1692) 41
——— *v.* Coulsting (1843) 239
Ord *v.* Ord (1923) 237
Orford *v.* Cole (1818) 30
——— *v.* Orford (Can.) 294
Orme *v.* Holloway (falsely calling herself Orme) (1847) 47, 48
——— *v.* Orme (1824) 273
Osborn *v.* Goldham (1808) 53, 56
Osborne *v.* Clark (Can.) 81
——— *v.* Holyoake (1882) 140
——— *v.* Osborne & Martelli (1863) 428, 429, 440
O'Sheehy *v.* O'Sheehy (1876) 275, 391, 395
Ostick *v.* Ostick (1917) 485
Ottaway *v.* Hamilton (1878) 207, 208
Otway *v.* Otway (1812) 281, 282, 283
——— *v.* ——— (1813) 495, 496
v. Otway & Hoffer (1888) 359, 368, 467
Ousey *v.* Ousey & Atkinson (1874) 294, 322, 373
——— *v.* ——— (1875) ... 294, 322, 373, 550, 551
Ousley *v.* Ousley (Aus.) 65
Outram *v.* Hyde (1875) 148, 149
Outwin's Trusts, *Re* (1883) 248
Overocker *v.* Overocker (Can.) 231
Owen *v.* Moberly (1900) 29
——— *v.* Owen (1831) 300, 302
——— *v.* ——— (1919) 363
(N.Z.) 429
——— *v.* Owen & Patira (N.Z.) 355
Owens *v.* Dickenson (1840) 143
Oxenham *v.* Gayre (1678) 41
Oxley *v.* Link (1914) 180, 253
Ozard *v.* Darnford (1779) ... 196, 197, 202

O.

O'Brien *v.* Joplin (Aus.) 27
S. Af.) 195
Obst *v.* Obst (Aus.) 42, 43
O'Connor *v.* Kennedy (Can.) 44
Odevaine *v.* Odevaine (1888) 415
Offley *v.* Clay (1840) 184
Ogden *v.* McArthur (Can.) 210
O'Gorman *v.* O'Gorman, Phillips, Goldberg & Von Boris (1912) 303
O'H. *v.* O'H. (otherwise O.) (1916) 271
O'Halloran *v.* King, *Re* Bown (1883) ... 102
102, 104, 105, 110
Old *v.* Old (Can.) 407
Oldroyd *v.* Oldroyd (1896) 277
O'Leary *v.* O'Leary (Can.) 273, 275, 281, 375, 458, 459, 542, 543
Oliphant *v.* Gerard, *Re* Gerard (Lord) (1888) 142
Oliver *v.* Lowther (1880) 547
——— *v.* Oliver (1801) ... 286, 287, 372
——— *v.* ——— (1859) 320
——— *v.* ——— (1918) 377
Ollier *v.* Ollier (1914) 504, 505, 507, 529
O'Malley *v.* Blease (1869) 245
Onefreychuck *v.* Onefreychuck (Can.) ... 421
Onslow, *Re*, Plowden *v.* Gayford (1888) 88, 142

P.

P. *v.* L. (falsely called P.) (1873)
— *v.* P. (otherwise A.) (1909) ... 426
— *v.* — (otherwise G.) (1909) ... 271
— *v.* — (1912) 369
— (otherwise C.) *v.* P. (Can.) 265
— *v.* P. (Ir.) 528
— *v.* — (N.Z.) 448
— *v.* P. & T. (1910) 443
— *v.* S. (1868) 266
P.'s Settlement, *Re* (1896) 126
Pace *v.* Pace (1891) 544
Pacey *v.* Pacey (N.Z.) 473, 474
Pacific Land Co. *v.* Jamieson (Can.) ... 248
Pagani *v.* Pagani & Vining (1866) ... 488, 489
Paget *v.* Paget (1898) ... 128, 130, 153, 155, 157
——— (Lord) *v.* Read (1682) 218
Paine *v.* Paine (1902) 459
——— *v.* ——— (1903) 347
Palethorp *v.* Furnish (1783) 187
Palin *v.* Palin (Can.) 77
Palliser *v.* Gurney (1887) 180
Palmer *v.* Palmer (1859) 328
——— *v.* ——— (1860) 337, 347
——— *v.* ——— (1865) 551
——— *v.* ——— (1923) 275, 279
——— *v.* ———, *Re* Thomasson's Petition (1921) 275, 394, 459

	PAGE
Palmer *v.* Palmer & Beaufort (1902) ...	485
——— *v.* Palmer & Stockley (1914)	463, 472
v. Vickers, *Re* Scott, *Re* Scott (1907)	165
Panchudas *v.* Shudhamayi (Ind.)	559
Pape *v.* Pape (1887)	317
Paquin, Ltd. *v.* Beauclerk (1906) .	185, 192
Paquine *v.* Snary (1909)	255, 559
Parish *v.* Parish (Can.)	413
Park (Doe d.) *v.* Henderson (Can.)	135
v. Park (Can.)	199, 200, 205
Parker *v.* Brooke (1804) ...	170, 173, 174
——— *v.* Leach (1866)	61
——— *v.* Lechmere (1879)	162
——— *v.* Parker (1871)	417
——— *v.* ———, *Re* Parker's Policies (1906)	151
——— *v.* Parker & Gorst (Can.)	396
——— *v.* Parker & MacLeod (1859) ...	394, 452
Parker's Policies, *Re*, Parker *v.* Parker (1906)	151
Parkes *v.* Parkes (1923)	277, 278
——— *v.* ——— (S. Af.)	570
——— *v.* White (1805)	107
Parkin, *Re*, Hill *v.* Schwarz (1892) ...	136
v. Parkin (Can.) ...	200
Parkinson *v.* Parkinson (1869)	317, 381
Parks *v.* Maybee (Can.) ...	
Parnell *v.* Parnell (1814)	384
Parr *v.* Parr & White (1863) ...	414, 417, 544
Parry *v.* Parry (1896)	355, 359, 552
Parslow *v.* Cochrane (Can.)	190
Parson's Case (1605)	41
Parsons, *Re*, Stockley *v.* Parsons (1890)	83, 84, 86
——— *v.* Parsons (1907)	382, 551
——— *v.* ——— (N.Z.)	376
——— *v.* Parsons & Chalmers (Can.) ...	422
Parteriche *v.* Powlet (1742)	154
Partington *v.* Partington (1909) ...	570, 571
——— *v.* Partington & Atkinson (1925)	367
Paspati *v.* Paspati (1914)	425
Patch *v.* Patch (1869)	414
Paterson *v.* Bone (Scot.)	304
——— *v.* Paterson (1850)	282, 288
——— *v.* Russell (or Paterson) (1850)	281, n., 282, 467, n.
Paton *v.* Paton (N.Z.)	265, 357, 358
Patrick *v.* Patrick (1810)	293, 294
(Can.)	76
v. — (N.Z.)	382
Patrickson *v.* Patrickson (1865)	66
Pattenden *v.* Pattenden & Herzfield (1868)	480
Patterson *v.* McGregor (Can.)	305
——— *v.* Patterson & Graham (1870) .	462, 552
——— *v.* Patterson, Curtis & Dore (1863)	412, 413
Pattinson, *Re*, Graham *v.* Pattinson (1885)	165
Paul *v.* Paul & Farquhar (1870)	518, 527, 528
Paule *v.* Goding (1861)	66, 205
Pawley *v.* Pawley (1905) ...	129, 130, 132
Payne, *Re*, Randle *v.* Payne (1883)	258
——— *v.* Little (1858)	172
——— *v.* Payne (Can.)	293
——— *v.* Payne, Rodway & Eddels (1888)	386
Peace & Waller, *Re* (1883)	254
Peacock *v.* Monk (1751)	136, 137
——— *v.* Peacock (1858) ...	336, 341, 465
v. (1894)	... 388
Pead *v.* Price (1903)	206, 208
Pearce *v.* Pearce (1860)	446
——— *v.* ——— (N.Z.)	450, 451
——— *v.* Pearce & French (1861)	527
Pearmain *v.* Pearmain (1921)	396
Pearman *v.* Pearman & Burgess (1860)	356, 371
Pears *v.* Pears (1912)	349, 350
Pearson *v.* Essery (Can.)	256

	PAGE
Pearson *v.* Pearson (1862)	544
——— *v.* ——— (1864) ... 273, 274, 353, 393	
Pearsons' Trusts, *Re* (1872)	
Peck *v.* Peck (Can.)	415
Peckover *v.* Peckover & Jolly (1858) ...	395
Peel *v.* Peel (Can.)	408, 409
Pegg *v.* Pegg & Gowing (1904) ...	349, 367
Pegler *v.* Pegler & Russell (1901)	378
Peillon *v.* Brooking (1858)	124
Peirce *v.* Welden (1692)	201
Pellew, *Re*, *Ex p.* Meager (1885)	123
——— *v.* Pellew & Berkeley (1859) ...	349, 354
Pelton Brothers *v.* Harrison (1891)	121
——— *v.* ——— (2) (1892)	121, 253
Pemberton *v.* M'Gill (1860) ...	122
Penhy *v.* Penhy, Johnson & Sabingie (1882)	387, 388
Penty *v.* Penty, Johnson & Sabingie (1882)	387, 388
Pepin *v.* Lamoureux (Can.)	305
Pepper, *In the Goods of* (1874)	89
Pepperas *v.* Le Duc (Can.)	27
Peradsky *v.* Peradsky (Can.) ...	408, 488, 489
Percival *v.* Percival (N.Z.)	385
Pereira *v.* Pereira & Bounjour (Ind.) ...	345
Perks *v.* Mylrea (1884)	177, 254
Perret *v.* Perret & Allt (1876)	397
Perrin *v.* Perrin (1822)	277, 304
——— *v.* ——— (1914)	393
Perrins *v.* Bellamy (1899)	258
Perry *v.* Diggs (1638)	214
Peters *v.* Peters (S. Af.)	325
——— *v.* Peters & Willett (1861)	387
Peterson (Doe d.) *v.* Cronk (Can.)	146
v. Peterson (Can.)	415
Petition for Dissolution of Marriage, *Re*, *Ex p.* Russell (1889)	379
Petition for Judicial Separation, *Re*, *Ex p.* Beecham (1901)	379
Pettit *v.* Kerr (Can.)	248
Petty *v.* Anderson (1825) ...	188
Pherrill *v.* Pherrill (Can.)	407, 408
Philip *v.* Philip (1872) ...	420
Phillimore *v.* Machon (1876)	50
Phillip *v.* Phillip (1873)	552
Phillips, *Re*, *Re* Howard, Charter *v.* Ferguson (1919)	43
— *v.* Barnet (1876)	260
— *v.* Phillips (1847)	328, 329, 332
. ...	494
. ...	260
v. — (1905)	548
(1917)	280
v. — (Ind.)	543
— — *v.* Phillips & Medlyn (1865)	415
Phillipson *v.* Hayter (1870)	195
Philp *v.* Squire (1791)	81
Pickard *v.* Pickard (1864)	291
Pickavance *v.* Pickavance (1901)	561, 562, 570
Picken *v.* Picken & Simmonds (1864) ...	331
Pierce *v.* Pierce (undated)	409
——— *v.* ——— (1892)	401, 484
——— *v.* Welden (1692)	201
Piers *v.* Piers (1849)	64, 65, 69, 70
—— *v.* Tuite (Ir.)	65
Pike *v.* Cave (1893)	250
—— *v.* Fitzgibbon (1880) .	111, 120
(1881) .	111, 120
Pillers & Pershouse *v.* Edwards (1894)	122, 123
Pindar *v.* Robinson, *Re* Robinson (1885) ...	250
Pinder *v.* Pinder (1902)	500
Pinède's Settlement, *Re* (1879)	140
Piper *v.* Piper (1902)	317, 555, 556
Pirie *v.* Pirie (Scot.)	153

PAGE

Pitcher *v.* Dummer (1833) ... 163
Pitman *v.* Pitman (Can.) ... 336
Pitt *v.* Jackson (1786) 169, 170
—— *v.* Pitt (1823) 148
—— *v.* —— (1868) 385
—— *v.* —— (1875) 339
Pizzala *v.* Pizzala (1896) 316
Playfair *v.* Playfair & Affleck-Graves (1908) 429
Plimmer *v.* Sells (1834) 188
Plowden *v.* Gayford, *Re* Onslow (1888) 88, 142
———— *v.* Plowden (1870) 283
Plowman *v.* Plowman (Can.) 377
Plumer *v.* Plumer & Bygrave (1859) ... 381
Plummer *v.* Plummer (1917) 47, 54, 55
Plunkett *v.* Sharp (1754) 66
Pocock *v.* Lee (1707) 154
——— *v.* Pocock & Barton (1868) 522
Pointon *v.* Pointon & Sutton (1922) 347, 354, 361
Poissant & Barrette (Can.) 31
Pollack *v.* Pollack & Deane & M'Namara (1861) 439, 440
——— *v.* Pollack & Deane & Macnamara (1862) 434, 485
——— *v.* Pollack, Deane & Macnamara (1868) 551
Pollard *v.* Pollard (1842) 66
v. (1894) 521, 526
v. (1904) 331
——— *v.* Pollard & Hemming (1864) ... 425
— —— (falsely called Wybourn) *v.* Wybourn (1828) 269, 270
Pollard's Settlement, *Re* (1896) 125, 126, 127
Pomero *v.* Pomero & Hadley (1884) 342
Pomfret *v.* Pomfret (1796) 469
Ponsonby *v.* Ponsonby (1884) 517, 518, 519
Pool *v.* Pool (1813) 375
Poole *v.* Poole (1831) 64
——— *v.* Poole & Charlton (1896) 481
Pope *v.* Bushell & Co., Burgess, etc. Claimants (1888) 94
—— *v.* Pope (1902) 536
Popkin *v.* Popkin (1794) ... 283, 289, 290, 349
Porter *v.* Porter & Jaggard (1864) ... 377, 399
Portsmouth (Earl) *v.* Portsmouth (Countess) (1826) 410, 423
Portsmouth (Countess) *v.* Portsmouth (Earl) (1828) 39, 410, 423
Portugal *v.* Portugal (1866) 541
Postman *v.* Harrell (1833) 66
Potter *v.* Deboos (1815) 24, 26
——— *v.* Potter (1892) 366
Potts *v.* Potts (1858) 438
—— *v.* Potts & Bateman (1862) ... 445, 472
Pouget *v.* Tomkins (1812) 49
Pounsford *v.* Pounsford & Bulpin (1861) 397, 541
Powell, *Re*, Powell *v.* Powell (1889) ... 570
——— *v.* Powell (1874) 409
——— *v.* ——— (1889) 554, 558, 563, 569, 570
——— *v.* ——— (1914) 393
... 309
re Powell (1889) 570
v. (Can.) 192
Power *v.* Power (1865) 287, 288
Practice Note (1908) 451
———— (1920) 551
(1923) 563, 571
Prager *v.* Prager & Goodison (1913) ... 73
Pratt *v.* Jenner, *Ex p.* Jenner (1866) 519, 532, 533
Preger *v.* Preger (1920) 332, 359
Prescott *v.* Prescott (1868) 503
——— *v.* ——— (Ir.) 149, 150
Preston *v.* Lyons (Can.) 70
Pretty *v.* Pretty (1911) ... 348, 361, 366, 483
Prevost *v.* Wood (1905) 26

PAGE

Price, *Re* (1860) 79, 80
——, *Re*, Price *v.* Stafford (1885) 134
——, *Re*, Stafford *v.* Stafford (1885) .. 134
—— *v.* Parker (1848) 138
—— *v.* Price (1851) 160
.. 160
v. —— (C 77, 190
v. Price & Brown (1911) .. 346
v. Stafford, *Re* Price (1885) ... 134
Prichard *v.* Prichard (1864) 291, 495
Pride *v.* Bath (Earl) & Montague (Earl) (1695) ... 443
—— *v.* Bubb (1871) 98, 99
Priestley *v.* Lamb (1801) 44, 46
Priestly *v.* Hughes (1809) 55
Pringle *v.* Allan (Can.) 63, 64
Priske *v.* Priske & Goldby (1860) 475
Pritchard *v.* Pritchard (1920) 73
v. Pritchard & Bean (1870) 462.
Procter *v.* Watkins, *Re* Gilling (1905) 232
Proctor *v.* Proctor (1819) 369
——— *v.* Proctor & Smith & Pitman (1865) 373
——— *v.* Robinson (1866) ... ...
Prole *v.* Soady (1868) 553
Prosser *v.* Miller (N.Z.) 254
Prowd *v.* Spence (Can.) ... ...
Prowse *v.* Spurway & Bowley (1877) ... 54
Pruyn *v.* Soby (Can.) 248
Prynne, *Re* (1885) ... ...
Pryor *v.* Pryor & Shelford (1887) ... 526, 532
——— *v.* Pryor, Cowie & Macdonald (1900) 348, 356, 371, 372, 161
Public Trustee *v.* Billing, *Re* Adamson (1913) 116
——— *v.* Dixon, *Re* Grove (1919) 127, 128
——— *v.* Shepherd (N.Z.) 160
——— *v.* Steven (N.Z.) 162
——— *v.* Wolf (1923) 103
Pugh *v.* Pugh (1920) 278
Pughe *v.* Pughe & Owen (1897) 355
Pulford *v.* Pulford (1923) 307, 308, 309, 313, 556, 562
Pullen *v.* Pullen & Holding (1920) ... 348, 361
Purdy *v.* Purdy (Can.) ... 457, 458, 480
Purgold *v.* Purgold & Lambart (1903) ... 390
Purser *v.* Purser (Ir.) 223, 224
Purshotamdas Maneklal *v.* Baimani (Ind.) 276, 277
Purves' Trustees *v.* Purves (Scot.) 41
Pykett, *Re* (N.Z.) 133
Pyne *v.* Pyne (1858) 377, 379

Q.

Quartermaine *v.* Quartermaine & Glenister (1911) 477
Queade's Trusts, *Re*, (1885) 86, 87
Quebec Bank *v.* Radford (Can.) 254
Quelsh *v.* Carpenter (1615) 215
Quick *v.* Church (Can.) 82
Quicke *v.* Quicke (1861) 384, 385
Quinn *v.* Beales (Can.) 214, 215
——— *v.* Quinn (1920) 391
Quirk *v.* Thomas (1916) 28, 29, 35

R.

R. *v.* Allison (1806) . . 71
— *v.* Althausen (1893) 62, 73
— *v.* Arnold (1864) . . 566

PAGE

R. *v.* Barter (1922) 261
— *v.* Beck (1741) 51
— *v.* Benson (1856) 45
— *v.* Billingshurst (Inhabitants) (1814) ... 49
— *v.* Birmingham (Inhabitants) (1828) 57, 58
— *v.* Birwistle, etc., J.J. (1889) ... 307, 555
— *v.* Bissell (Can.) 562, 563
— *v.* Bowman (Can.) 78
— *v.* Brighton (Inhabitants) (1861) 41, 43
— *v.* Brooke & Fladgate, Gregory's Case (1766) 79
— *v.* Bullard (Can.) 78, 557
— *v.* Burton-upon-Trent (Inhabitants) (1815) 52
— *v.* Carnatic Ry. Co. (1873) 88
— *v.* Chadwick (1848) ... 40, 41, 42, 43
— *v.* Chitnita (Can.) 78
— *v.* Clark (1847) 56
— *v.* Clarke (1867) 50
— *v.* Corrigan (1898) ... ...
— *v.* Cresswell (1876) 61
— *v.* Davidson etc., Durham JJ. (1889) 307, 315
— *v.* Dibdin (1910) 42
— *v.* ———, *Ex p.* Thompson (1908) 42
— *v.* Dickout (Can.) 61
— *v.* Edgar (1789) 239
— *v.* Edmonton (Inhabitants) (1784) 55
— *v.* Egre (Can.) 293, 294
— *v.* Gravesend JJ. (1891) 569
— *v.* Greenhill (1836) 418, 419
— *v.* Hammer (1923) 62, 73
— *v.* Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin (1917) ... ...
— *v.* Hassall (1826) ... ...
— *v.* Hind (1813) 46,
— *v.* Hodnett (Inhabitants) (1786) 55
— *v.* Huggins, etc., JJ. & Humphreys (1891)
— *v.* Jackson (1891) 79, 80
— *v.* Kay (1887) 47, 48
— *v.* Knowles (1900) 555
— *v.* Lee (Lord) (1674) 80
— *v.* Leggatt (1852) 79
— *v.* Loresche (1891) .. 307, 308, 309, 313, 317, 555, 556
— *v.* Lister (1721) 79, 239
— *v.* London (Lord Mayor) (1886) 261
— *v.* McIntyre (Can.) 291
— *v.* Mainwaring (1856) 64
— *v.* Manwaring (1856) 64
— *v.* Mariott (Can.) 78
— *v.* Masters (1754) 261
— *v.* Mead (1758) 241
— *v.* Middleton (1819) 80
— *v.* Millis (1844) 43, 44, 59
— *v.* Nasillski (1897) 73
— *v.* Naw-E-Quis-A-K (Can.) 63
— *v.* Nazir Khan (Ind.) 81
— *v.* Newton (1728) 79
— *v.* Oldham JJ. (1887) 568
— *v.* Perry (1861) 60
— *v.* Peterson (Ind.) 44
— *v.* Plummer (1844) 75, 78
— *v.* Plymouth JJ. (1880) 554
— *v.* Preston (Inhabitants) (1759) ... ...
— (otherwise K.) *v.* R. (1907) 271
— *v.* R. (Ind.) 412, 413
— *v.* Rea (1872) 55
— *v.* Richardson, *Ex p.* Sherry (1909) ... 564
— *v.* Roberts (Aus.) 43
— *v.* Robinson (Can.) 78
... ... 78
v. Roblin (Can.) 55, 56
v. Rundle (1855) 75, 78
v. St. Faith's, Newton (Inhabitants) (1823) 49

PAGE

R. *v.* St. Giles in the Fields (Inhabitants) (1848) 40, 41, 42, 43
— *v.* St. John Delpike (Inhabitants) (1831) 64
— *v.* Salford Union Superintendent Registrar (1840) 53
— *v.* Secker (Can.) 57, 59
— *v.* Smith (1865) 54, 55
— *v.* ———, *Ex p.* Conch (Aus.) 196
— *v.* Stockland (1762) 66
— *v.* Tibshelf (Inhabitants) (1830) ... 47, 48, 49
— *v.* (falsely called W.) *v.* W. (1876) ... 352
— *v.* Weeks (1733) 40
— *v.* Wild, etc., JJ. (1887) 568
— *v.* Wiseman, *Ex p.* Newton (1805)
— *v.* Wroxton (Inhabitants) (1833) ... 47, 48
— *v.* Yeomans (1860) 66
Rabbeth *v.* Donaldson, *Re* Abdy (1895) 245. 2
Radford *v.* Radford (1869) 323, 401
Raibould *v.* Raibould (1788) ... 404
Rainsdon's Trusts, *Re* (1859 100, 560
Raisback *v.* Raisback (Can.) 448, 449
Ralston *v.* Ralston & Lord Advocate (Scot.) 340
Ramdsden's Trusts, *Re* (1859) ... 100, 560
Ramsay *v.* Boyle (Ind.) 389
——— *v.* Margrett (1894) 84
——— *v.* Ramsay (otherwise Beer) (1913) 501
Ramsden *v.* Brearley (1875) 560
——— *v.* Ramsden & Luck (1886) ... 346
Randle *v.* Gould (1857) 245, 246
——— *v.* Payne, *Re* Payne (1883) 258
Randolph *v.* Randolph & Casey (N.Z.) 537, 538
Rands *v.* Rands & Rands (1887) 493
Rankin *v.* Walsh (Nfld.) 186
Rankine *v.* Rankine (1922) 273
Ranmalsangji Bhagwatsangji *v.* Bai Shri Kundankuwar (Ind.) 540
Rann *v.* Lawless (Can.) 248
Ratcliff *v.* Ratcliff & Anderson (1858) 449, 473
——— *v.* ——— (1859) 332, 339, 352, 353, 501
Ratner *v.* Vicker (Can.) 146
Rattray *v.* Rattray (Scot.) 432
Rauson *v.* Sacheverel (1682) 148
Ravenscroft *v.* Ravenscroft & Smith (1872) 462, 463, 476
Rawlins *v.* Rawlins (1865) 501, 502, 506, 512
Rawlyns *v.* Vandyke (1800) 196, 205
Ray *v.* Sherwood & Ray (1836) 376, 383, 390
Rayment *v.* Rayment & Stuart (1910) ... 392
Raymond *v.* Raymond (N.Z.) 162
Rayson *v.* Sacheverel (1682) 148
Read *v.* Legard (1851) 75, 203
—— *v.* Passer (1794) 68
—— *v.* Teakle (1853) 191
Reddall *v.* Leddiard (1820) 56
Redfern *v.* Redfern (1891) ... 263, 425, 426
——— *v.* Redfern & Herbert (1890) ... 421
Reece *v.* Reece (1924) 392
Reed *v.* Moore (1832) 76, 77, 196
v. Passer (1794)
v. Reed & Davis (1859) 545
v. Royal Exchange Assurance Co. (1795) 149
Rees *v.* Rees (1821) 411
—— *v.* Rees & Robertson (1908) 530
Reeve *v.* Conyngham (Marquis) (1847) ... 198
——— *v.* Hicks (1825) 158
Reeves *v.* Reeves (1813) 331
——— *v.* ——— (1862) 284
Reeves & Co. *v.* Friel (Can.) 209
Reibey, *Ex p.* (1843) 57
Reid *v.* Aull (Can.) 262
—— *v.* Reid (1886) 85
v. —— (1925) 503, 548
v. Teakle (1853) 191

PAGE

Remmington *v.* Broadwood (1902) 194
Renaux *v.* Teakle (1853) 193
Reneaux *v.* Teakle (1853) 193
Rennie *v.* Ritchie (1845) 114
Renton *v.* Renton (Aus.) 557
Reuss *v.* Reuss & Applegarth (1862) ... 379
Reynolds *v.* Ellis, *Re* Bankes (1902) ... 110
——— *v.* Jamieson (Can.) 33
(otherwise Wilkins) *v.* Reynolds 352
Rhemes *v.* Humphreys (1632) 214
Rhinard *v.* Ginther (Can.) 400
Rice *v.* Rice (Can.) 171
—— *v.* Shepherd (1862) 208
Rich *v.* Cockell (1804) 159
—— *v.* Hull (1804) 159
—— *v.* Rich (1863) 396
Richardes *v.* Richardes & Jones (1861) ... 450
Richards *v.* Richards & Cook (1869) ... 479
Richardson *v.* Du Bois (1869) 203
——— *v.* Greenep, *Re* Garnett (1905) 554
——— *v.* Richardson & Plowman (1895) 423, 477
Riches *v.* Riches & Clinch (1918) 303
Rickaby *v.* Rickaby & Swift (1901) 422
Rickard *v.* Rickard & Bond (1921) 319
Ricketts *v.* Ricketts (1866) ... 449
——— *v.* ——— (1891) ... 516
——— *v.* Taylor (1798) ... 294
Riddell *v.* Errington (1884) 132, 133
v. Riddell, *Re* Ailesbury (Marquis) Iveagh (Lord) (1893) 127
Riddlesden *v.* Wogan (1601) 40
Rider *v.* Kidder (1805) 161
Ridgway *v.* Ridgway (1881) ... 338, 345
Ridley, *Re*, Buckton *v.* Hay (1879) ... 102
Ridout *v.* Lewis (1738) 172
——— *v.* Plymouth (Earl) (1740) ... 172
Ringham *v.* Clements (1848) 185
Ringrose *v.* Ringrose (Can.) 77
Rioux *v.* Rioux (Can.) ... 165, 166
Rippingall *v.* Rippingall & Delacour (1876) 2 277
v. Rippingall & Lockhart (1882) 550
Rissmuller *v.* Balcom (Can.) 231, 236
Ritchie *v.* Broadbent (1821) 114
——— *v.* Rennie (1845) 114
——— *v.* Ritchie's Trustees (Scot.) ... 97
Rix *v.* Rix (1777) 331
Robarts *v.* Mason (1808) 177
Robb *v.* Watson (Ir.) 149
Roberts, *Re*, Kiff *v.* Roberts (1886) ... 250
——— *v.* Brown & Beattie (N.Z.) ... 167, 169
——— *v.* Denham (1844) 35
——— *v.* Roberts (1859) 416
——— *v.* —— —— (1909) 383
——— *v.* ——— (Can.) 406
——— *v.* Roberts & Lang (1916) 486
——— *v.* Roberts & Temple (1917) ... 339
——— *v.* Watkins & Howells (1877) ... 120
Robertson *v.* Crawford (1840) 69
——— *v.* Robertson (N.Z.) ... 506, 507
v. —— (Scot.) ... 430
v. Robertson & Favagrossa (1881) 472, 552
(1883) 502, 510
Robins *v.* Robins (1907) 547
——— *v.* Wolseley (1755) 439
Robinson, *Re* (1868) 132
——, *Re* (1884) 96, 499
——, *Re*, Pindar *v.* Robinson (1885) ... 250
——, *v.* Byers (Can.) 135
——, *v.* Coyne (Can.) 188

PAGE

Robinson *v.* Grant (1811) 46
——— *v.* Nahon (1808) 212
——— *v.* Pickering (1881) 178, 179
——— *v.* Robinson (1728)
v. —— (1859) ... 407
v. —— (1861) ... 499
v. —— (1871) ... 416
v. —— (1877) 401, 406
v. —— (1897) ... 260
v. —— (1898) ... 563
——— *v.* ——— (1919)
——— *v.* Robinson & Dearden (1903) 355, 357
——— *v.* Robinson & Gamble (1860) ... 472
——— *v.* Robinson & Lane (1859) 294, 300, 301, 434, 450, 464
——— *v.* Robinson & Wilson (1898) 461, 476
——— *v.* Shistel (Can.) 27
——— *v.* Smith (1915) 31
——— *v.* Wheelwright (1856) ... 114, 124
Robinson, King & Co. *v.* Lynes (1894) ... 178
Robinson's Settled Estate, *Re* (1894) ... 133
Robison (or Robinson) *v.* Gosnold (1704) ... 191, 196
Roblin *v.* Roblin (Can.) ... ...
Robotham *v.* Robotham (1858) 391, 460, 461, 5
Robson *v.* Robson (1904) 557, 5
v. Thorp (Can.) 305
Roche *v.* Roche (1905) 481, 482
Rodman *v.* Rodman (Can.) ...
Rodney (Lord) *v.* Chambers (1802) 222
Roe *v.* Roe (1916) 311, 317
Rogers *v.* Rogers (1830) ... 327, 331, 332
——— *v.* ——— (1865) 413, 424
——— *v.* ——— (1894) ... 335, 486, 550
v. ——— (Can.) 430
Rolfe *v.* Perry (1863) 99
Rolt *v.* Rolt (1864) 478
Romanes *v.* Fraser (Can.) 135
Ronalds *v.* Ronalds (1875) .. 406, 407
Rondeau, Legrand & Co. *v* ... 166
Rooker *v.* Rooker & Newton , 70, 435
Roper, *Re*, Roper *v.* Doncaster (1888) 144, 145
——— *v.* Hull & Royal Trust Co. (Can.)
Ros *v.* Willoughby (1822) ... ...
Rose *v.* Rolls (1839) 257
—— *v.* Rose (1883) ... 338, 343, 362
—— *v.* Sharrod (1863) 107
Rosenstadt *v.* Rosenstadt . 399, 400
Rosenz *v.* Rosenz & Josten (1909) 483
Rosier's Trusts, *Re* (1877) 97, 98
Ross, *Re*, Ashton *v.* Ross (1909) 118
v. Ross (1869) 329, 330, 331, 434
— *v.* —— (1882) 530
—— *v.* —— (Ir.) 238
Ross' Trust, *Re*, *Ex p.* Collins (1851) ... 108
Rossworm *v.* Rossworm (Can.) 409
Rothschild *v.* Fisher (1920) 120
Round *v.* Round (1869) 446
Rousseau *v.* Rousseau (Can.) 76
Routh, *Ex p.*, *Re* Whitehead (1887) 160
——— (otherwise Fry) *v.* Fry (18 ... 384
Rowbotham *v.* Rowbotham (1858) 394
Rowe *v.* Rowe (1848) 174
—— *v.* ——— (1865) 375
Rowell *v.* Rowell (1900 246
——— *v.* ——— (1903) 234, 246
Rowland *v.* Oakley (1850) 257
——— *v.* Rowland & Miles (1 ... 397
Rowlands *v.* Rowlands (1902) . 557, 561
Rowley *v.* Rowley (1859) 380
——— *v.* ——— (1865) 379, 445
——— *v.* ——— (1866) ... 325, 379, 445
——— *v.* Unwin (1855) 172
Royle *v.* Royle (1909) 562, 563

PAGE

Rubens *v.* Rubens (S. Af.) 38
Rubie *v.* Rubie (Aus.) 542
Ruck *v.* Ruck (1896) 299
—— *v.* Ruck & Croft (1911) 432
Ruddock *v.* Marsh (1857) 188
Rudge *v.* Weedon (1859) ... 100, 101, 565
Ruffles *v.* Alston (1875) 246
Ruscombe *v.* Hare (1828) 158
Rush, *Re*, Warre *v.* Rush (1923) . 102, 103, 113
—— *v.* Rush, Bailey & Pimenta (1920) 385, 387, 388
Russell, *Ex p.*, *Re* Petition for Dissolution of Marriage (1889) 379
——— *v.* Russell (1892) ... 424, 463, 489
——— *v.* ——— (1894) 400, 401
——— *v.* ——— (1895) ... 273, 318, 322, 451
——— *v.* ——— (No. 2) (1895) 539
——— *v.* ——— (1897) 273, 281, 284, 291, 318, 322, 372, 451
——— *v.* ——— (1924) 297, 430
——— *v.* ——— (Can.) 147
——— *v.* Russell & Maclaren (1889) ... 379
Rust *v.* Smith (Scot.) 161
Ruston *v.* Sherras (1899) 248
Ruther *v.* Ruther (1903) ... 564, 566, 569
Rutherford *v.* Richardson (1923) 488
Rutter, *Re*, Donaldson *v.* Rutter (1907) ... 54
——— *v.* Hebden (1664) 27
——— *v.* Rutter (1920) 349
——— *v.* ——— (1921) 383, 477
——— *v.* ——— (No. 2) (1921) 477, 480
Rutton *v.* Rutton (1796) ... 295
Ryan, *Re* (Can.) 165
—— *v.* Sams (1848) 212, 213
Ryberg *v.* Ryberg & Smith (1863) ... 435
Ryder *v.* Ryder (1861) ... 418, 419, 420, 445
Rydill *v.* Rydill (1896) 504
Rye *v.* Fuliambe (1602) 553
Rylance *v.* Rylance & Jones (1858) 438
Ryland *v.* Alnutt (Can.) 118

S.

S. *v.* A. (otherwise S.) (1878) 268, 269
— (falsely called B.) *v.* B. (1881) 413
— *v.* B. (falsely called S.) (1905) 269, 351, 427
v. D. (Can.) 81
— (otherwise G.) *v.* S. (1907) 370, 404, 430, 434
— *v.* S. (otherwise M.) (1908) 268
— *v.* — (otherwise H.) (1910) 528
— *v.* — (Can.) 301, 355, 356, 391
— *v.* S. & H. (Can.) 394
— *v.* S. & R. (1912) 402, 404
S—— (falsely called E——) *v.* E—— (1863) 267, 269, 426
Sabell's Case (1559) 268
Sabine *v.* Legge (1921) ... 190, 193, 194
Sabourin *v.* Bardorf (Can.) 264, 265
Safford's Settlement, *Re*, Davies *v.* Burgess (1915) 138
St. Charles *v.* Andrea (Can.) 256
Ste. Croix *v.* Ste. Croix (Ind.) ... 334, 338, 466, 467
St. George's, Albemarle Street, Petition, *Re* (1890) 60, 61
St. Giles in the Fields *v.* St. Mary, Lambeth (1848) 40, 41, 42, 43
St. John (Lord) *v.* St. John (Lady) (1803) ... 222
St. Michael's College *v.* Merrick (Can.) ... 256
St. Paul *v.* St. Paul & Farquhar (1869) ... 356
——— *v.* ——— (1870) 527, 528

PAGE

Salaman *v.* Salaman (N.Z.) 235, 237, 451, 452, 535, 553
Samail *v.* Samail (Can.) ... 482, 483
Sampson *v.* McArthur (Can.)
——— *v.* Sampson (1832) 380
Sanders *v.* Rodway (1852) 220, 241, 243
——— *v.* Sanders (1885) 491
v. ——— (1911) 443
Sanderson *v.* Sanderson (Scot.) 461
——— *v.* Sanderson & Gibson (1866) ... 434
——— *v.* Sanderson, Stephens & Hiscox (1871) ... ...
Sandilands, *Ex p.* (1852) 79
Sanford Manufacturing Co. *v.* Mc Ewan (Can.) 256
Sanger *v.* Sanger (1871) 119
Sanguinetti *v.* Messiter (1885) 183
Sarel, *Re* (1864) 106, 117
Sarkies *v.* Sarkies (1884) ... 284, 287, 288
Sastry Velaider Aronegary *v.* Sembecutty Vaigalie (1881) 64, 65, 70, 72
Sastry Velaider Aronegary & Sembacutty Sinnepullei *v.* Kassanader Sambonade
Saunders *v.* Saunders (1846) 291, 292
——— *v.* ——— (1847) ... 287, 405, 406
——— *v.* ——— (1858) 498
——— *v.* ——— (1897) 385, 386
——— *v.* Saunders & Beck (1893) ... 247, 529
Saunderson *v.* Griffiths (1826) 190
Savary *v.* Savary (1898) 529, 537
Savile's Case (1740) 369
Sawyer *v.* Bletsoe (1694) 95
Sawyer-Massey Co. *v.* Hodgson (Can.) ... 209
Sawyer's Trusts, *Re* (Ir.) 132
Sayer *v.* Sayer & Cowman (N.Z.) 340
Scales *v.* Baker (1859) 173
Scaramanga *v.* A.-G. (1889) 74
——— *v.* —— (1890) 74
Scarborough *v.* Borman (1840) 110
Schaffer *v.* Dumble (Can.) 160, 161
Scharrer *v.* Scharrer (1909) 378, 446
Schenck *v.* Schenck (1908) 414, 445
Schira *v.* Schira & Sampajo (1868) 405
Schnaar *v.* Jansen (S. Af.) 30
Schofield, *Re* (1890) 261
——— *v.* Schofield (1915) 361, 362
v. Schofield & Cowper (1891) ... 517
Scholefield *v.* Lockwood (1863) 155, 156
Scholey *v.* Goodman (1823) 220, 237, 244
Schoolcraft *v.* Schoolcraft & Ruhmoor (1891) 425
Schraml *v.* Schraml (1899) 500, 511
Schultze *v.* Schultze (1887) 152
Schumann, etc. *v.* Scottish Widows Fund (Scot.) 149
Scott, *Re*, *Re* Scott, Palmer *v.* Vickers (1907) 165
—— (falsely called Jones) *v.* Jones (1842) 270
—— *v.* Morley, *Re* Morley, *Ex p.* Morley (1887) 178, 180, 253
v. Scott (1860) 291
v. —— (1862) 470
v. —— (1863) 492, 493
... 273, 274, 275
(1913) 333, 334
v. (1921) 510
v. (N.Z.) 390
v. Sebright (1886) 38, 39
v. Wye (Can.) 178
Scully *v.* Scully (1920) 448, 449
Sea, *Re* (Can.) ... ...
Seagrave *v.* Seagrave (1807) 167
Sealey *v.* Gaston (1865) ... ...
Searle *v.* Price (falsely called Searle) (1816) 435 436

PAGE

Seatel *v.* Seatel (1860) 136, 518
Seaton *v.* Benedict (1828) 183, 184, 191, 194
v. Espinasse (1828) ... 183, 184
Sebright (otherwise Scott) *v.* Sebright (1886) 38
Secrest *v.* Secrest (Can.) 406
Seddon *v.* Seddon & Doyle (1860) 402
——— *v.* ——— (1862) 459, 467, 474, 535
Sedgwick *v.* Thomas (1883) ... ...
Seeling *v.* Crawley (1700) 241
Segrave's Trust, *Re* (Ir.) 125, 126
Seller *v.* Seller (1859) 368
Senior *v.* Senior (1866) 417
Sephton *v.* Sephton (1888) 568
Sergent *v.* Sergent & Weaver (1891) 371, 372
Seroka *v.* Kattenburg (1886) 214
Serrell *v.* Serrell & Bamford (1862) 266, 426, 451
Severance *v.* Civil Service Supply Assocn., Ltd. (1883) 248, 249
Severn *v.* Severn (Can.) 496, 498, 506, 556
Sewell *v.* Sewell (1840) 383
——— *v.* ——— (Can.) 77
Seymor's Case (1613) 261
Seymour *v.* Gartside (1822) 28, 29
——— *v.* Kingscote (1922) 191
——— *v.* Seymour (1859) 460, 462
Seyton, *Re*, Seyton *v.* Satterthwaite (1887) 150
Shafto *v.* Butler (1871) 112
Shaik Fakrudin's Petition, *Re* (Ind.) ... 554
Shakespear, *Re*, Deakin *v.* Lakin (1885) ... 180
Sharp, *Re* (1864) 566
Sharpe (otherwise Morgan) *v.* Sharpe (1909) 505, 506, 507, 510, 528
Shattock *v.* Shattock (1866) 144
Shaw, *Re*, Shaw *v.* Jones (1906) 211
v. Shaw (1862) 425, 439, 440
— *v.* — — (1904) 365
— *v.* — — (Can.) 432
— *v.* — (Ir.) 104, 105
Sheehan *v.* Mercantile Trust Co. of Canada, Ltd. (Can.) 26
Sheehy, *Re* (1876) 275, 394, 395
Sheffield *v.* Sheffield & Paice (1881) 550
Sheldon *v.* Sheldon (1865) 480
Shelton, *Re*, Chancellor *v.* Brown (1891) ... 87
——— *v.* Shelton & Campbell (1869) ... 549
Shephard, *Re*, George *v.* Thyer (1904) 64, 65, 66, 67, 71, 72
Shepherd, *Re*, *Ex p.* Shepherd (1879) ... 186
——— *v.* Mackoul (1813) 209
Sheppard *v.* Sheppard (1905) 423
——— *v.* ——— (Can.) 248, 262
Sheran, *Re* (Can.) 43
Sherratt *v.* Merchants Bank of Canada (Can.) 158, 159
Sherry, *Ex p.*, *R. v.* Richardson (1909) ... 564
Sherwood *v.* Ray (1837) 376, 383
Shewell *v.* Shewell & Fox (1869) 460
Shickle's Trust, *Re* (1859) 559, 560
Shilson *v.* A.-G. (1874) 73
Shine *v.* Shine (1893) 543
Shipman *v.* Shipman (1924) 259
Shirley *v.* Shirley (N.Z.) 421, 422
——— *v.* Wardrop (falsely called Shirley) (1858)
Shoolbred *v.* Baker (1867) 193, 195
Short *v.* Short & Bolwell (1874) 353
—— *v.* Stone (1846) 28
Shorthouse *v.* Shorthouse (1898) ... 505, 509
Shorting *v.* Shorting (Can.) 547
Shrewsbury Peerage Case (1858) 67
Shufflebotham *v.* Shufflebotham (1923) ... 488
Sibbald *v.* Sibbald (N.Z.) 276

PAGE

Sichel *v.* Lambert (1864) ... 61, 62, 64, 68, 70
Sickert *v.* Sickert (1899) 308, 309, 310, 315, 316
Sidney *v.* Sidney (1734) 167
——— *v.* —— – (1865) 500, 503, 506, 507. 547, 549
——— *v.* ——— (1866) 488, 500, 503, 506, 507, 512, 547, 549
——— *v.* ——— (1867) 488, 500, 503, 506, 507, 512, 547, 549
Silver *v.* Silver (1870) 399, 402
——— *v.* ——— (Can.) 171
v. Silver & Grenfell (1924) ... 442, 443
Sim *v.* Miles (Scot.) 294, 295
Simmons *v.* Simmons (1847) 283, 303, 304, 340, 375
——— *v.* —— ——— (1848) 283, 303, 304, 340, 375
Simon, *Re* (1909) 91
Simpson *v.* Hartman (Can.) 135
Sims *v.* Kelly (Can.) 558
Sinclair *v.* Fell (1913) 458
——— *v.* Wakefield (Can.) 249
Sirrell *v.* Sirrell (1911) 571
Skeats *v.* Skeats & White (1865) ... 459
Skinner *v.* Skinner (1888) ... 461, 462
v. Todd (1881) ... 117
Slanning *v.* Style (1734) ... 95, 162
Slater *v.* Parker (1908) 194
—— *v.* Slater (Aus.) 68
—— *v.* Slater & Bolderson (1900) ... 446
Slatter *v.* Slatter (1834) 235
Slaytor *v.* Slaytor & Jackson (1897) ... 386, 387
Small *v.* Hedgely, *Re* Hedgely (1886) ... 119
—— *v.* Small & Furber (1923) 48
—— *v.* Thompson (Can.) 179
Smallpeice, *Re*, *Ex p.* Smallpeice (1857) ... 157
Smallpiece *v.* Dawes (1835) 188, 189
Smallwood *v.* Smallwood (1861) ... 284, 350
Smeath *v.* Nesbitt (N.Z.) 81
Smeaton *v.* Smeaton (Scot.) 345
Smiley *v.* Smiley (Can.) 555
Smit *v.* Jacobs (S. Af.) 35
Smith, *Re*, Bull *v.* Smith (1901) 162
———, *Re*, Chapman *v.* Wood (1884) ... 108
———, *Re*, Smith *v.* New (1907) 257
—— *v.* Allison (1765) 329
—— *v.* Atkin, *Re* Atkin's Trusts (1909) ... 250
—— *v.* Berg (1877) 252
—— (Doe d.) *v.* Bird (1833) ... 137, 138
—— *v.* Camelford (Lord) (1795) ... 169, 170
—— *v.* Huson (falsely called Smith) (1811) 56
—— *v.* Jamieson (Can.) 24, 25
—— *v.* Jenkins (1873) 33
—— *v.* Kaye (1904) 81, 82
—— *v.* Lucas (1881) 117
—— *v.* Marohn (Can.) 210
—— *v.* Metherell, *Re* Crosby's Trusts (1919) 42
—— *v.* New, *Re* Smith (1907) 257
—— *v.* Smith (1813) 410
—— *v.* ——— (1814) ... 410, 495, 496
v. (1854) 221
v. (1859) 311, 381
v. (1860) 411
v. (1863) 383
v. (1882) 489
(1888) 313
v. (1889) 543
v. (1890) . 274, 275
v. —— (1897) 490
v. —— (1898) 505, 506, 507
v. —— (1900) 451
v. —— (1901) 372
v. —— (1905) 320
v. —— (1915) 317
v. —— (1923) 398, 399, 422
v. —— (Can.) 408

	PAGE
Smith *v.* Smith (N.Z.)	497
——— *v.* ———, *Re* Benton (1882)	104
v. Smith & Armstrong (1919)	390, 396
——— *v.* Smith & Cashion (Aus.)	378
——— *v.* Smith & Charlesworth (1900) ...	451
——— *v.* Smith & Graves (1887)	527, 529, 531
——— *v.* Smith & Liddard (1859)	399
——— *v.* Smith & Millet (1864)	446, 447, 472
——— *v.* Smith & Palk (1882)	421
——— *v.* Smith & Reed (1922)	454, 464, 475
——— *v.* Smith & Rutherford (1920) ...	423
——— *v.* Smith & Tremsaux (1863) ...	407
——— *v.* Smith, Major, Child & Rabett (1882)	471
——— *v.* Smith's Trustees (Scot.)	162
——— *v.* Whitlock (1886)	121
——— *v.* Woodfine (1857)	35
Smith's Case (Ir.)	61
Smith's Estate, *Re*, Clements *v.* Wood (1887)	134
Re, Clifford *v.* Washington (1879)	218
Smithe *v.* Smithe & Roupell (1868) ...	530
Smout *v.* Ilbery (1842)	189
Smyth *v.* Smyth (1824)	406
——— *v.* ——— (1831) ...	325, 377
Smythe *v.* Smythe (1887)	448
——— *v.* ——— (Aus.) ...	
Snape *v.* Snape (1897) ...	563, 570, 571
(1900)	557
Snellgrove *v.* Snellgrove (N.Z.)	
Snelling *v.* Snelling (1890)	531
Sneyd *v.* Sneyd & Burgess (1925)	342, 431
Snider *v.* Snider (Can.)	409
Snook *v.* Snook & Woolacott (1892) ...	366
Snow *v.* Snow (1842) ...	339, 340, 341, 342, 343, 345, 346
Snowball *v.* Snowball (1871)	450
Snowdon *v.* Snowdon (1871)	415, 416
Snowling *v.* Nursey (1702)	41
Soar *v.* Foster (1858)	163, 175
Socket *v.* Wray (1794) .	139, 140
Softlaw *v.* Welch (1899)	119, 121, 254
Soilleux *v.* Soilleux (1802)	470
Soler *v.* Soler (N.Z.)	467, 535
Somers *v.* Kingsbury (Can.)	399
Somerset (Duke), *Re*, Thynne *v.* St. Maur (1887)	248, 249
Somerville *v.* Somerville (N.Z.)	311
——— *v.* Somerville & Webb (1867)	464, 478
Sopwith *v.* Sopwith (1859)	294, 295
——— *v.* ——— (1860)	471
(1861) ...	325
Sottomayer *v.* De Barros (1879) ...	36, 479
Soules *v.* Soules (Can.)	406
Soutar's Policy Trusts, *Re* (1884)	152
Southern *v.* Southern (1890)	446, 551
Sowdon *v.* Sowdon (1866)	512, 552
Spahr *v.* Bean (Can.)	248
Spark's Trusts, *Re*, Spark *v.* Massey (1904)	246
Sparkes *v.* Bell (1828)	177
Sparks *v.* Southall, *Re* Lovell (1920) ...	83
Sparrow (falsely called Harrison) *v.* Harrison (1841)	270, 426, 427
Spedding *v.* Spedding & Lander (1862) ...	537
——— *v.* Spedding & Smith (1862)	378, 382
Spencer, *Re*, Thomas *v.* Spencer (1885)	112, 113
Spendley *v.* Spendley & Goard (1920)	396, 436
Spering *v.* Spering (1863)	278
Spicer *v.* Dawson (1857)	94
——— *v.* Spicer (1857)	94
Spiers *v.* Hunt (1908)	26
Spiller, *Re* (1860)	149
Spilsbury *v.* Spilsbury (1863)	377, 379, 382
. ...	366
Spooner *v.* Godfrey (1908) ...	29, 30
Sporle *v.* Barnaby (1864) ...	... 214
Sprange *v.* Lee (1908) ...	118, 122
Spratt *v.* Spratt (1858) ...	... 418
Spreadbury *v.* Chapman (1838)	... 184
Spring *v.* Pride (1864) ...	... 105
Springfield, *Re*, Davies *v.* Springfield (1922)	42
Squire *v.* Dean (1793)	... 169
——— *v.* Squire & O'Callaghan (1905)	371, 372, 507
Squires *v.* Squires (1864)	290, 292
Stace *v.* Stace (1868)	... 372
Stacey *v.* Stacey (1860)	264, 535
Stack *v.* Stack (N.Z.)	... 429
Stafford *v.* Mongy (1595)	... 266
——— *v.* Stafford, *Re* Price (1885)	... 134
Stagg (falsely called Edgecombe) *v.* Edgecombe (1863)	267
Stallwood *v.* Tredger (1815)	45
Stamford, Spalding & Boston Banking Co. *v.* Ball (1862)	156
Standall *v.* Standall (Can.)	407, 408
Standard Bank *v.* McGuaig (Can.)	251
Standard Life Assurance Co. & Keefer, *Re* (Can.)	149
Standen *v.* Standen (1791)	45, 72
Stanes *v.* Stanes (1877)	325, 447
Stanhope *v.* Baldwin (1822)	49, 55
——— *v.* Stanhope (1886) ...	444, 551
Stanley *v.* Stanley (1878)	113, 116
——— *v.* ——— (1898)	508
Stanton *v.* Lambert, *Re* Lambert's Estate (1888)	84
Stanway *v.* Styles (1734)	95
Staples *v.* Marquard (S. Af.)	26
Starbuck *v.* Starbuck & Oliver (1889) ...	358
Stark *v.* Stark & Hitchins (1910)	459, 461, 533, 536
Starkey *v.* Starkey & Irwinn (1861)	467, 472, 474
Stayner *v.* Applegate (Can.)	135
Stayte *v.* Farquharson (1826)	49
Steadman *v.* Poole (1847) ...	105
Stedall *v.* Houghton (1901) ...	184
——— *v.* Stedall (1902) ...	516
Stedman *v.* Poole (1847) ...	105
Steed *v.* Steed (1867)	
Steedman *v.* Poole (1847) ...	105, 112, 116
Steels *v.* Hullman (Can.)	178
Stein *v.* Stein (Scot.)	265
Stephens *v.* Olive (1786) ...	
Stephenson, *In the Goods of* (1866)	101
——— *v.* Hardy (1773)	184
——— *v.* Stephenson (1925)	558, 559
——— *v.* Stephenson & Jackson (1897)	429
——— *v.* Strutt (1872)	458, 459
Sterbini *v.* Sterbini (1870)	447
Steuart *v.* Robertson (Scot.)	43, 44
——— *v.* Steuart (Scot.)	460
Stevens, *Re* (1886)	149
——— *v.* Stevens & Field (1889) ...	355, 358
——— *v.* Thompson, *Re* Thompson (1888)	250
——— *v.* Trevor-Garrick (1893)	87
Stevenson *v.* Hardie (1773) ...	184, 189
——— *v.* Stevenson (1911)	320
——— *v.* ——— (Can.)	421
——— *v.* ——— (Ind.)	417
Steward *v.* Blakeway (1868)	94
19	94
Stewart *v.* Byrnes (Aus.) ...	28, 34
——— *v.* Fletcher (1888)	114, 115, 117 118
——— *v.* Stewart (Scot.) ...	96, 97
——— *v.* ———	346
Stickland *v.* Stickland (1876) ...	310, 319
Stier (otherwise Clarke) *v.* Stier (1896) ...	38

PAGE

Stillwell, *Re*, Brodrick *v.* Stillwell (1916) ... 541
Stimpson *v.* Wood & Son (1888) 76
Stoate *v.* Stoate (1859) 403, 495
——— *v.* ——— (1861) 292, 323, 480, 497, 540
Stocken *v.* Pattrick (1873) 206
Stocker *v.* Stocker, Brice & Patterson (1917) 306, 342, 478
Stockley *v.* Parsons, *Re* Parsons (1890) 83, 84, 86
Stogdon *v.* Lee (1891) 102, 181, 229, 232
Stoker *v.* Stoker, Skidmore & Murray (1889) 360, 361
Stokes *v.* Stokes (1911) 561, 564
——— *v.* Stokes & Claybrook (1897) ... 467
Stone, *Re*, Stone *v.* Stone (1885) 90
——— *v.* Carr (1799) 195
——— *v.* M'Nair (1817) 184
——— *v.* Stone (1843) 405, 411, 412
——— *v.* ——— (1844) 327, 328, 332
——— *v.* ——— (1845) 327, 328, 332, 414
——— *v.* Stone, *Re* Stone (1885) 90
——— *v.* Stone & Appleton (1862) 440
——— *v.* ——— (1863) 458
——— *v.* ——— (1864) 398, 433, 458, 492
——— *v.* Stone & Brownrigg (1862) ... 551
(1864) 516, 521, 532
——— *v.* Stone & Osborne (1917) 374
Stoner *v.* Walton (Can.) 65
Stonor's Trusts, *Re* (1883) 86
Stoole *v.* McLeish (Scot.) 33, 34
Storer *v.* Storer (1894) ... 529, 532, 533
Story *v.* Story & O'Connor (1887) 362, 363, 462
Stovel Co. *v.* De Tremaudan (Can.) .. 179, 183
Strachan *v.* Murray (N.Z.) 171, 172
Strain *v.* Strain (Scot.) 289, 494
Strong *v.* Hudson (1850) 189
Stroud *v.* Edwards (1897) 112
Strutt *v.* Strutt & Hitching (1915) 364
Stuart *v.* Stuart (1862) 446
Studdy *v.* Studdy (1858) 330
330, 434, 437
Studholme *v.* Studholme & Cullum (1876) 449, 485
Studley *v.* Studley (1913) ... 131, 132, 389, 477
Stumpel *v.* Stumpel & Zepfel (1900) 394, 395
Styles *v.* Styles & Jackson (1890) 367
Suart *v.* Suart (otherwise Hodgson) (1910) 530
Sudlow *v.* Sudlow (1858) 394
Sugg *v.* Sugg & Moore (1861) 331
Suggate *v.* Suggate (1859) 290, 340, 343, 376, 400, 439, 534, 538, 539, 540
Sullivan *v.* Oldacre (falsely called Sullivan) (1819) 37, 38, 39
——— *v.* School District Number Eleven, Parish of Kent Trustees (Can.) 210
——— *v.* School Trustees (Can.) 159
——— *v.* Sullivan (falsely called Oldacre) (1818) 37, 38, 39, 49
——— *v.* Sullivan (1824) 374
——— *v.* ——— (Ir.) 208
——— *v.* Sullivan, Leahay, Madden & Slaney (1875) 542
Summers *v.* Ball (1841) 233, 234
Surman *v.* Wharton (1891) 180
Sutherland (falsely called Cromie) *v.* Cromie 437
——— *v.* Sutherland (N.Z.) 77
Sutton, *Re*, Boscawen *v.* Wyndham (1921) 139
——— *v.* Sutton & Peacock (1863) . 444
Swan *v.* Canadian Northern Ry. Co. (Can.) 248, 249
v. Swan (1903) 299
Swan & Edgar, Ltd. *v.* Mathieson (1910) ... 202
Swanson *v.* Thomas (Can.) 146, 147

PAGE

Swatman *v.* Swatman (1865) 288
Sweet *v.* Sweet (1895) ... 230, 231, 236
Sweeting *v.* Sweeting & Rowlands (1919) 454, 476
Sweetland *v.* Neville (Can.) 162
Swift *v.* Swift (otherwise Kelly) (1832) ... 426
——— *v.* ——— (1865) 219, 234
——— *v.* ——— (1890) 515
——— *v.* ——— (1891) 515, 516, 517
——— *v.* Wenman (1870) 97
Swinarton *v.* Swinarton (Can.) 407
Swoffer *v.* Swoffer (1896) 569
Sykes *v.* Sykes (1859) 499
——— *v.* ——— (1897) 410, 411, 417, 489
——— *v.* Sykes & Smith (1868) ... 382, 435
——— *v.* ——— (1870) 518, 528
Sykes' Trusts, *Re* (1862) 115
Symington *v.* Symington (1875) 460
Symonds *v.* Hallett (1883) 259
——— *v.* Symonds & Harrison (1870) ... 382
——— *v.* ——— (1872) ... 517
——— *v.* Wilkes (1865) 106, 120
Symons *v.* Symons (1897) ... 364, 365, 487
——— *v.* Symons & Pike (1861) 544
——— *v.* ——— (1862) 445
Synge *v.* Synge (1901) 322, 375
Szapira (otherwise Lieberman) *v.* Szapira (1898) 38

T.

T. (falsely called D.) *v.* D. (1866) 271, 352
— *v.* M. (falsely called T.) (1865) ... 426
— (otherwise W.) *v.* T. (1895) ... 405
— *v.* T. (otherwise T.) (1908) ... 482
— *v.* — (Can.) 77
T——— *v.* B——— (Can.) 266
Taber, *Re*, Arnold *v.* Kayess (1882) ... 103
Tacey *v.* Macarlton (1839) ... 71, 176
Tait *v.* Lindsay (Can.) 199
——— *v.* Tait (N.Z.) 445
Talbot *v.* Cody (Ir.) 163
——— *v.* Von Boris (1911) 169
Tamplin *v.* Miller (1882) 126
Tangye *v.* Tangye (1914) ... 513, 514, 540
Tannam *v.* Tannam, Beeson & Ballard (1897) 371
Taplen *v.* Taplen & Cowen (1891) 485
Taplin *v.* Taplin & Holland (1888) 491
Tarry *v.* Browne (1661) 38
Tartt, *Ex p.* (1886) 379
Tasker *v.* Tasker (1895) 92
Tate *v.* Austin (1714) 151, 157
Tatham, *Re*, Bensaude *v.* Hastings (1892) 540
——— *v.* Tatham & Nutt (1864) 302, 434
Tatum *v.* Tatum (1886) ... 478
Taunton *v.* Wyborn (1809) 60
Taverner (falsely called Ditchfield) Ditchfield (1864) 370
Tavernor (falsely called Ditchfield) *v.* Ditchfield (1866) ... 352
Tayler *v.* Fisher (1591) ... 183
——— *v.* Tayler (1912) ... 558
Taylor, *Re* (1840) 420
——— *v.* Allen (N.Z.) ... 93
——— *v.* Bleach (Ind.) ... 508
——— *v.* Brittan (1823) ... 185
——— *v.* Green (1837) ... 217
——— *v.* Hailstone (1882) ... 208
——— *v.* Neil (Can.) ... 424, 425
——— *v.* Taylor (1755) ... 293
——— *v.* ——— (1756) 65, 66

PAGE

Taylor *v.* Taylor (1796) ... 496
— *v.* —— (1842) ... 413
— *v.* —— (1843) ... 413
... 303
449, 470
... 312
(1892) ... 531
(1907) ... 321
(otherwise Woodhead) *v.* Taylor (1923) 431
v. Taylor (1925) ... 377, 378, 390
v. (Can.) 406
—— *v.* Taylor & Darg (1899) 490
—— *v.* Taylor & King (1923) 431
—— *v.* Taylor & Kraft (1920) 476
—— *v.* Taylor & Wolters (1870) 537
Teagle *v.* Teagle & Nottingham (1858) ... 475
Teasdall *v.* Brady (Can.) 177, 178
Tempany *v.* Hakewill (1859) ... 200, 201
Temple *v.* Temple & Laing (1861) 395
Templeton *v.* Stewart (Can.) 249
v. Tyree (1872) 39, 47, 48, 49
Tench's Trusts, *Re*, *Ex p.* M'Cormack (Ir.) ... 85
Tenducci's Case (1775) 393
Tennant's Estate, *Re* (Ir.) 128
Tereleski *v.* Tereleski (Can.) 76
Terry *v.* Terry (1915) 556
Tetley *v.* Griffith (1887) 180, 181
Tew *v.* Tew (N.Z.) 273
Thaker *v.* Jennison (Can.) 39
Tharp, *In the Goods of*, Tharp *v.* Macdonald (1878) 96
Theakstone *v.* Theakstone (Can.) ... 415, 416
Theobald *v.* Theobald (1889) 514
Thomas *v.* Everard (1861) 231
—— *v.* Perham & Perham (N.Z.) ... 216
—— *v.* Price (1877) 115, 116
—— *v.* Shirley (1862) 29
—— *v.* Spencer, *Re* Spencer (1885) 112, 113
—— *v.* Thomas (1855) 156, 157
—— *v.* —— (1860) . 330, 544
315, 316, 556
(N.Z.) 282, 283
v. Thomas & Hegnaur (1918) ... 425
—— *v.* Thomas & Vigne (1865) ... 518, 527
Thomasset *v.* Thomasset (1894) 418, 533, 537
Thomasson *v.* Thomasson (1921) 459
Thomasson's Petition, *Re*, Palmer *v.* Palmer (1921) 275, 394, 459
Thompson, *Ex p.*, R. *v.* Dibdin (1908) ... 42
——, *Re*, Langham *v.* Thompson (1904) 66, 67, 69
——, *Re*, Stevens *v.* Thompson (1888) 250
v. Dibdin (1912) 42
v. Doyle (Can.) 162
v. Hervey (1768) 200
v. Rourke (1892) 449
v. —— (1893) 272
v. Thompson (1858) 309, 310, 311
v. —— (1886) 466
v. —— (1901) 290
v. —— (1908)
v. —— (1916) 344
v. —— (Can.) 415
v. —— (Ind.) ... 284, 345
v. Thompson & Barras (1862) ... 523
v. Thompson & Johnson (1868) 408, 411
v. Thompson & Sturmfells (1861) 420, 489
& Curzon, *Re* (1885) 85
Thompson's Case (prior to 1801) 53
Thomson *v.* Dickson (Can.) 249
—— *v.* Thomson (Ind.) 422, 423

PAGE

Thomson *v.* Thomson (Scot.) ... 331, 384, 463
—— *v.* Thomson & Rodschinka (1896) 124, 127, 444, 518, 519, 523, 530
Thorman *v.* Thorman & Greenbank (1890) 453
Thorne-George *v.* Godfrey, *Re* Godfrey (1894) 130, 132
Thorne-George *v.* Godfrey, *Re* Godfrey (1895) 129, 130, 132
Thornley *v.* Thornley (1893) 96
Thorp *v.* Eyers (1844) 176
Thorpe *v.* Angles (1844) 176
Threlfall *v.* Wilson, *In the Goods of* Wilson (1883) 249, 250
Thrupp *v.* Harman (1834) 172
Thurston *v.* Thurston (1910) 319
Thynne *v.* St. Maur, *Re* Somerset (Duke) (1887) 248, 249
Tickner *v.* Tickner (1924) ..
Tiernay, *Re* (Can.) 65
Tiffany *v.* McCumber (Can.) 135
Till *v.* Till (Can.) 147
Timmings *v.* Timmings (1792) 329, 331, 339
Timmins *v.* Timmins (1919) .. . 567, 568
Timms *v.* Timms (Can.) .. . 284, 285
Timothy *v.* Crown (1900) 257
Tinkley *v.* Tinkley (1909) 260
Tippet *v.* Tippet & Meredith (1866) ... 300
Tippett's & Newbould's Contract, *Re* (1888) 112
Tipping *v.* Jepson (1906) 30
Tirrell's (Lady) Case (1674) 95
Todd *v.* Stokes (1699) 196
—— *v.* Todd (1866) 336, 465
... 497
—— *v.* Todd & Cunniam (1907) ... 365
Tollemache *v.* Tollemache (1858) ... 386
—— *v.* —— (1859) 354, 433, 434
Tomkin *v.* Tomkin (1858) 386
Tomkins *v.* Tomkins (1858) ... 281, 282, 406
—— *v.* —— (1872) 484
Tonge *v.* Tonge, Anderson & Eykyn (1892) 416, 417
Tongue *v.* Allen (1835) 46, 47, 48
— *v.* Tongue (1836) 46, 48
Tooth *v.* Barrow (1854) . 48, 49
Toovey *v.* Turner, *Re* Bacon (1907) .. 85, 135
Topp *v.* Topp (N.Z.) 285
Topper *v.* Topper (1869) 292, 380
Torgerson *v.* Torgerson (Can.) 355
Toronto Carpet Co. *v.* Wright (Can.) ... 166
Torsell *v.* Torsell (Can.) 285
Tourle *v.* Tourle (1858) ... 378, 402, 404
—— *v.* Tourle & Renshaw (1858) 428, 473
Town *v.* Town (Can.) 345
Townend *v.* Townend (1905) 544, 545
Towns *v.* Towns (Can.) 148
Townsend *v.* Townsend (1873) ... 309, 311
Townson *v.* Townson & Bucknall (1898) 469, 473
Tracey *v.* M'Arlton (1839) 71, 176
Trafford *v.* Maconochie, *Re* Moore (1888) ... 82
Travers *v.* Sen (1917) 196
Traviss *v.* Hales (Can.) 213
Tree *v.* Quin (1812) 49
Trelawney *v.* Coleman (1817) 436
Tress *v.* Tress (1887) 280
Trevalion *v.* Anderton (1897) ... 231, 232
Trick *v.* Canniff (Can.) 184
Trimmell *v.* Fell (1853) 138
Trinder *v.* Trinder (N.Z.) 356, 357
Trotter *v.* Chambers (Can.) ... ...
—— *v.* Vining (1852) 173
Troward *v.* Troward (1884) 445
Trubner *v.* Trubner & Cristiani (1889) 394, 395
Trueman, *Re*, *Ex p.* Trueman (1872) ... 157
Trustee, *Ex p.*, *Re* Macdonald (1920) ... 166

PAGE

Trustees, Executors & Agency Co., Ltd. *v.* Johnston, *In the Estate of* Beatty (Aus.) ... 68
Trusts Corpn. of Ontario *v.* Clue (Can.) 254
Trye *v.* Sullivan, *Re* Young (1885) ... 134, 164
Tubb *v.* Harrison (1790) 205
Tucker, *Re* (1897) 274, 275
———, *Re*, Emanuel *v.* Parfitt (1885)
——— *v.* Tarrant (1859) 197
——— *v.* Tucker (1847) 295, 302
(Can.) .. 210, 211
Tuckness *v.* Alexander (1863) 45, 51, 59, 60
Tulk *v.* Tulk (1906) 365
Tullett *v.* Armstrong (1838) ... 101, 102, 110
——— *v.* ——— (1840) ... 101, 102, 110
Tupper *v.* Tupper & Terrell (1890) 521, 524, 525, 526
Turnbull, *Re*, Turnbull *v.* Nicholas (1900) ... 256
, Turnbull *v.* Turnbull (1897) ... 153
——— *v.* Forman (1885) 179, 180
——— *v.* Nicholas, *Re* Turnbull (1900) ... 256
——— *v.* Turnbull, *Re* Turnbull (1897) ... 153
——— *v.* Turnbull & Coats (1925) ... 339
Turnbull & Co. *v.* Duval (1902) ... 168, 169
Turner *v.* Felton (1812) 40
——— *v.* King, *Re* Davenport (1895) 84, 85, 88, 142
——— *v.* Meyers (1808) 36, 37. 40
——— *v.* Rookes (1839) 209
——— *v.* Turner (1854) 340
——— *v.* ——— (1862) 376
——— *v.* ——— (1916) ... 391, 392, 394, 395
———— *v.* Turner & Wedgewood (1863) 501, 502
——— *v.* Winter (*circa* 1770) 196
Turton *v.* Turton (1830) ... 294, 327, 336, 340
Tuthill *v.* Tuthill (1862) 403, 404
Tuxford *v.* Tuxford (Can.) 76, 77, 228
Twentyman *v.* Twentyman (1903) ... 505, 508
Twisleton *v.* Twisleton & Kelly (1872) 415, 447
Tyrrel's (Lady) Case (1674) 95

U.

U. (falsely called J.) *v.* J. (1867) . 271
U——n (falsely called F——s) *v.* (1853) 270, 271
Uhlig *v.* Uhlig (1916) 534, 535
Underwood *v.* Underwood (1894) 545
Union Debenture Co., Ltd. *v.* Baker (1896) 182
Upton *v.* Henderson (1912) ... 447, 448
——— *v.* Upton (Can.) ... 395, 396, 427, 428
Usher *v.* Usher (1922) 469
Utick *v.* Utick (Aus.) 511
Utley *v.* Mitre Publishing Co. (1901) ... 216

V.

Valentine *v.* Valentine (1901) 439
Valier *v.* Valier (otherwise Davis) (1925) ... 38
——— *v.* Valier, Valier Intervening (1925) ... 38
——— *v.* Wright & Bull, Ltd. (1917) ... 161
Vallance *v.* Vallance (1907) 521
Vallentine *v.* Vallentine (1901) . 439, 440
Van Aalst *v.* Van Aalst (Can.) 229
Vance *v.* Vance (1839) 164
Vandergucht *v.* De Blaquiere (1839) 223, 224, 417, 418

PAGE

Van der Veen *v.* Van der Veen (N.Z.) ... 534
Vane (Lord) *v.* Vane (Lady) (1740) ... 221, 222
Vane's (Lord) Case (1744) 239
Vansickler (Doe d.) *v.* Fairwell (Can.) ... 135
Vansittart *v.* Vansittart (1858) 219, 220, 234, 242
Vardon *v.* Vardon (Can.) 252
Vardon's Trusts, *Re* (1885) 112, 113
Varner *v.* Morton (Can.) 248
Vaughan *v.* Building & Loan Assocn. (Can.) 251
——— *v.* Vanderstegen (1854) 143
——— *v.* Wiggins (1854) 143
——— *v.* Wilkinson (1885) 116
Veal *v.* Veal (1867) 257
Velie *v.* Rutherford (Can.) 179
Venables *v.* Venables & Wheeler (1916) ... 454
Ver Mehr *v.* Ver Mehr (1921) ... 413, 415
Verax, *Ex p.* Chaddock *v.* Chaddock (1860) 388
Vernall, *Ex p.*, *Re* Cook (1892) 192
Verney *v.* Verney (1920) 274
Vicars *v.* Vicars (1859) 512
Vickery *v.* Vickery (otherwise Cox) (1920) ... 269
Vigevena & Silveira *v.* Alvarez (1794) ... 62
Vincent (Doe d.) *v.* Murray (Can.) ... 146
Vine *v.* Saunders (1837) 215
Vineall *v.* Veness (1865) 23, 24
Virgo *v.* Virgo (1893) 306
Vivian (Lord) *v.* Vivian (Lady) (1909) 531, 532
——— *v.* Vivian & Waterford (Marquis) (1870) 487
Von Eckhardstein *v.* Von Eckhardstein (1907) 399
Vopni *v.* Bell (Can.) 190
Voss, *Re*, King *v.* Voss (1880) 89

W.

W. (falsely called R.) *v.* R. (1876) 351, 352
— *v.* S. (otherwise W.) (1905) ... 271
— *v.* W. (1901) 243
— *v.* — (1905) 271
— *v.* — (1908) 553
— *v.* — (otherwise L.) (1912) (Can.) ... 268
262, 290, 336
W—— *v.* H (falsely called W——) (1861) 267, 272, 427
Waddell *v.* Waddell (1862) 285, 286
- *v.* Waddell & Craig (1892) .. 444, 547
Waddington, *Re*, Bacon *v.* Bacon (1897) ... 136
Wade *v.* Wade (1903) 477
Wadsworth *v.* McCord (Can.) 264
Wagner *v.* Jefferson (Can.) 147
Wain *v.* Wain & Eve (1909) 361, 363
Wainford *v.* Heyl (1875) 218
Wait *v.* Wait (1871) ... ...
Waite *v.* Jones (1835) 219
——— *v.* Morland (1888) 99, 111
——— *v.* Waite & Muir (1916) ... 443, 490
Waithman *v.* Wakefield (1807) ... 190, 195
Wake *v.* Dyer (1911) 213
Wakefield *v.* Mackay (1807) 37, 44, 49
Wakshinsky *v.* Wakshinsky (Can.) ... 75, 162
Wales *v.* Wales (1900) 304
Walker *v.* Lees (Can.) 233, 234
——— *v.* Lupton, *Re* Lucas (1896) 530
——— *v.* Walker (1837) 465
——— *v.* ——— (1861) 380, 381
——— *v.* ——— (1862) 451
——— *v.* ——— (1898) 288, 293
(1912) 375, 377
v. ——— (Can.) 246, 262, 406, 571
v. ——— (Scot.) 295, 334, 458

PAGE

Walker *v.* Walker & Lawson (1897) 207, 208, 468, 469
——— *v.* Walker, Nicoll & Craig (1861) ... 493
Wall *v.* Ogle (1869) ... ...
—— *v.* Rogers (1869) ... ...
Wallace *v.* Lea (Can.) 134
——— *v.* Wallace (1862) 462, 499
——— *v.* Wallace, Guiter & Macnamara (1862) 381, 382
Waller *v.* Atkinson, *Re* Atkinson (1899) ... 84
——— *v.* Waller (1910) 280
Wallis *v.* Biddick (1873) 188, 189
——— *v.* Wallis (1891) 549
Walls (J.), Ltd. *v.* Legge (1923) 255, 414, 415
Wallscourt *v.* Wallscourt (1847) 293, 402, 403
Walmesley *v.* Walmesley (1893) ... 288, 289
Walmington. *Re* (1846) 79
Walpole *v.* Walpole & Chamberlain (1901) 444
——— *v.* Walpole & Goddard (1901) 526, 527
Walrond *v.* Walrond (1858) ... 225, 227, 229, 234, 240, 242
Walsh *v.* Walsh (1919) . 310, 318, 319
——— *v.*——— (Can.) 282, 375
Walter, *Re* (1891) 254
——— *v.* Aldridge (1884) 194
——— *v.* Hodge (1818) 159
——— *v.* Walter (1921) . 279, 318, 326
——— *v.* Walter & Bergmann (1909) ... 473
Walton *v.* Green (1825) 203
——— *v.* Rider (1752) 272
——— *v.* Walton (1900) 558, 571
——— *v.* Walton & Hazell (1920) 483
——— *v.* Walton & Hibbert (1858) ... 438
——— *v.* Walton & Hibell (1859) 330
War *v.* Huntly (1703) 199
Ward *v.* Ward (1858) 310, 311. 402, 422, 423, 542, 545
(1861) 403
... ... 467
Warde *v.* Warde (1849) 534
——— *v.* ——— (1851) 251
——— *v.* ——— (1852) 251
Warden *v.* Warden (Ind.) 552
Waring *v.* Waring (1813) 293
Warmbein *v.* Ulrich (Can.) 425
Warner *v.* Babington (1599) 40
Warnford *v.* Heyl (1875) 218
Warr *v.* Huntly (1703) 199
Warre *v.* Rush, *Re* Rush (1923) 102, 103, 113
Warren *v.* Warren (1890) 504
(1925) 298
Warren's Settlement, *Re* (1883) 124, 126, 127
Warter *v.* Yorke (1815) 44, 45, 49
Warwick *v.* Warwick (1901) ... 446
——— *v.* Warwick & Giovanni (1907) 292, 401
Wassell, *Re*, Wassell *v.* Leggatt (1896) ... 147
——— *v.* Wassell (1899) 312
Wasteneys *v.* Wasteneys (1900) ... 228, 236
Waterhouse *v.* Waterhouse (1893) 507, 512, 549
Waters *v.* Bellamy (Can.) 29
——— *v.* Waters (1875) 275, 394
——— *v.* Waters & Gentel (1875) 294
Watkin *v.* Watkin & Malcolm (1919) ... 333
Watkins *v.* Watkins (1896) 510
——— *v.* ——— (N.Z.) ... 563, 568, 569
Watkinson *v.* Mergatron (1682) 41
Watson *v.* Campbell (No. 2) (Aus.) .. 23
——— *v.* Hardy (1844) 305
——— *v.* Ontario Supply Co. (Can.) 256
v. Threlkeld (1798) 212
— *v.* Watson (1903) 490
— *v.* Watson & Watts (1905) 454
— *v.* Watson & Wilkinson (1862) 467, 472, 474

PAGE

Watson's Case (1647) 188, 192
Watt *v.* Logan (Can.) 257, 258
—— *v.* Watt (1905) 253
Watton *v.* Watton (1866) 549
Watts *v.* Thomas (1726) 163
——— *v.* Watts (1859) 416
——— *v.* ——— (1861) 544
... ... 499
— (1876) 518, 548
— (Aus. 299
Waudby *v.* Waudby & Bowland (1902) 467, 474
Waynford *v.* Heyl (1875) 218
Weatherley *v.* Weatherley (1854) 304
Weaver *v.* Lawrence (Can.) 192
——— *v.* Weaver (1892) 309
Webb *v.* Webb (1828) 380
(1862) 437
Webber *v.* Webber (S. Af.) 309, 310
Weber *v.* Weber & Pyne (1858) 409, 411, 467
Webley *v.* Webley (1891) 461
Webster *v.* Leys (Can.) 249
——— *v.* Rickards, *Re* Hobson's Settlement (1885) 85
——— *v.* Webster (1853) ... 224, 242, 244, 245
——— *v.* ——— (1916) 260
——— *v.* ——— *v.* Webster & Mitford (1862) 521, 527, 528
Weedon *v.* Timbrell (1793) 305
Weekes *v.* Weekes & Marshall (1905) 447, 464
Weightman *v.* Weightman (1906) .. 567, 568
Weinberg *v.* Weinberg (1910) 301
Weir *v.* Weir (Can.) 76, 77
Welch *v.* Welch (1916) 279
Welde (*alias* Aston) *v.* Welde (1731) ... 270
Weldhen *v.* Scattergood (1887) 250
Weldon *v.* Banks, *Re* Banks (1912) 211
—— *v.* De Bathe (1884) 248, 259
—— *v.* Neal (1884) 251
— *v.* Riviere (1884) ... ..
——— *v.* Weldon (1883) ... 273, 281. 543
— *v.* Winslow (1884) 248
Wellborne *v.* Wellborne & Evered (1890) ... 472
Weller, *Re* (Can.) 104
——— *v.* Weller, Funnell & Cass (1890) 506, 552
Wellesley *v.* Wellesley (1839) 226
——— *v.* ——— (1849) ... 235, 236
——— *v.* ——— (1852) ... 235, 236
——— *v.* ——— (1853) ... 235, 236
Wells *v.* Cottam (falsely called Wells) (1863) 383
—— *v.* Cottam (falsely called Wells) & Wells (1864) 465
—— *v.* Wells (1858) 468
—— *v.* Wells & Cottam (1864) 423, 463, 465, 477
—— *v.* Wells & Hudson (1864) 413
—— *v.* Wells & Hummerston (1863) 324, 381, 399, 401
Wells & Fisher *v.* Southland District Land Registrar (N.Z.) 179
Wellsman *v.* Wellsman (N.Z.) 396
Wenham *v.* Wenham (1906) ... 563, 570, 571
Wescombe *v.* Dods (1752) 272, 273
Wescott *v.* Wescott (1908) 487
Wessels *v.* Wessels (S. Af.) 553, 554
West *v.* Ames Holden & Co. (Can.) 166
—— *v.* West (1870) 464, 473
—— *v.* —— (1910) 375
—— *v.* West & Maxted (1917) 477
—— *v.* West & Parker (1870) ... 464, 473
v. Wheeler (1849) 189, 190
West & Hardy's Contract, *Re* (1904) ... 133
Westbrooke *v.* Strutville (1718) 261
Westcott *v.* Westcott (1908) 487
Westergaard *v.* Westergaard (Scot.) ... 535, 536

PAGE

Westlake *v.* Westlake (otherwise Williams) (1910) 73
Westmeath (Marquis) *v.* Salisbury (Marquis) (1831) ... 222, 244, 246
——— (Earl) *v.* Westmeath (Countess) (1821) 222
——— *v.* Westmeath (1827) 279, 283, 285, 339, 340, 341, 345
——— *v.* ——— (1829) 340
——— (Marquis) *v.* Westmeath (Marchioness) (1831) 222
——— (Marquis) *v.* Westmeath (Marchioness) (1834) ... 496, 497
Weston, *Re*, Davies *v.* Tagart (1900) ... 227
——— *v.* Perry (Can.) 305
Westropp's Divorce Bill (1886) 285
Westrupp, *Re*, *Ex p.* Moore (1845) ... 206, 209
Wharton *v.* Lewis (1824) 30, 31
Wheeldon *v.* Milligan (Can.) 184
Wheeler, *Re*, Hankinson *v.* Hayter (1904) ... 182
——— *v.* Wheeler (Can.) 77
——— *v.* Wheeler & Rhodes (1889) 387, 389
Wheeler's Settlement Trusts, *Re*, Briggs *v.* Ryan (1899) 111, 122
Whieldon *v.* Whieldon (1861) 496
Whildon *v.* Whildon (1861) 496
Whimbey *v.* Whimbey (Can.) 284
Whinney, *Ex p.*, *Re* Harrison & Ingram (1900) 153
Whitaker, *Re*, Christian *v.* Whitaker (1887) 87
——— *v.* Cohen (1893) 103
v. Kershaw, *Re* Kershaw (1890) ... 250
v. Van der Smissen (1888) ... 181
White *v.* Butt (1909) 240
——— *v.* Cuyler (1795) 184
——— *v.* Eldridge (1699) 215
——— *v.* Herrick (1873) 106, 115
——— *v.* White (1859) ... 291, 471, 495
——— *v.* ——— (1898) 486
——— *v.* ——— (1925) ... 377, 378, 390
——— *v.* ——— (Aus.) 309
v. ——— (Can.) . 77, 408
——— *v.* White & Jerome (1890) 302
——— *v.* White & McLelland (N.Z.) ... 446
Whitehead, *Re*, *Ex p.* Routh (1885) 160
——— *Re*, *Ex p.* Whitehead (1885) 160, 162
v. Hall (1887) 25, 26
Whiteley *v.* Edwards (1896) 123
Whitfield, *Re*, Hill *v.* Mathie (1911) ... 42
Whiting *v.* Whiting & Botwright (1920) ... 384
Whitlow *v.* Dilworth (1854) 98
Whitmore *v.* Whitmore (1866) ... 413, 466
v. Whitmore & Brettell (1865) 473
Whittaker, *Re*, Whittaker *v.* Whittaker (1882) 90, 160
——— *v.* Kershaw (1890) ... 249, 250
——— *v.* Kershaw, *Re* Kershaw (1890) 249
——— *v.* Whittaker (1881) ... 546, 547
——— *v.* Whittaker, *Re* Whittaker (1882) 90, 160
Whittal *v.* Whittal & Hunt (1860) 292
Whittingham's Trusts, *Re* (1864) 560
Whitton *v.* Whitton (1901) 519, 526
Whitworth *v.* Whitworth & Thomasson (1893) 366
Whyte *v.* Whyte (Scot.) 303
Wicken *v.* Wilson, *Re* Wimperis (1914) ... 107
Wickham *v.* Wickham (1880) 366
Wickins *v.* Wickins (1918) ... 348, 373, 374
——— *v.* ——— (No. 2) (1918) 514
Widmeyer *v.* McMahon (Can.) 254
Wiedemann *v.* Walpole (1891) 29
Wiggins *v.* Horlock (1888) 236
Wigglesworth *v.* Wigglesworth, Bennett & Smith (1911) 444
Wight *v.* Wight & Field (1867) 473
Wigley *v.* Treasury Solicitor (1902) 67
Wigney *v.* Wigney (1882) ... 517, 520, 522, 523, 524, 525
Wilcocks *v.* Wilcocks (1859) 470, 496
Wilcox *v.* Gotfrey (1872) 29, 30
——— *v.* Wilcox (1902) 558, 564
Wild *v.* Harris (1849) 24, 30
Wilder *v.* Wilder & Charters (No. 2) (1912) 260, 261
Wildey *v.* Wildey & Ryder (1878) ... 363, 372
Wiles *v.* Cooper (1846) 147
Wiley & Wiley, *Re* (Can.) 554, 555
Wilkes *v.* Wilkes (1757) 220
Wilkins *v.* Wilkins (1896) 491
Wilkinson *v.* Beale (1823) 154
——— *v.* Gibson (1867) 97
——— *v.* Payne (1791) 65, 66
——— *v.* Schneider, *Re* Le Blanc (1870) 257
——— *v.* Wilkinson (1845) 39
——— *v.* ——— (1871) 82
——— *v.* ——— (1893) ... 502, 504
——— *v.* ——— (1894) 555
——— *v.* Wilkinson & Seymour (1921) 360, 362, 481
Willcox *v.* Gotfrey (1872) 29, 30
Willey *v.* Willey (Can.) 287
Williams, *In the Goods of*, Williams *v.* Davies (1864) 164
———, *Re*, Williams *v.* Grant (1897) ... 88
———, *Re*, Williams *v.* Stratton (1881) ... 149
——— *v.* Baily (1866) 326
——— *v.* Davies, *In the Goods of* Williams (1864) 164
——— *v.* Fowler (1825) 209
——— *v.* Grant, *Re* Williams (1897) ... 88
——— *v.* Homfray (falsely calling herself Williams) (1860) 405
——— *v.* Homfray (falsely called Williams) (1861) 427
——— *v.* Hudson (1889) 162
——— *v.* Mercier (1882) 177, 178
——— *v.* ——— (1884) ... 177, 178
——— *v.* Stratton, *Re* Williams (1881) ... 149
——— *v.* Williams (1798) ... 296, 301
——— *v.* ——— (1864) ... 307, 308
——— *v.* ——— (1866) ... 325, 326
——— *v.* ——— (1867) 416
——— *v.* ——— (1869) ... 423, 542
——— *v.* ——— (1904) 562
——— *v.* ——— (1909) 61
——— *v.* ——— (1916) 437
——— *v.* ——— (1921) 280
——— *v.* ——— (Ind.) ... 348, 349
——— *v.* Williams, *Re* Eyre-Williams (1923) 212
——— *v.* Williams & Gazzard (1897) 450, 475
——— *v.* Williams & Hutton (Can.) 452, 453
——— *v.* Williams & Kilburn (1920) 518, 526
——— *v.* Williams & Padfield (1865) ... 302
——— *v.* Williams & Pocock (1896) ... 395
Williamson *v.* Auckland Electric Tramways Co., Ltd. (N.Z.) 71
——— *v.* Williamson (1882) ... 322, 358
Willis *v.* Barron (1902) 142, 167
——— *v.* Bernard (1832) 436
Willmott *v.* Willmott (1921) 548
Willoughby-Osborne, *Re*, Willoughby-Osborne *v.* Holyoake (1882) 140
Willson *v.* Smyth (1831) 204
Wilson, *In the Goods of*, Threlfall *v.* Wilson (1883) 249, 250
——— *v.* Ann, *Re* Ann (1894) 145
——— (otherwise Bennett) *v.* Bennett (N.Z.) 41
——— *v.* Brockley (1810) 49

PAGE

Wilson *v.* Ford (1868) ... 207
——— *v.* Glossop (1888) 202, 203
——— *v.* Mushett (1832) ... 245
——— *v.* Smyth (1831) ... 204
——— *v.* Wilson (1797) ... 423
——— *v.* ——— (1830) ... 499
——— *v.* ——— (1848) 220, 226, 227, 230, 231, 241, 242, 243, 244
v. — (1849) 340
v. — (1854) ... 220, 226, 227, 230, 231, 241, 242, 243, 244
v. — — (1872) 471
v. — — (1883) 441
v. — — (1908) 321
— (1916) 344
v. — (1920) ... 348, 360, 362
v. — (Can.) ... 407, 432, 433
v. — (Scot.) 304
——— *v.* Wilson & Howell (1871) 264, 398, 403, 441
——— *v.* ——— (1872) ... 398, 412
Wilson-Stewart, *Re*, Keown-Boyd *v.* Gilmour (1896) 126
Wilton *v.* Hill (1855) 114
——— *v.* Webster (1835) 305, 455
——— *v.* Wilton & Chamberlain (1859) ... 346
v. Wilton & Gambier (1881) ... 504, 552
Wiltshire *v.* Prince (1830) ... 48
Wily *v.* Wily (1918) 276
Wimperis, *Re*, Wicken *v.* Wilson (1914) ... 107
Windham *v.* Windham & Giuglini (1863) ... 342
Winfrey *v.* Clute (Can.) 81, 305
Wing *v.* Taylor (falsely calling herself Wing) (1861) 41, 61, 63
Wingfield *v.* Wingfield (1898) 404
——— *v.* Wingfield & Wright-Motion (1919) 364
——— *v.* ——— (1921) 364
— & Blew, *Re* (1904) ... 204. 207, 500
Winkworth *v.* Winkworth (1908) 273
Winscom *v.* Winscom & Plowden (1864) 345, 425
Winsmore *v.* Greenbank (1745) 81
Winstone *v.* Winstone & Dyne (1861) ... 501
Winter *v.* Henn (1831) ... 305, 359, 456
——— *v.* Wroot (1834) 456
Winter's Estate, *Re* (Can.) 147, 148
Wiremu Taurua *v.* Niho Taurua (N.Z.) ... 349
Wirth *v.* Wirth (Aus.) 280
Wishart *v.* McManus (Can.) 179
Withers *v.* Berry (1895) 95
Witt *v.* Witt (1891) 506, 533, 535
Witts *v.* Dawkins (1806) 107, 108
Wodehouse *v.* Wodehouse (1885) ... 284, 285
——— *v.* Wodehouse & Farrow (1863) 380, 399
Wolter, *Re* (Can.) 147
Woltereck *v.* Woltereck & Walters (1912) 348, 363, 364, 372
Wombwell's Settlement, *Re*, Clerke *v.* Menzies (1922) 457, 458
Wood, *Re*, *Ex p.* Naden (1874) 224
———, *Re*, Wood *v.* Hooper (1889) 108, 110, 124
Re, Wood *v.* Kimber (1885) 125
v. Cock, *Re* Flamank (1889) 171, 174
v. Hooper, *Re* Wood (1889) 108, 110, 124
v. Hurd (1835) 34, 35
v. Kimber, *Re* Wood (1885) ... 125
v. Lewis (1914) ... 123, 255, 256
v. Suckling (1617) ...
v. Wood (1789) 299
v. ——— (1870) ... 137, 141
v. ——— (1871)
v. ——— (1887) ... 320, 378, 409, 411

PAGE

Wood *v.* Wood (1889) ... 260
——— *v.* ——— (1891) 506, 507
— *v.* — (Can.) 76, 295, 459
(Ind.) ... 311
v. Wood & Hutchins (1866) ... 397
Wood's Estate, *Re*, Davidson *v.* Wood (1863) 203, 205
Woodcock *v.* Woodcock & Codesido (1914) 506, 529
Woodey *v.* Woodey (1874) 277, 403
Woodgate *v.* Potts (1847) 66
——— *v.* Taylor (1861) 384
Woodhead *v.* Woodhead (1895) ... 558
——— *v.* Woodhead & Jones (1907) 487
Woodhouse *v.* Shepley (1742) ... 37
Woodman *v.* Blair (Can.) 30
Woodmeston *v.* Walker (1831) ... 110
Woodruff, *Re* (Can.) 78
Woods *v.* Woods (1840) 429
——— *v.* ——— (1884) ... ...
Woodward *v.* Pratt (1873) 257
——— *v.* Woodward (1863) ... 172, 210
Woolley, *Ex p.*, Re Kingsley (1858) 100
Woolnoth *v.* Woolnoth (1902) 461
Woolston *v.* Smith (1825) 201
Wootton-Isaacson *v.* Wootton-Isaacson (1902) 520, 529, 530
Wormald, *Re*, Frank *v.* Muzeen (1890) ... 116
——— *v.* Neale & Wormald (falsely called Neale) (1868) 48
Worman, *In the Goods of* (1859) 101
Worrall *v.* Jacob (1817) 225, 230
Worsley, *Re*, *Ex p.* Lambert (1901) 91
Worsley *v.* Worsley (1730) 345, 347
——— *v.* Worsley & Wignall (1869) 230, 246
v. Worsley & Worsley (1904) ... 493
Wortesley's Case (1679) ... 41
Worth *v.* Worth (1859) 380, 396
Wortley *v.* Watkinson (1679) 41
Wray *v.* Wray & D'Almeida (1901) ... 394, 395
Wright *v.* Cadogan (Lord Charles) (1766) 139
v. Elwood (1829) 46, 47, 49
— *v.* ——— (1835) 46, 47, 49
— *v.* ——— (1837) .. 46, 47, 49
— *v.* Englefield (1764) 139
— *v.* Leonard (1861) 213, 215, 217
v. Sherren (Can.) .. 252, 253
— *v.* Skinner (Can.) 70
— *v.* Wright (1858) .. 379, 382
— *v.* ——— (1862) 124
v. Wright & Pico (1904) 487
Wright's Executors *v.* City of Glasgow Bank (Scot.) 162
Wright's Trusts, *Re* (Ir.) 127
Wyatt *v.* Henry (1817) 49
Wyke *v.* Wyke (1904) 364, 365
Wylie, *Re*, Wylie *v.* Moffat (1895) 135
——— *v.* Frampton (Can.) 248
Wynn *v.* Davies & Weever (1835) ... 45. 46
Wynne *v.* Wynne (1898) 310, 526

Y.

Y—— *v.* Y—— (1860) ... 383, 388
Yarrow *v.* Yarrow (1892) 324
Yarwood *v.* Hart (Can.) 29
Yates *v.* Yates (Can.) ... 400, 401
Yeatman *v.* Yeatman (1868) ... 307, 322
— *v.* ——— (1870) ... 372, 373
v. Yeatman & Rummell (1869) 401, 442, 443

PAGE

Yeatman *v.* Yeatman & Rummell (1870) ... 324
Yelverton *v.* Longworth (or Yelverton) (1864) 422
Yglesias *v.* Yglesias & Selby (1879) 519
Yonge *v.* Furse (1856) 57
——— *v.* ——— (1857) 57
Youd *v.* Youd (Ind.) 346
Youell *v.* Youell, Terrass & Burleigh (1875) 476, 477

Young, *Re*, Trye *v.* Sullivan (1885) ... 134 164
———, *Re*, Young *v.* Young (1913) ... 170, 172
——— *v.* Furse (1856) 57
——— *v.* Murphy (1836) 31
——— *v.* Pridd (1627) 80
——— *v.* Young (Scot.) 260
Young *v.* Young, *Re* Young (1913) ... 170, 172
Yowell *v.* Yowell, Serrash & Burleigh (1875) 476, 477

Z.

Zarafi *v.* A-G. (1885) 74
Zealand *v.* Dewhurst (Can.) 198
Zhrahal *v.* Shatney (Can.) 305
Zycklinski *v.* Zycklinski (1862) 383, 398

HUSBAND AND WIFE.

PAGE

PART I. CONTRACTS TO MARRY 23
SECT. 1. FORMATION OF 23
SUB-SECT. 1. MUTUALITY 23
SUB-SECT. 2. OFFER AND ACCEPTANCE 23
SUB-SECT. 3. DECLARATION OF INTENTION TO THIRD PARTIES . . 24
SECT. 2. FORM—STATUTE OF FRAUDS 24
SECT. 3. CONSIDERATION 24
SECT. 4. VALIDITY 25
SUB-SECT. 1. IN GENERAL 25
SUB-SECT. 2. PROMISE BY INFANTS. 25
SUB-SECT. 3. PROMISE BY MARRIED PERSONS 26
SUB-SECT. 4. PROMISE BASED ON IMMORAL CONSIDERATION OR DURESS 26
SECT. 5. CONSTRUCTION AND EFFECT 26
SUB-SECT. 1. GENERAL AND CONDITIONAL PROMISES . . . 26
SUB-SECT. 2. IMPLIED TERMS 27
SUB-SECT. 3. EFFECT OF BREACH 27
SECT. 6. ACTIONS FOR BREACH 27
SUB-SECT. 1. RIGHT OF ACTION 27
A. In General 27
B. Anticipatory Breach 27
C. Survival of Right 27
SUB-SECT. 2. JURISDICTION OF COURTS TO ENTERTAIN . . . 28
SUB-SECT. 3. BY WHOM MAINTAINABLE 28
SUB-SECT 4. EVIDENCE OF REQUEST TO MARRY AND REFUSAL . 28
SUB-SECT. 5. CORROBORATION OF PLAINTIFF'S TESTIMONY . . 29
SUB-SECT. 6. PRACTICE 30
SECT. 7. DEFENCES TO ACTIONS FOR BREACH 30
SUB-SECT. 1. IN GENERAL 30
SUB-SECT. 2. PROMISE INDUCED BY MISREPRESENTATION OR FRAUD . 30
SUB-SECT. 3. BAD CHARACTER OF PLAINTIFF 31
SUB-SECT. 4. MENTAL OR BODILY INFIRMITY 32
SUB-SECT. 5. MUTUAL RELEASE 33
SUB-SECT. 6. ACCORD AND SATISFACTION 33
SUB-SECT. 7. OFFER OF PERFORMANCE 33
SECT. 8. DAMAGES FOR BREACH 34
SUB-SECT. 1. IN GENERAL 34
SUB-SECT. 2. MEASURE OF DAMAGES 34
A. In General 34
B. Matters in Aggravation 35
C. Matters in Mitigation 35
SUB-SECT. 3. EXCESSIVE DAMAGES—NEW TRIAL 35

PART II. MARRIAGE 36
SECT. 1. NATURE OF 36
SECT. 2. REQUISITES OF A VALID MARRIAGE 36

PAG

SECT. 3. CONSENT OF BOTH PARTIES
SUB-SECT. 1. IN GENERAL
SUB-SECT. 2. MISTAKE
SUB-SECT. 3. DURESS
SUB-SECT. 4. UNDUE INFLUENCE
SUB-SECT. 5. FRAUD
SUB-SECT. 6. DRUNKENNESS
SECT. 4. CAPACITY TO MARRY
SUB-SECT. 1. IN GENERAL
SUB-SECT. 2. AGE
SUB-SECT. 3. LUNATICS AND PERSONS OF UNSOUND MIND. *See* LUNATICS.
SUB-SECT. 4. DEAF AND DUMB PERSONS.
SUB-SECT. 5. CIVIL DISABILITY UNDER FORMER MARRIAGE
SECT. 5. CONSANGUINITY AND AFFINITY
SUB-SECT. 1. IN GENERAL
SUB-SECT. 2. WHAT ARE PROHIBITED DEGREES
A. In General
B. Marriage with Deceased Wife's Sister
C. Marriage with Deceased Husband's Brother
D. Marriage with Illegitimate Relations
SUB-SECT. 3. EFFECT OF MARRIAGE WITHIN PROHIBITED DEGREES
SUB-SECT. 4. REMARRIAGE OF DIVORCED PERSONS
SECT. 6. FORMS AND CEREMONIES
SUB-SECT. 1. IN GENERAL
SUB-SECT. 2. CONTRACTS PER VERBA DE PRÆSENTI
SECT. 7. PRELIMINARIES TO CELEBRATION
SUB-SECT. 1. PUBLICATION OF BANNS
A. In General
B. Notice to Clergyman
C. The Publication
(*a*) Form
(*b*) Time
(*c*) Place
D. Residence of Parties
E. False Names and Descriptions
(*a*) In General
(*b*) "Persons wilfully and knowingly intermarrying without due publication".
i. In General
ii. Knowledge of Parties
iii. Variations in Christian Names
iv. Variations in Surnames
v. Acquired Names
vi. False Descriptions
(*c*) Prior to Marriage Act, 1823
F. Acquired Names
G. False Descriptions
H. Time within which Marriage celebrated after Publication
SUB-SECT. 2. SPECIAL LICENCE
SUB-SECT. 3. COMMON LICENCE
A. In General
B. Affidavit previous to Grant
C. Grant of
(*a*) In General
(*b*) To Divorced Persons
(*c*) Objections to Grant
(*d*) Appeals from Refusal to grant
D. Residence of Parties
E. Effect of Alterations in

PAGE

F. False Names and Descriptions 51
G. False Oaths as to Age 52
H. Knowingly and wilfully intermarrying without Licence 53
SUB-SECT. 4. SUPERINTENDENT REGISTRAR'S CERTIFICATE OR CERTIFICATE AND LICENCE 53
A. Powers and Duties of Registrars 53
B. Notice to Superintendent Registrar 54
(a) What constitutes "Due Notice" 54
(b) "Knowingly and wilfully intermarrying without due notice" . . . 55
(c) Effect of making False Statements in 55
SUB-SECT. 5. CONSENTS IN CASE OF MINORS 55
A. Whether Consent necessary 55
B. Whose Consent necessary 55
(a) In General 55
(b) Illegitimate Minors 56
C. Presumption of Consent 56
D. Retraction of Consent. 57
E. Consent of the Court 57
F. Proof of Want of Consent 57
G. Effect of Want of Consent 57
(a) On Validity of Marriage 57
(b) Forfeiture of Interest in Property 58
i. In General 58
ii. Settlements ordered by Court 58
iii. Practice 59
SUB-SECT. 6. CRIMINAL LIABILITY FOR FALSE STATEMENTS 59
SECT. 8. CELEBRATION 59
SUB-SECT. 1. ACCORDING TO RITES OF CHURCH OF ENGLAND 59
A. By Whom solemnised 59
B. Where solemnised 59
C. Marriage Fees 61
SUB-SECT. 2. ACCORDING TO NON-ANGLICAN RITES 61
A. In General 61
B. Jews and Quakers 62
SUB-SECT. 3. THE CEREMONY 62
SUB-SECT. 4. CIVIL MARRIAGES AT SUPERINTENDENT REGISTRAR'S OFFICE . . 63
SECT. 9. MARRIAGES ABROAD 63
SECT. 10. CONFIRMATION OF INVALID MARRIAGES 63
SECT. 11. PRESUMPTIONS IN RELATION TO MARRIAGE 64
SUB-SECT. 1. VALIDITY OF MARRIAGE 64
SUB-SECT. 2. EXISTENCE OF MARRIAGE FROM COHABITATION 65
A. In General 65
B. Factors determining Strength of Presumption 66
(a) Duration of Cohabitation 66
(b) Acknowledgment 66
(c) Reputation 67
(d) Lapse of Time after Ceremony 69
(e) Special Conditions in Foreign Country 70
C. Rebuttal of Presumption 70
D. Proceedings in which Presumption entertained 71
E. Proceedings in which Presumption not entertained 71
SECT. 12. PROOF OF MARRIAGE 71
SUB-SECT. 1. IN ENGLAND 71
A. Matters not necessary to be proved 71
B. Marriage Certificates 72
C. Parish Registers 72
D. Episcopal Registers and Records 72
E. Non-Anglican Church Registers and Records 72
F. Prison Registers 72
G. Competency of Witness 72
H. Onus of Proof 72

PAGE
SUB-SECT. 2. MARRIAGES ABROAD 73
A. Proof of Foreign and Colonial Law 73
B. Foreign and Colonial Registers and Certificates 73
C. Channel Islands 73
D. Other Cases 73
SUB-SECT. 3. JEWS AND QUAKERS 73
SUB-SECT. 4. IN MATRIMONIAL CAUSES 73
SUB-SECT. 5. IN ACTION AGAINST HUSBAND FOR ANTÉ-NUPTIAL OBLIGATIONS OF WIFE 73
SECT. 13. PROCEEDINGS TO ESTABLISH VALIDITY 73
SECT. 14. OFFENCES IN RELATION TO MARRIAGE 74
PART III. PERSONAL RIGHTS AND OBLIGATIONS ARISING FROM MARRIAGE . 75
SECT. 1. OBLIGATION OF HUSBAND AND WIFE TO MAINTAIN ONE ANOTHER . . . 75
SUB-SECT. 1. DUTY OF HUSBAND TO MAINTAIN WIFE 75
SUB-SECT. 2. LIABILITY UNDER POOR LAW ACTS. *See* POOR LAW.
SUB-SECT. 3. LIABILITY UNDER VAGRANCY ACTS. *See* POOR LAW.
SUB-SECT. 4. CRIMINAL LIABILITY FOR NEGLECT OF DUTY 78
SECT. 2. RIGHT OF CONSORTIUM 78
SUB-SECT. 1. HUSBAND'S RIGHT TO WIFE'S CUSTODY 78
A. In General 78
B. Restraint of Wife's Liberty 79
(*a*) By Husband 79
(*b*) By Third Parties 79
SUB-SECT. 2. REMEDY FOR UNLAWFUL DETENTION—HABEAS CORPUS . . . 79
SUB-SECT. 3. ACTION FOR LOSS OF CONSORTIUM 80
A. By Husband 80
(*a*) For Assault on Wife 80
(*b*) For enticing away or harbouring Wife 81
(*c*) Slander of Wife. *See* LIBEL AND SLANDER.
(*d*) Negligence causing Injury to Wife. *See* NEGLIGENCE.
B. By Wife 82
SUB-SECT. 4. CONDITIONAL GIFT INDUCING SEPARATION 82
SECT. 3. FUNERAL EXPENSES 83
SUB-SECT. 1. LIABILITY OF HUSBAND 83
A. In General 83
B. Where Wife leaves Separate Property 83
SUB-SECT. 2. LIABILITY OF WIFE 83
PART IV. EFFECT OF MARRIAGE WITH REGARD TO WIFE'S PROPERTY . . 83
SECT. 1. IN GENERAL 83
SECT. 2. INTERESTS CONTINGENT, REVERSIONARY AND IN REMAINDER 85
SECT. 3. EFFECT OF STATUTE ON PRIOR SETTLEMENTS OR DISPOSITIONS. . . . 86
SECT. 4. PROPERTY ACQUIRED BETWEEN 1870 AND 1883 88
SECT. 5. DISPOSITION OF PROPERTY 89
SECT. 6. SEPARATE TRADING 89
SUB-SECT. 1. IN GENERAL 89
SUB-SECT. 2. WHAT IS SEPARATE TRADE 89
SECT. 7. GIFT OR LIMITATION TO HUSBAND AND WIFE 91
SUB-SECT. 1. IN GENERAL 91
SUB-SECT. 2. EFFECT OF DIVORCE 92
SECT. 8. PARAPHERNALIA 92
SECT. 9. PIN MONEY 93
SECT. 10. SAVINGS OF WIFE. 93
SUB-SECT. 1. FROM SEPARATE PROPERTY 93
SUB-SECT. 2. FROM PROCEEDS OF HUSBAND'S BUSINESS 94
SUB-SECT. 3. FROM ALLOWANCE BY OR ON BEHALF OF HUSBAND 94
A. When Living Together 94
B. When Living Apart 95

PAGE

SECT. 11. CONFLICT OF LAWS . . . 96
SECT. 12. EFFECT OF DIVORCE OR SEPARATION 96

PART V. EFFECT OF DIVORCE OR SEPARATION WITH REGARD TO WIFE'S PROPERTY 96
SECT. 1. DIVORCE 96
SUB-SECT. 1. PROPERTY LIMITED TO HUSBAND AND WIFE 96
SUB-SECT. 2. PROPERTY SUBJECT TO MARRIAGE SETTLEMENT 96
SECT. 2. SEPARATION 98
SUB-SECT. 1. SEPARATION UNDER AGREEMENT 98
SUB-SECT. 2. JUDICIAL SEPARATION 99
SUB-SECT. 3. PROTECTION ORDERS, ETC. 100

PART VI. DISPOSITION OF PROPERTY 101
SECT. 1. RESTRAINT ON ANTICIPATION OR ALIENATION . . 101
SUB-SECT. 1. NATURE OF DOCTRINE 101
SUB-SECT. 2. TO WHAT PROPERTY OR INTEREST APPLICABLE 102
A. In General 102
B. Property Producing or Not Producing Income . 103
SUB-SECT. 3. HOW IMPOSED 104
A. In General 104
B. Form of Receipt Clause 107
C. Power of Appointment 108
D. Direction for Payment of Fund 109
SUB-SECT. 4. DURATION. 110
A. In General 110
B. Effect of Remarriage 111
C. Restraint for limited Period. 112
SUB-SECT. 5. EFFECT 112
A. In General 112
B. On Dealings with Property 113
(*a*) Alienation 113
i. In General 113
ii. By Way of Charge 115
(*b*) Leases 116
(*c*) Powers in Relation to Settled Property . 116
(*d*) Covenant to Settle After-Acquired Property . 117
(*e*) Disentailing Assurance 17
(*f*) Appointment of Attorney to Receive Income . 17
(*g*) Disposition by Will 18
C. On Availability of Property to Creditors . 18
(*a*) In General 18
(*b*) Obligations Incurred before Marriage . . 119
i. Before Married Women's Property Act, 1882 119
ii. Since Married Women's Property Act, 1882 119
(*c*) Obligations Incurred during Coverture . . 120
(*d*) Obligations Resulting from Breach of Trust . 122
(*e*) Costs 122
(*f*) Income Accrued or Accruing Due . . . 122
SUB-SECT. 6. REMOVAL OF RESTRAINT 123
A. By Spinster or Widow 123
B. By Court 124
SECT. 2. REMOVAL OF RESTRAINT BY THE COURT . . . 124
SUB-SECT. 1. FOR BENEFIT OF MARRIED WOMEN . . 124
A. Apart from Statute 124
B. Under Statute 124
(*a*) Extent of Power 124
(*b*) Application for Removal 125

PAGE

(c) When Exercised 125
i. In General 125
ii. Payment of Debts 125
iii. Other Cases 126
(d) Effect of Removal 128
SUB-SECT. 2. FOR PAYMENT OF COSTS 128
A. Before Married Women's Property Act, 1893 128
B. Since Married Women's Property Act, 1893 129
(a) In General 129
(b) "Action or Proceeding Instituted" 130
(c) The Order for Payment. 132
C. Other Cases 132
SUB-SECT. 3. FOR OTHER PURPOSES 132
SECT. 3. DISPOSITION OF WIFE'S PROPERTY 132
SUB-SECT. 1. IN GENERAL 132
SUB-SECT. 2. DISPOSITION BY WILL 134
SUB-SECT. 3. PROPERTY ACQUIRED BETWEEN 1870 AND 1883 135
SUB-SECT. 4. SAVINGS OF WIFE 135
SUB-SECT. 5. DEED ACKNOWLEDGED 135
SUB-SECT. 6. EFFECT OF DIVORCE OR SEPARATION 135
SECT. 4. UNDER POWERS OF APPOINTMENT 136
SUB-SECT. 1. IN GENERAL 136
SUB-SECT. 2. CAPACITY OF MARRIED WOMAN TO APPOINT 136
A. Exercise During Coverture 136
B. Infant Married Woman 138
C. Effect of Separation or Dissolution of Marriage 139
SUB-SECT. 3. EXERCISE OF POWER BY WILL 139
SUB-SECT. 4. APPOINTMENT TO SELF OR HUSBAND 141
SUB-SECT. 5. RELEASE OF POWER BY MARRIED WOMAN 142
SUB-SECT. 6. APPOINTED PROPERTY LIABLE FOR DEBTS 142
A. In General 142
B. Power Exercised by Will 143
(a) Before Married Women's Property Act, 1882 143
(b) Since Married Women's Property Act 1882 144
C. Life Interest to Woman with Absolute Remainder in Default 145
SECT. 5. LIABILITY OF WIFE'S PROPERTY FOR DEBTS 146
SECT. 6. DEALINGS BY HUSBAND WITH WIFE'S PROPERTY 146
SUB-SECT. 1. IN GENERAL 146
SUB-SECT. 2. IMPROVEMENT OF WIFE'S PROPERTY 147
SUB-SECT. 3. DISCHARGE OF INCUMBRANCE ON WIFE'S PROPERTY 148
SUB-SECT. 4. WIFE OF UNSOUND MIND 148
SECT. 7. DEALINGS BY WIFE WITH HUSBAND'S PROPERTY 149
SECT. 8. DISPOSITION BETWEEN HUSBAND AND WIFE 149
SUB-SECT. 1. CONTRACT 149
SUB-SECT. 2. LIFE ASSURANCE POLICIES 149
A. In General 149
B. Under Married Women's Property Acts 149
C. Appointment of Trustees 152
D. Payment of Premiums by Husband 153
SUB-SECT. 3. EQUITY OF EXONERATION 153
A. When Arising 153
B. Benefit to Husband 156
(a) When Presumed 156
(b) Rebuttal of Presumption 157
C. Priority between Wife and Husband's Creditors. 157
D. Waiver 157
SUB-SECT. 4. JOINT MORTGAGE 158
SUB-SECT. 5. GIFTS 158

PAGE

SECT. 0. GIFTS BETWEEN HUSBAND AND WIFE 158
SUB-SECT. 1. REQUISITES FOR VALIDITY 158
A. In General 158
B. Where Made by Declaration of Trust 160
C. Chattels 160
SUB-SECT 2. GIFTS BY HUSBAND 161
A. When Presumed 161
(*a*) Property in Wife's Name 161
(*b*) Property in Joint Names 163
(*c*) Money Advanced on Joint Account 165
(*d*) Chattels in Wife's Possession 165
B. Gifts in Fraud of Creditors 166
C. Pin Money 166
SUB-SECT. 3. GIFTS BY WIFE 167
A. Validity 167
(*a*) In General 167
(*b*) Onus of Proof 169
B. When Presumed 169
(*a*) Income 169
i. Received by Husband 169
ii. Retention of Income Due from Husband 172
iii. Accumulations 173
(*b*) Capital 173
i. In Husband's Name 173
ii. In Joint Names 174
iii. Receipt by Husband of Wife's Legacy 174
C. Fund in Court 175
SUB-SECT. 4. PARTIES NOT LEGALLY MARRIED 175
SECT. 10. MARRIAGE SETTLEMENTS 175

PART VII. LIABILITY FOR ANTE-NUPTIAL OBLIGATIONS OF WIFE . . . 175
SECT. 1. LIABILITY OF HUSBAND 175
SUB-SECT. 1. IN GENERAL 175
SUB-SECT. 2. IN RESPECT OF SHARES OWNED BY WIFE 176
SUB-SECT. 3. PROOF OF MARRIAGE. 176
SECT. 2. LIABILITY OF WIFE 176
SUB-SECT. 1. BEFORE MARRIED WOMEN'S PROPERTY ACTS 176
SUB-SECT. 2. SINCE MARRIED WOMEN'S PROPERTY ACTS 177

PART VIII. CONTRACTS OF WIFE DURING COVERTURE 178
SECT. 1. AS PRINCIPAL 178
SUB-SECT. 1. IN GENERAL 178
SUB-SECT. 2. UNDER MARRIED WOMEN'S PROPERTY ACT, 1882 179
SUB-SECT. 3. UNDER MARRIED WOMEN'S PROPERTY ACT, 1893 182
SUB-SECT. 4. "OTHERWISE THAN AS AGENT" 183
SUB-SECT. 5. IN RESPECT OF SHARES 183
SUB-SECT. 6. JOINT OR JOINT AND SEVERAL CONTRACTS 183
SUB-SECT. 7. LIMITATION OF ACTIONS 183
SECT. 2. AS AGENT FOR HUSBAND 183
SUB-SECT. 1. IN GENERAL . . . . .
SUB-SECT. 2. EXPRESS AUTHORITY . . . . .
SUB-SECT. 3. BILLS OF EXCHANGE, PROMISSORY NOTES, ETC. . . . . .
SUB-SECT. 4. HUSBAND UNDISCLOSED PRINCIPAL . . . . . .
SUB-SECT. 5. CREDIT GIVEN TO WIFE OR THIRD PARTY . . . . . .
SUB-SECT. 6. SEPARATE TRADING . . . . . .
SUB-SECT. 7. LIABILITY AS CONTRIBUTORY . . . . . .
SUB-SECT. 8. EFFECT OF JUDGMENT OBTAINED AGAINST WIFE . . . . . .
SUB-SECT. 9. ACKNOWLEDGMENT OF DEBT OF WIFE . . . . . .

PAGE

SUB-SECT. 10. IMPLIED AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR NECESSARIES. 188
SUB-SECT. 11. IMPLIED AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR COSTS . . 188
SUB-SECT. 12. HOLDING OUT 188
A. By Previous Dealings 188
B. Wife Managing Household 188
C. Wife Carrying on Husband's Business 188
D. Revocation of Authority 189
SUB-SECT. 13. RATIFICATION 189
A. In General 189
B. What amounts to Ratification 190
SECT. 3. NECESSARIES 190
SUB-SECT. 1. WHILE LIVING TOGETHER 190
A. Presumption of Husband's Liability 190
(*a*) Presumption from Cohabitation 190
(*b*) Money lent to Wife 192
(*c*) Rebuttal of Presumption 192
i. Warning to Tradesman 192
ii. Prohibition to Wife to Pledge Credit 193
iii. Allowance to Wife 193
iv. Separate Income of Wife 194
v. Extravagance of Wife 194
vi. Sufficient Supply of Articles Ordered 194
vii. Adultery of Wife 195
B. What are Necessaries 195
(*a*) In General 195
(*b*) Particular Instances 195
SUB-SECT. 2. WHILE LIVING APART 196
A. In General 196
B. What Amounts to living Apart 196
C. Separation by Mutual Consent 196
(*a*) Where Agreed Allowance 196
i. Allowance Paid 196
ii. Allowance Not Paid 197
(*b*) Where no Agreed Allowance 198
i. Allowance in fact Made 198
ii. No Allowance Made 199
(*c*) Where Agreement for Separation Void 199
D. Separation without Mutual Consent 199
(*a*) Wife Deserted or Turned Away 199
(*b*) Wife Living Apart with good Cause 200
(*c*) Wife Living Apart without good Cause 201
(*d*) Adultery of Wife 202
i. In General 202
ii. What Evidence Admissible 203
E. Lunacy of Husband 203
F. Separation by Act of Law 203
G. Money lent to Wife 204
H. What are Necessaries 205
SECT. 4. AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR COSTS 206
SUB-SECT. 1. IN MATRIMONIAL CAUSES 206
A. In General 206
B. Conduct of Wife's Solicitor 207
C. Proceedings to Recover 208
SUB-SECT. 2. PROCEEDINGS BY WIFE AGAINST HUSBAND 209
A. Criminal 209
B. Civil 209
SUB-SECT. 3. PROCEEDINGS AGAINST WIFE BY THIRD PARTIES. 209
SUB-SECT. 4. LUNATIC HUSBAND 209

PAGE

SECT. 5. CONTRACTS WITH HUSBAND 209
SUB-SECT. 1. IN GENERAL 209
SUB-SECT. 2. CONTRACTS BETWEEN HUSBAND AND WIFE . . . 210
SUB-SECT. 3. LOANS FOR PURPOSE OF BUSINESS 211
SUB-SECT. 4. LIMITATION OF ACTIONS 211

PART IX. CONTRACTS OF WOMAN PASSING AS WIFE 212

PART X. WRONGS OF WIFE DURING COVERTURE 213
SECT. 1. CRIMES AND OFFENCES 213
SECT. 2. TORTS 213
SUB-SECT. 1. IN GENERAL 213
SUB-SECT. 2. TROVER AND CONVERSION 214
SUB-SECT. 3. LIBEL AND SLANDER 215
SUB-SECT. 4. TRESPASS 215
SUB-SECT. 5. DEATH OF WIFE 215
SUB-SECT. 6. DIVORCE, JUDICIAL SEPARATION AND PROTECTION ORDER . 215
SUB-SECT. 7. HUSBAND AND WIFE LIVING APART 216
SUB-SECT. 8. TORTS ARISING OUT OF CONTRACT 216
SUB-SECT. 9. TORTS AUTHORISED BY HUSBAND 217
SUB-SECT. 10. PLEADING 218
SECT. 3. BREACHES OF TRUST AND DEVASTAVIT 218

PART XI. CONTRACTS FOR SEPARATION 219
SECT. 1. VALIDITY 219
SUB-SECT. 1. IN GENERAL 219
SUB-SECT. 2. CONTRACTS FOR IMMEDIATE SEPARATION 220
SUB-SECT. 3. CONTRACTS FOR FUTURE SEPARATION 221
A. In General 221
B. In Reconciliation Agreements 223
SUB-SECT. 4. WHERE MARRIAGE INVALID 224
SECT. 2. CONSIDERATION 225
SECT. 3. EFFECT OF FRAUD AND DURESS 227
SUB-SECT. 1. FRAUD 227
SUB-SECT. 2. DURESS 228
SECT. 4. WIFE'S POWER TO BIND PROPERTY. 229
SECT. 5. FORM OF AGREEMENT 229
SECT. 6. CONSTRUCTION AND OPERATION 230
SUB-SECT. 1. IN GENERAL 230
SUB-SECT. 2. USUAL CLAUSES. 230
SUB-SECT. 3. COVENANT NOT TO MOLEST OR ANNOY 230
SUB-SECT. 4. COVENANT TO PAY ANNUITY TO WIFE 231
SUB-SECT. 5. COVENANT TO INDEMNIFY HUSBAND AGAINST WIFE'S DEBTS 233
SUB-SECT. 6. PROVISIONS AS TO WIFE'S PROPERTY 234
SUB-SECT. 7. PROVISION FOR CUSTODY AND MAINTENANCE OF CHILDREN . 234
SUB-SECT. 8. TRUSTS FOR CHILDREN 235
SUB-SECT. 9. SATISFACTION OF DOWER, ETC. 235
SUB-SECT. 10. SATISFACTION BY LEGACY OF PAYMENTS DUE UNDER DEED 236
SUB-SECT. 11. EFFECT OF SUBSEQUENT ADULTERY OF WIFE . . .
SUB-SECT. 12. EFFECT OF SUBSEQUENT MISCONDUCT OF HUSBAND . . 237
SUB-SECT. 13. EFFECT OF COVENANT NOT TO SUE 238
SECT. 7. BREACH OF CONTRACT 238
SUB-SECT. 1. IN GENERAL 238
SUB-SECT. 2. REMEDIES FOR BREACH 239
A. Habeas Corpus 239

PAGE

B. Action 239
C. Specific Performance 241
D. Injunction 243
E. Proof for Annuity in Bankruptcy 244
SECT. 8. RECONCILIATION 244
SECT. 9. VARIATION OF SEPARATION DEED 246

PART XII. LEGAL PROCEEDINGS 248
SECT. 1. CIVIL PROCEEDINGS 248
SUB-SECT. 1. BY AND AGAINST MARRIED WOMEN 248
A. In General 248
B. Under Married Women's Property Act, 1882 248
(*a*) Capacity to Sue and be Sued 248
(*b*) Security for Costs 249
(*c*) Actions in formâ pauperis 250
(*d*) Undertakings in Damages 250
(*e*) Third Party Procedure 251
(*f*) Payment into Court 251
(*g*) Damages recovered Separate Property 251
(*h*) Effect of Marriage during Proceedings 251
(*i*) Limitation of Actions 251
C. Joinder of Causes of Action 251
D. Discovery, Interrogatories, etc. 251
E. Compromise of Actions 252
F. Judgments against Married Women 252
(*a*) In Respect of Contracts during Coverture 252
(*b*) In Respect of Ante-Nuptial Obligations and Torts during Coverture . . 253
(*c*) Under R. S. C., Order 14 253
(*d*) Judgments for Costs 254
G. Execution 254
(*a*) What Property Available 254
(*b*) Receivers 254
(*c*) Garnishee Proceedings 255
(*d*) Sequestration 256
(*e*) Discovery in Aid of Execution 256
(*f*) Attachment and Committal 256
H. Payment Out of Court 256
(*a*) Affidavit of No Settlement 256
(*b*) Separate Examination 257
I. Costs 257
SUB-SECT. 2. BETWEEN HUSBAND AND WIFE 258
A. Remedies for Protection of Private Property 258
B. In Tort 259
C. In Contract 260
D. Inquiry as to Ownership of Property 260
E. By Wife de facto 261
SECT. 2. CRIMINAL PROCEEDINGS BETWEEN HUSBAND AND WIFE 261
SUB-SECT. 1. BY HUSBAND AGAINST WIFE 261
SUB-SECT. 2. BY WIFE AGAINST HUSBAND 261
SUB-SECT. 3. COMPETENCY OF SPOUSES TO GIVE EVIDENCE 261
SECT. 3. RIGHTS AND LIABILITIES IN BANKRUPTCY PROCEEDINGS 261

PART XIII. MATRIMONIAL CAUSES 262
SECT. 1. DIVORCE DIVISION 262
SUB-SECT. 1. THE COURT 262
SUB-SECT. 2. BUSINESS OF THE COURT 262
SUB-SECT. 3. HOW PRACTICE AND PROCEDURE GOVERNED 263
SECT. 2. MARRIAGES VOID AB INITIO 264
SECT. 3. VOIDABLE MARRIAGES 265
SUB-SECT. 1. IN GENERAL 265

PAGE
SUB-SECT. 2. FOR IMPOTENCE. 265
A. In General 265
B. Who may seek Relief 266
C. What Constitutes Impotence 266
D. Presumption of Impotence 268
(a) Wilful Refusal to Cohabit 268
(b) Wilful Refusal to Consummate 268
(c) Non-Consummation after Lapse of Reasonable Time 269
(d) Non-Consummation after Triennial Cohabitation 270
(e) Rebuttal of Presumption 271
E. Proof of Impotence 271
F. Persons of Advanced Age 271
G. Medical Examination 272
SUB-SECT. 3. MARRIAGE BY PERSONS UNDER AGE 272
SECT. 4. JACTITATION OF MARRIAGE 272
SECT. 5. MATRIMONIAL OFFENCES AND REMEDIES THEREFOR 273
SUB-SECT. 1. FAILURE TO RENDER CONJUGAL RIGHTS—RESTITUTION. 273
A. In General 273
B. Persons Entitled to seek Relief 273
C. Proof of Marriage 273
D. Written Demand for Return to Cohabitation 274
E. Sincerity of Petitioner 275
F. Defences 275
(a) In General 275
(b) Justifiable Withdrawal from Cohabitation 276
(c) Separation by Mutual Consent 278
(d) Covenant by Petitioner not to sue 279
G. Service of Citation and Decrees 280
H. Enforcement of Decrees 281
SUB-SECT. 2. CRUELTY 281
A. In General 281
B. What Constitutes 281
(a) In General 281
(b) Single Acts of Cruelty 283
(c) Conduct injurious to Health or rendering Cohabitation unsafe . . . 284
(d) Physical Violence 285
(e) Threats with or without Violence 286
(f) Abuse with or without Violence 287
(g) Drunkenness 287
(h) Subjection to Indignity, Neglect, Indifference, Aversion from Society, etc. . 288
(i) Groundless Charges of Immorality 289
(j) Communication of Disease 289
(k) Cruelty to or Neglect of Children 290
(l) Other Cases 290
C. Cruelty on Part of Wife 290
D. Evidence of Cruelty 291
(a) In General 291
(b) Corroboration 292
(c) Medical Evidence 293
E. Defences to Charges of Cruelty 293
F. Remedies 293
SUB-SECT. 3. ADULTERY. 293
A. In General 293
B. Proof of Adultery 294
(a) In General 294
(b) Circumstantial Evidence 295
(c) Birth of Children 297
(d) Visits to Houses of Ill Repute 299
(e) Decrees and Admissions in Previous Proceedings 299
(f) Confessions and Admissons 300
i. In General 300
ii. Statements to Third Parties 300
iii. Corroboration . . . . . .

PAGE

C. Corroboration of Testimony 302
D. Competency of Witnesses 303
E. Admissibility of Evidence 303
(a) In General 303
(b) Incontinence before Marriage 304
F. Remedies 304
(a) In General 304
(b) Petition for Damages only 304

SUB-SECT. 4. INCESTUOUS ADULTERY . . . . . .
SUB-SECT. 5. BIGAMY AND ADULTERY . . . . . .
SUB-SECT. 6. COMMISSION OF UNNATURAL OFFENCES 306
SUB-SECT. 7. RAPE 306
SUB-SECT. 8. DESERTION 306

A. In General 306
B. What is Desertion 307
(a) In General 307
(b) Withdrawal from Existing State of Cohabitation 308
(c) Intention to Desert 309
(d) Consent of Petitioner to Separation 310
(e) Refusal to resume Conjugal Relations 312
i. In General 312
ii. By Respondent 312
iii. By Petitioner. 313
(f) Constructive Desertion—Wife forced out of Matrimonial Home . . 315
(g) Deeds of Separation—Effect of 317
C. Statutory Desertion 318
D. Commencement of Desertion 318
(a) In General 318
(b) Where Separation originally by Consent 318
E. Continuance of Desertion 319
F. Termination of Desertion 319
(a) In General 319
(b) Effect of Petition in Matrimonial Court or Order of Justices . . . 319
G. Defences to Charge of Desertion 321
(a) Separation by Consent 321
(b) Offer to resume Cohabitation 321
(c) Reasonable Cause for Withdrawal from Cohabitation 322
H. Evidence 323
I. Remedies 323

SECT. 6. LEGITIMACY DECLARATIONS 323
SECT. 7. BARS TO RELIEF 323
SUB-SECT. 1. IN GENERAL 323
SUB-SECT. 2. INSANITY 323
SUB-SECT. 3. ABSOLUTE BARS. 324
A. Res judicata; Estoppel 324
(a) In General 324
(b) Previous Findings of Fact 324
(c) Admissions and Agreements as to Proceedings 325
(d) Where the Parties are Separated 325
B. Connivance 326
(a) In General 326
(b) What is Connivance 327
i. In General 327
ii. Knowledge of Adultery 328
iii. Where there is Likelihood of Adultery 329
iv. Where the Parties are Separated 330
v. Adultery induced by Agent 331
vi. Passive Connivance 331
(c) Conduct not amounting to Connivance 331

PAGE

C. Collusion 332
(a) In General 332
(b) What is Collusion 333
i. In General 333
ii. Agreements to Institute Proceedings 334
iii. Agreements Not to Defend 334
iv. Suppression of Material Facts 334
v. Other Cases 335
D. Condonation 336
(a) In General 336
(b) What is Condonation 337
i. In General 337
ii. Return to or Continuation of Matrimonial Cohabitation . . 339
(c) Full Knowledge of Act Condoned 340
(d) Condonation by Wife 341
(e) Condonation after Decree Nisi 342
(f) Effect on Claim for Damages against Co-Respondent . . . 342
(g) Pleading and Proof 342
(h) Revival of Condoned Offence 343
i. In General 343
ii. Where Condonation before Separation 343
iii. Sufficiency of Offence to constitute Revival . . . 345
iv. Revival of Condoned Adultery 345
v. Revival of Condoned Cruelty 347
vi. Revival of Condoned Desertion 347
SUB-SECT. 4. DISCRETIONARY BARS. 347
A. Discretion of Court Generally 347
B. Undue Delay 348
(a) In General 348
(b) In Suits for Dissolution of Marriage 349
(c) In Suits for Judicial Separation 350
(d) In Suits for Nullity 350
i. On Ground of Impotence 350
ii. On Ground of Minority 352
(e) In Suits for Restitution of Conjugal Rights 352
(f) Excuses for Delay 352
i. In General 352
ii. Poverty 354
iii. Other Excuses 355
C. Conduct conducing to Adultery 355
(a) In Suits for Dissolution of Marriage 355
i. Discretion of Court. 355
ii. "Wilful Neglect or Misconduct" 355
iii. Where the Parties are Separated 357
iv. Where the Wife is known to be frail. 358
v. Wife Conducing to Husband's Adultery 359
(b) In Suits for Judicial Separation 359
(c) In Suits claiming Damages only 359
D. Petitioner's Adultery 359
(a) In Suits for Dissolution of Marriage 359
i. In General 359
ii. Discretion of Court 359
iii. Petitioner guilty of Single Lapse 361
iv. Prospect of Regularising Illicit Union 362
v. Petitioner's Adultery Condoned by Respondent . . 362
vi. Respondent's Conduct Conducing to Petitioner's Adultery 364
vii. Adultery not Amitted by Petitioner 366
viii. Adultery in Ignorance of Law or under Mistake of Fact . 366
ix. Proof of Adultery. 367
x. Other Cases 367
(b) In Suits for Judicial Separation 367
(c) In Suits for Restitution of Conjugal Rights 369
(d) In Suits for Nullity of Marriage 370
(e) In Suits claiming Damages only 370

PAGE

E. Petitioner's Cruelty 370
(a) In General 370
(b) In Suits for Dissolution of Marriage 370
(c) In Suits for Judicial Separation 372
(d) In Suits for Restitution of Conjugal Rights 372
F. Petitioner's Desertion or Wilful Separation without Reasonable Excuse . . 372
(a) In Suits for Dissolution of Marriage 372
(b) In Suits for Judicial Separation 374
(c) In Suits for Restitution of Conjugal Rights 375
SECT. 8. INSTITUTION AND DEFENCE OF PROCEEDINGS 375
SUB-SECT. 1. PETITIONS AND CONTENTS THEREOF 375
A. In General 375
B. Indorsement of Notice to Appear 375
C. Petitions for Restitution of Conjugal Rights 375
(a) In General 375
(b) Preliminary Demand for Cohabitation 375
D. Petitions for Judicial Separation 376
E. Petitions for Nullity of Marriage 376
F. Petitions for Dissolution of Marriage 376
(a) In General 376
(b) Claiming Damages against Co-Respondent 378
G. Supplemental Petitions 378
SUB-SECT. 2. AFFIDAVITS VERIFYING PETITIONS 378
SUB-SECT. 3. AMENDMENT OF PLEADINGS 379
A. In General 379
B. Leave to Amend 379
C. Where Charges Inferential 379
D. Corrections of Dates, Names, Places, etc. 379
E. Additional Charges 380
F. New Co-Respondents 381
G. Countercharges 381
H. Amendment of Prayer 381
I. Petitions Claiming Damages 382
J. Re-Service of Amended Petitions 382
SUB-SECT. 4. PARTIES 383
A. In General 383
B. Minors 383
C. Persons of Unsound Mind 383
D. Pauper Suitors 384
E. Co-Respondents 384
(a) Jurisdiction of Court over Co-Respondents 384
(b) Necessity to make every Alleged Adulterer Co-Respondent . . . 384
i. In General 384
ii. "Special Grounds" Dispensing with Necessity 385
iii. Adultery alleged in Countercharges 387
iv. Adultery alleged both with Specified and Unknown Persons . . 387
(c) Leave to proceed without naming Co-Respondents 388
F. Parties by Intervention 388
(a) In General 388
(b) Adultery alleged in Countercharges 389
(c) Where King's Proctor has intervened 390
SUB-SECT. 5. SERVICE 390
A. In General 390
B. Necessity for Personal Service 391
C. Service on Persons under Disability 391
D. Service out of the Jurisdiction 391
(a) In General 391
(b) In Suits for Dissolution of Marriage 391
(c) In Suits for Judicial Separation 392
(d) In Suits for Restitution of Conjugal Rights 392
(e) In Suits for Nullity of Marriage 393

PAGE
E. Substituted Service 393
(a) When Granted 393
i. In Suits for Dissolution of Marriage 393
ii. In Suits for Judicial Separation 394
iii. In Suits for Restitution of Conjugal Rights 394
(b) Application for Leave to Effect 395
(c) Methods of Substituted Service 395
i. In General 395
ii. By Registered Post 395
iii. By Advertisement in the Press 395
F. Proof of Service—Affidavits 395
G. Dispensation with Service 396
SUB-SECT. 6. FILING 396
SUB-SECT. 7. APPEARANCE 397
A. In General 397
B. Time for Appearance 397
C. Absolute Appearance 398
D. Appearance under Protest 398
SUB-SECT. 8. PARTICULARS OF PLEADINGS 399
A. In General 399
B. Particulars of Charges of Adultery 399
C. Particulars of Charges of Cruelty 400
SUB-SECT. 9. STRIKING OUT PLEADINGS AND PARTICULARS 400
SUB-SECT. 10. ANSWER TO PETITION 402
A. In General 402
B. In Suits for Dissolution of Marriage 402
C. In Suits for Judicial Separation 403
D. In Suits for Restitution of Conjugal Rights 403
E. In Suits for Nullity of Marriage 403
F. In Suits for Jactitation of Marriage 404
G. Affidavit verifying Answer 404
SUB-SECT. 11. CROSS-PETITIONS AND CROSS-PRAYERS 404
A. In Suits for Dissolution of Marriage 404
B. In Suits for Judicial Separation 404
C. In Suits for Restitution of Conjugal Rights 404
D. In Suits for Nullity 405
E. Withdrawal of Original Petition 405
SUB-SECT. 12. REPLIES 405
SECT. 9. PROCEEDINGS PENDING SUIT 406
SUB-SECT. 1. ALIMONY PENDENTE LITE 406
A. Jurisdiction to Grant 406
B. When Granted 406
(a) In General 406
(b) Where Husband has Small or No Means 407
(c) Where Wife has Separate Property 408
(d) Where Parties have been Separated before Proceedings 409
(e) In Suits for Nullity of Marriage 410
C. Amount 410
D. Calculation of Husband's Income 411
(a) In General 411
(b) What must be included 411
(c) What may be deducted 412
E. Duration 413
(a) Commencement 413
(b) Suspension 413
(c) Termination 413
F. Increase or Reduction of Amount 414
G. Payment 414
H. Alienation 414

PAGE

I. Procedure 415
(a) Time for Application 415
(b) Service of Petitions and Orders 415
(c) Pleadings 415
(d) Evidence 416
i. In General 416
ii. Attendance of Husband for Cross-Examination . . . 417
(e) Production and Inspection of Documents 417
J. Costs of Application 417
K. Enforcement of Order 417
SUB-SECT. 2. DISPUTES AS TO PROPERTY 418
SUB-SECT. 3. CUSTODY AND MAINTENANCE OF, AND ACCESS TO CHILDREN 418
A. Custody 418
(a) In General 418
(b) To Whom Given 418
(c) What Court will Consider 418
(d) Practice and Procedure. 419
(e) Costs of Application 420
(f) Enforcement of Order 420
B. Maintenance 420
C. Access 420
SUB-SECT. 4. SECURITY FOR COSTS 421
A. In General 421
B. Against Whom Ordered 421
C. Costs of Co-Respondent 421
D. Wife's Costs 421
SUB-SECT. 5. WIFE'S COSTS 421
A. In General 421
B. Costs of Particular Proceedings 422
C. Where Husband has No Means 422
D. Where Wife has Separate Estate 423
E. After Judicial Separation or Separation Order 423
F. In Nullity Suits 423
G. Delay in Application 423
H. Practice and Procedure 424
SECT. 10. PREPARATIONS FOR TRIAL 424
SUB-SECT. 1. DISCOVERY, INSPECTION, INTERROGATORIES, ETC. . . . 424
A. Discovery 424
B. Production and Inspection 425
C. Interrogatories 425
D. Inspection of the Person 426
SUB-SECT. 2. ARRANGEMENTS FOR HEARING 427
A. Setting down Causes 427
B. Application for Directions 428
C. Trial by Jury 428
D. Trial of Issues 428
E. Consolidation of Cross-Suits 428
F. Postponement of Trial 429
SECT. 11. EVIDENCE 429
SUB-SECT. 1. IN GENERAL 429
SUB-SECT. 2. PROOF OF MARRIAGE 429
SUB-SECT. 3. IN "PROCEEDINGS INSTITUTED IN CONSEQUENCE OF ADULTERY" 430
A. Competency of Witnesses 430
B. Protection of Witnesses 430
(a) In General 430
(b) In What Proceedings 430
(c) In What Circumstances. 431
SUB-SECT. 4. PRIVILEGE OF WITNESSES 432
SUB-SECT. 5. ADMISSIBILITY OF EVIDENCE 432
SUB-SECT. 6. EXAMINATION IN CHIEF 433

PAGE
SUB-SECT. 7. CROSS-EXAMINATION 433
SUB-SECT. 8. EXAMINATION OF WITNESSES BY ORDER OF COURT 434
A. Examination of Petitioner 434
B. Other Witnesses 434
SUB-SECT. 9. IMPEACHING CREDIT OF WITNESSES 435
SUB-SECT. 10. PRODUCTION OF DOCUMENTS AT TRIAL 435
SUB-SECT. 11. PROOF OF IDENTITY OF PARTIES 435
SUB-SECT. 12. PETITIONS FOR DAMAGES ONLY 436
SECT. 12. PROOF BY AFFIDAVITS 437
SUB-SECT. 1. IN GENERAL 437
SUB-SECT. 2. WHAT MAY BE PROVED BY AFFIDAVIT 437
A. Adultery 437
B. Other Matters 438
SUB-SECT. 3. GROUNDS FOR GRANTING OR REFUSING LEAVE 438
SECT. 13. COMMISSIONS TO TAKE EVIDENCE 439
SUB-SECT. 1. IN GENERAL 439
SUB-SECT. 2. AFFIDAVITS IN SUPPORT OF APPLICATION 439
SUB-SECT. 3. WHEN ORDER MADE 439
SUB-SECT. 4. AT WHAT STAGE OF PROCEEDINGS ORDER MADE 439
SUB-SECT. 5. FORM OF ORDER 440
SUB-SECT. 6. APPOINTMENT OF COMMISSIONERS 440
SUB-SECT. 7. THE EXAMINATION 440
SUB-SECT. 8. RE-OPENING COMMISSIONS 440
SUB-SECT. 9. ADMISSIBILITY OF EVIDENCE TAKEN ON COMMISSION 440
SUB-SECT. 10. SECURITY FOR COSTS 441
SECT. 14. STAY OF PROCEEDINGS 441
SUB-SECT. 1. IN GENERAL 441
SUB-SECT. 2. WHEN ORDERED 441
A. In General 441
B. Non-Compliance with Orders of Court 442
SECT. 15. DISPOSING OF CAUSES 443
SUB-SECT. 1. BY ABATEMENT ON DEATH OF PARTIES 443
A. In General 443
B. Death of Petitioner 443
C. Death of Respondent 444
D. Death of Co-Respondent 444
E. Wife's Costs and Alimony 444
SUB-SECT. 2. BY DISMISSAL OR WITHDRAWAL OF PETITION 445
A. In General 445
B. For Want of Prosecution 445
(*a*) In General 445
(*b*) The Application to Dismiss 445
(*c*) When Order for Dismissal made 446
(*d*) Form and Contents of Order 446
(*e*) Dismissal on Terms 446
SUB-SECT. 3. COMPROMISE OF PROCEEDINGS 447
SUB-SECT. 4. BY STRIKING OUT 448
SUB-SECT. 5. BY TRIAL OR HEARING 448
SECT. 16. THE TRIAL OR HEARING 448
SUB-SECT. 1. MODE OF TRIAL—TRIAL BY JURY 448
A. In General 448
B. In Suits for Dissolution of Marriage 448
C. In Other Suits 449
SUB-SECT. 2. PLACE OF TRIAL 450
SUB-SECT. 3. POSTPONEMENT OF TRIAL 450
SUB-SECT. 4. PROCEDURE AT TRIAL 450
A. In General 450
B. Right to Begin 451

PAGE

SUB-SECT. 5. ASSESSMENT OF DAMAGES 452
A. In General 452
B. By Whom Assessed 452
C. Duty to Assess 452
D. Principles governing Assessment 453
(a) In General 453
(b) Damages Compensatory 453
(c) Where Co-Respondent ignorant that Respondent married . . . 453
(d) Conduct of Parties 454
E. Measure of Damages 454
(a) Compensation for Loss of Wife 454
(b) Where the Parties have Separated 455
(c) Co-Respondent's Rank and Fortune 456
F. Matters in Aggravation and Mitigation 456
G. Agreements as to Damages 456
SECT. 17. FINDING AND DECREE 457
SUB-SECT. 1. JUDGMENTS AND VERDICTS. 457
SUB-SECT. 2. DECREE 457
SUB-SECT. 3. CUSTODY OF AND ACCESS TO CHILDREN 459
A. In General 459
B. Jurisdiction of Court 459
C. When Granted 459
D. To Whom Custody Given 460
E. Variation or Rescission 461
F. Declaration of Unfitness of Guilty Parent 461
(a) Conduct of Respondent Justifying Order 461
(b) Rescission of Order 461
G. Access 461
H. Practice and Procedure 462
SUB-SECT. 4. ORDER FOR DAMAGES 462
SUB-SECT. 5. ORDER FOR COSTS 462
SECT. 18. ORDER FOR COSTS 462
SUB-SECT. 1. IN GENERAL 462
SUB-SECT. 2. DISCRETION OF COURT 463
SUB-SECT. 3. BETWEEN HUSBAND AND WIFE 465
A. In General 465
B. Petition by Wife 465
C. Petition by Husband 467
(a) In General 467
(b) Petition Successful 467
(c) Petition Unsuccessful 467
D. Conduct of Wife's Solicitor 468
E. Where Wife has Separate Property 469
(a) Discretion of Court 469
(b) Wife's Liability for Costs 469
(c) Wife's Right to Costs 470
F. What Costs Allowable 470
(a) In General 470
(b) When Limited to Security in Court 471
(c) When Not Limited to Security in Court 472
SUB-SECT. 4. BETWEEN PETITIONER AND CO-RESPONDENT 472
A. Discretion of Court 472
B. Liability of Petitioner 472
C. Liability of Co-Respondent 473
(a) In General 473
(b) Effect of Conduct of Petitioner 474
(c) Knowledge of Co-Respondent that Respondent Married 475
i. In General 475
ii. Proof of Knowledge 476
iii. Knowledge Acquired after Commencement of Adultery . . . 476
Rescission of Decree Nisi 476

PAGE
SUB-SECT. 5. BETWEEN OTHER PARTIES 477
SUB-SECT. 6. PARTIES SUING IN FORMÂ PAUPERIS . . . 477
SUB-SECT. 7. APPLICATION FOR COSTS 477
SUB-SECT. 8. ENFORCEMENT OF ORDER 478
SUB-SECT. 9. APPEAL FROM ORDER. 479
SECT. 19. FUNCTIONS OF KING'S PROCTOR 479
SUB-SECT. 1. INTERVENTION AT INSTANCE OF COURT . . 479
SUB-SECT. 2. INTERVENTION BEFORE DECREE NISI . . . 479
A. On What Grounds 479
B. Effect of Intervention 480
C. Procedure 480
SUB-SECT. 3 SHOWING CAUSE AGAINST A DECREE . . . 480
SECT. 20. SHOWING CAUSE AGAINST A DECREE 480
SUB-SECT. 1. WHO MAY SHOW CAUSE 480
SUB-SECT. 2. WHEN CAUSE MUST BE SHOWN 481
SUB-SECT. 3. ON WHAT GROUNDS 481
A. Collusion 481
B. Suppression of Material Facts 481
(*a*) In General 481
(*b*) Adultery not admitted by Petitioner . . . 482
SUB-SECT. 4. PLEADING AND PRACTICE 483
A. Intervention by King's Proctor 483
(*a*) No Opposition to Motion to Rescind . . . 483
(*b*) Particulars 484
(*c*) Pleading 484
(*d*) Discovery 484
(*e*) Hearing 485
(*f*) Evidence 485
(*g*) Costs 485
i. Successful Intervention 485
ii. Unsuccessful Intervention 486
B. Intervention by Member of Public 487
SECT. 21. APPEALS, RE-HEARING, NEW TRIAL, ETC. . . . 487
SUB-SECT. 1. APPEALS 487
A. Who may appeal 487
B. Decrees Nisi and Absolute 487
C. Interlocutory Orders 488
D. Appeal as to Costs 489
SUB-SECT. 2. RE-HEARING 490
SUB-SECT. 3. NEW TRIAL 491
A. The Application 491
B. When Granted 491
(*a*) In General 491
(*b*) Whole Verdict not Attacked 493
C. Appeal from Grant or Refusal 494
SUB-SECT. 4. REVERSAL OF DECREES OF JUDICIAL SEPARATION . 494
SUB-SECT. 5. DISCHARGE OF PROTECTION ORDERS 494
SECT. 22. PROCEEDINGS AFTER DECREE 494
SUB-SECT. 1. PERMANENT ALIMONY 494
A. In General 494
B. Jurisdiction to Grant 495
C. When Granted 495
D. Amount 495
(*a*) In General 495
(*b*) Proportion of Husband's Income Allotted . . 496
(*c*) Where Wife has Separate Property or Income . . 496
E. Duration 497
F. Increase or Reduction of Amount 497

PAGE

G. Payment 498
H. Alienation 499
I. Procedure 499
(a) The Application 499
(b) Inquiry as to Husband's Income 499
(c) Other Cases 500
J. Costs of Application 500
K. Enforcement of Order 500

SUB-SECT. 2. MAINTENANCE 500
A. In General 500
B. Jurisdiction to Grant 500
C. When Granted 501
D. Amount of Order 502
(a) On Dissolution of Marriage 502
(b) On Decree of Nullity of Marriage 505
E. Duration 505
F. Variation of Order 505
G. Dum sola et casta Clauses 506
H. Payment 507
(a) In General 507
(b) Payment of Lump Sum 508
(c) Weekly and Monthly Payments 508
(d) Deduction of Income Tax on Allowance. *See* INCOME TAX.
I. Security for Maintenance 508
J. Alienation or Release 510
K. Procedure 510
(a) The Application 510
(b) Service of Petition 511
(c) Inquiry as to Husband's Income 511
(d) Reference to Registrar 511
(e) The Order 511
L. Enforcement of Order 512

SUB-SECT. 3. PAYMENTS ON DISOBEDIENCE TO ORDER FOR RESTITUTION OF CONJUGAL RIGHTS 513

SUB-SECT. 4. SETTLEMENT OF PROPERTY OF GUILTY WIFE 514
A. In General 514
B. Property Subject to Control of Court 516
C. The Order 516
(a) In General 516
(b) Amount of Order 516
D. Payment of Allowance. 517

SUB-SECT. 5. VARIATION OF SETTLEMENTS 517
A. In General 517
B. Jurisdiction of Court 518
(a) In General 518
(b) "Settlement" and "Property Settled" 520
C. What Court will Consider 521
D. What Orders will be Made 523
(a) Object of Orders 523
(b) Extinction or Modification of Guilty Party's Interest in Settled Funds . 523
(c) Variation, Postponement and Extinction of Powers of Appointment . . 525
(d) Reconveyance to Parties of Settled Property 526
(e) Application of Settled Property for Benefit of Children 527
(f) Variation of Separation Deeds 528
(g) In Nullity Suits 528
(h) Dum sola and dum sola et casta Clauses 528
(i) As to Heirlooms 529
(j) Extinction of Contingent Interests 529
(k) Payment of Costs out of Settled Funds 529
E. Amount Ordered to be Settled 529
F. Review of Orders 529

PAGE

G. Practice and Procedure 530
(a) The Application 530
(b) Service of Petition 531
(c) The Answer 531
(d) The Hearing 531
(e) Inquiry as to Legitimacy of Children 532
(f) The Order 532
(g) Costs 532
SUB-SECT. 6. CUSTODY, MAINTENANCE AND EDUCATION OF CHILDREN . 533
A. Custody 533
(a) Jurisdiction of Court 533
(b) To Whom given 533
(c) What Court will Consider 535
(d) Change of Custody 535
(e) Practice and Procedure 535
(f) Costs 535
(g) Enforcement of Order 535
535
C. Maintenance and Education 536
SUB-SECT. 7. APPORTIONMENT OF DAMAGES . . 537
A. How Apportioned 537
B. Variation of Order 538
C. Practice and Procedure 538
D. Costs 538
SUB-SECT. 8. TAXATION OF COSTS 538
A. In General 538
B. What Costs May be Allowed . . . 539
C. Review of Taxation and Appeals . . . 540
SECT. 23. ENFORCING ORDERS AND AUTHORITY OF COURT 540
SUB-SECT. 1. IN GENERAL 540
SUB-SECT. 2. AGAINST WHOM ENFORCED . . 540
SUB-SECT. 3. HOW ENFORCED 541
A. In General 541
B. Attachment and Committal 541
(a) In What Cases Granted . . . 541
(b) Practice 543
C. Sequestration 545
D. Writ of fieri facias 545
E. Writ of elegit 546
F. Charging Orders 546
G. Garnishee Orders 547
H. Appointment of Receiver 547
I. Writ ne exeat regno 547
J. By Injunction 547
K. By Stay of Proceedings 547
L. By Action in King's Bench Division . . 548
M. By Proceedings in Bankruptcy . . . 548
SECT. 24. INJUNCTIONS 548
SUB-SECT. 1. IN GENERAL 548
SUB-SECT. 2. RESTRAINT ON DEALING WITH PROPERTY 548
SECT. 25. DECREES ABSOLUTE 549
SUB-SECT. 1. POWER OF COURT 549
A. As to Time within which to Make Decree . 549
B. To Impose Terms before Making Decree . 550
SUB-SECT. 2. APPLICATION FOR DECREE . . . 550
A. In General 550
B. Affidavit in Support 551
C. Time for Making 551
(a) In General 551
(b) Effect of Delay 551

PAGE

SUB-SECT. 3. GROUNDS FOR REFUSING DECREE . . . 551
SUB-SECT. 4. SUSPENSION OF DECREE 552
SUB-SECT. 5. FORM AND AMENDMENT 553
SUB-SECT. 6. EFFECT 553
A. In General 553
B. On Right to Remarry 553
C. Wife's Right to Husband's Name after Divorce . . 553
D. On Rights to Property 553
SECT. 26. EFFECT OF DECREES IN SUITS OTHER THAN DIVORCE . 553
SUB-SECT. 1. JUDICIAL SEPARATION 553
SUB-SECT. 2. NULLITY OF MARRIAGE 554
SUB-SECT. 3. JACTITATION OF MARRIAGE 554
SECT. 27. SUMMARY JURISDICTION 554
SUB-SECT. 1. JURISDICTION OF COURT 554
SUB-SECT. 2. ON WHAT GROUND RELIEF WILL BE GIVEN . 555
A. Assault 555
(*a*) Summary Conviction 555
(*b*) Conviction on Indictment 555
B. Desertion 555
C. Persistent Cruelty causing Wife to leave and live apart . 556
D. Neglect to Maintain causing Wife to leave and live apart 557
E. Habitual Drunkenness 557
F. Husband suffering from Venereal Disease . . . 558
G. Husband compelling Wife's Prostitution . . .
SUB-SECT. 3. NATURE OF RELIEF GIVEN. 558
A. In General 558
B. Separation Orders 558
C. Orders for Maintenance 558
(*a*) Of Wife 558
(*b*) Of Children 559
D. Custody of Children 559
E. Protection Orders 559
SUB-SECT. 4. COMPLAINTS 560
A. Time for making Complaints 560
B. Defences to Complaints 561
C. Withdrawal of Complaints 562
SUB-SECT. 5. FORM OF SUMMONS 562
SUB-SECT. 6. HEARING BEFORE MAGISTRATES . . . 562
A. In General 562
B. Notes of Proceedings by Magistrate's Clerk . . 563
C. Adjournment 564
D. Orders 564
(*a*) Form of Orders 564
(*b*) Enforcement of Orders 564
(*c*) Discharge and Variation of Orders . . . 565
E. Costs 568
F. Rehearing 568
SUB-SECT. 7. APPEALS 568
A. To What Court 568
B. What Matters Appealable 569
C. Practice 569
D. Jurisdiction of Court on Appeal 570
E. Costs 570
F. Notes of Proceedings before Magistrates . . 571

PART XIV. DIVORCE BILLS. *See* PARLIAMENT.

PART XV. CONFLICT OF LAWS 571

PART XVI. COSTS 572

Abduction with Intent to Marry	*See* CRIMINAL LAW.
Bankruptcy of Married Women	BANKRUPTCY.
Coercion as a Defence in Criminal Cases	CRIMINAL LAW.
Criminal Proceedings between Husband and Wife	,, CRIMINAL LAW.
Curtesy	,, COPYHOLDS; REAL PROPERTY.
Custody of Children generally	,, INFANTS.
Domicil	,, CONFLICT OF LAWS.
Dower	,, REAL PROPERTY.
Education of Children	,, EDUCATION; INFANTS.
Felonious and Irregular Marriages	,, CRIMINAL LAW.
Foreign Divorces	,, CONFLICT OF LAWS.
Foreign Marriages	,, CONFLICT OF LAWS.
Frecbench	,, COPYHOLDS; REAL PROPERTY.
Guardian and Ward	,, INFANTS.
Husband and Wife, when Competent or Compellable Witnesses against each other	,, CRIMINAL LAW; EVIDENCE.
Instigation of Breach of Trust by Married Woman	,, TRUSTS AND TRUSTEES.
Joint Income, Assessment for Income Tax	,, INCOME TAX.
Jointure	,, SETTLEMENTS.
Legitimacy Declaration	,, BASTARDY.
Legitimation by subsequent Marriage	,, BASTARDY.
Maintenance of Children	*See* INFANTS.
Married Women as Executors or Administrators	,, EXECUTORS.
Married Women as Protectors of Settlements	,, REAL PROPERTY.
Married Women as Trustees	,, TRUSTS AND TRUSTEES.
Marriage Brocage	,, BONDS; CONTRACT.
Marriage of Ward of Court	,, INFANTS.
Marriage Settlements	,, SETTLEMENTS.
Mortgages by Married Women	,, MORTGAGE.
Nationality of Married Women	,, CONFLICT OF LAWS.
Privilege of Husband and Wife as Witnesses	,, CRIMINAL LAW; EVIDENCE.
Publication in Actions for Defamation	,, LIBEL AND SLANDER.
Registration of Marriages	,, REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.
Restraint of Marriage	,, BONDS; CONTRACT; WILLS.
Revocation of Will by Marriage	,, WILLS.
Royal Marriages	,, CONSTITUTIONAL LAW.
Settlements	,, SETTLEMENTS.
Widow's Share in Personalty on Death of Husband Intestate	DESCENT, EXECUTORS.
Wills of Married Women	WILLS.

Part I.—Contracts to Marry.

SECT. 1.—FORMATION OF.

SUB-SECT. 1.—MUTUALITY.

Formation of contracts generally, *see* CONTRACT, Vol. XII., pp. 51 *et seq.*

1. Necessity for.]—Actions would lie upon mutual promises of marriage.—COCK *v.* RICHARDS (1805), 10 Ves. 429; 32 E. R. 911, L. C.

2. ——.]—VINEALL *v.* VENESS, No. 3, *post.*

SUB-SECT. 2.—OFFER AND ACCEPTANCE.

3. General rule.]—In an action by a woman for breach of promise of marriage, it must appear, not only that deft. proposed, or even promised to marry pltf., but that she promised to marry deft.; for in this, as in all other cases, a contract must be mutual; &, although the assent to the engagement on both sides need not appear to have been strictly concurrent, it must appear to have been within a reasonable time.—VINEALL *v.* VENESS (1865), 4 F. & F. 344, N. P.

4. Acceptance on part of woman—Necessity for.]—In *assumpsit* by a woman for breach of a promise of marriage, it is enough to aver that she was *semper parata*, without saying *obtulit se*.

On promise that concerns marriage an action will lie (ATKINS, J.).—HOLCROFT *v.* DICKENSON (1673), Freem. K. B. 347; Cart. 233; 89 E. R. 258; *sub nom.* HOLDER *v.* DICKESON, Freem. K. B. 95; *sub nom.* DICKISON *v.* HOLCROFT, 3 Keb. 148.

Annotations:—**Distd.** Low *v.* Poers (1770), Wilm. 364. **Refd.** Holt *v.* Ward (1732), 2 Barn. K. B. 173. **Mentd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

PART I. SECT. 1, SUB-SECT. 2.

a. *Acceptance on part of woman — Inferred from conduct.*]—WATSON *v.* CAMPBELL (No. 2), [1920] V. L. R. 347.—**AUS.**

Sect. 1.—*Formation of: Sub-sects.* 2 & 3. *Sects.* 2, 3 & 4: *Sub-sects.* 1 & 2.]

5. Inferred from conduct—Without proving express promise.]—An action on a promise of marriage may be maintained, without proving an express promise on the part of the woman.

There is no necessity of proving an actual promise on the woman's part; for it is sufficient evidence to show that she countenanced the promise & carried herself so as one who approved & consented to it (HOLT, C.J.).—HUTTON *v.* MANSELL (1705), 6 Mod. Rep. 172; Holt, K. B. 458; 3 Salk. 16, 64; 87 E. R. 928.

6. —— —— ——.]—In an action by a lady for a breach of promise of marriage, it is not necessary, for the purpose of making out the mutual promises, which are necessary to support the action, that pltf. by words consented to accept deft.; but the jury may infer such consent from the circumstances of her making no objection at the time of the offer, & her afterwards receiving visits from deft. in the capacity of a suitor.—DANIEL *v.* BOWLES (1826), 2 C. & P. 553, N. P.

7. Assent on both sides—Must be within reasonable time—Not necessarily concurrent.]—VINEALL *v.* VENESS, No. 3, *ante*.

Declarations to third parties—Whether amounting to promise to marry.]—*See* Sub-sect. 3, *post*.

SUB-SECT. 3.—DECLARATION OF INTENTION TO THIRD PARTIES.

8. Made to father of plaintiff—To marry daughter within time certain—Evidence of general promise.]—POTTER *v.* DEBOOS, No. 27, *post*.

General promises.]—*See* Sect. 5, sub-sect. 1, *post*.

9. Not uttered in presence of plaintiff—Or subsequently communicated.]—(1) An expression to third persons of an intention to marry another, not uttered in the hearing of or communicated to such person by the authority of the party expressing the intention, does not amount to a promise, so as to sustain an action.

(2) A statement, in the presence of a woman, of an intention to marry her as soon as her business is settled, must be laid as a conditional promise, & the condition must be shown to have been performed.—COLE *v.* COTTINGHAM (1837), 8 C. & P. 75, N. P.

SECT. 2.—**FORM—STATUTE OF FRAUDS.**

10. Not within Statute of Frauds—Distinguished from contracts in consideration of marriage.]—HARRISON *v.* CAGE, No. 26, *post*.

11. —— ——.]—Stat. Frauds extends only to contracts in consideration of marriage, & not contracts to marry.—CORK *v.* BAKER (1717), 1 Stra. 34; 93 E. R. 367.

12. —— ——.]—Stat. Frauds does not require promises of marriage to be in writing, but only money to be given in consideration of marriage (*per* CUR.).—ATKINS *v.* FAR (1738), West *temp.* Hard. 589; 1 Atk. 287; 2 Eq. Cas. Abr. 247; 25 E. R. 1100, L. C.

Annotations:—**Refd.** Cock *v.* Richards (1805), 10 Ves. 429. **Mentd.** Clarke *v.* Periam (1741), 2 Atk. 333; Woodhouse *v.* Shepley (1742), 2 Atk. 535.

Statute of Frauds generally, *see* CONTRACT, Vol. XII., pp. 118 *et seq*.

SECT. 3.—**CONSIDERATION.**

13. Sufficiency of—Going to particular place to marry promisor—Promise to marry within a reasonable time after arrival.]—In *assumpsit* upon a promise of marriage, the declaration, after alleging that pltf. was sole & unmarried, & resided in parts beyond the seas, stated that, "in consideration that pltf., at the request of deft., would go to L. for the purpose of marrying him, deft. promised pltf. to marry her in a reasonable time after her arrival at L." At the trial, the judge gave pltf. leave to amend the declaration, by stating the consideration thus—"in consideration that pltf., so then being sole & unmarried as aforesaid, at the request of deft., then promised deft. to marry him, & would go to L. for the purpose of marrying him, deft., & would, within a reasonable time of her arrival there, marry deft., he, deft., promised to marry her in a reasonable time after her arrival at L.":—*Held*: the consideration was sufficient as originally stated.—HARVEY *v.* JOHNSTON (1848), 6 C. B. 295; 6 Dow. & L. 120; 17 L. J. C. P. 298; 11 L. T. O. S. 244; 12 Jur. 981; 136 E. R. 1265.

Annotations:—**Mentd.** Duncan *v.* Topham (1849), 8 C. B. 225; British & American Telegraph Co. *v.* Colson (1871), L. R. 6 Exch. 108.

Agreement to remain unmarried—Promise by married man—Promisee ignorant of marriage.]—In *assumpsit* for breach of promise of marriage, the declaration stated, that in consideration that pltf., being sole & unmarried, at the request of deft. had promised deft. to marry deft. within a reasonable time, deft. promised pltf. to marry her within a reasonable time; that pltf., confiding in the promise of deft., had from thenceforward remained sole & unmarried, & had always, until she had notice that deft. was married, been ready & willing to marry him; that, although a reasonable time had elapsed since the making of deft.'s promise, yet deft. had not married pltf., but, on the contrary thereof, deft., at the time of making his promise, & from thenceforward, had been & still was, married; & that pltf. did not know, at the time of deft.'s making his said promise to her, nor for a long time afterwards, that deft. was married:—*Held*: (1) the declaration disclosed a sufficient consideration for deft.'s promise; (2) deft. could not set up the fraudulent concealment of his marriage in discharge of the liability arising on the promise so fraudulently made by him.—WILD *v.* HARRIS (1849), 7 C. B. 999; 7 Dow. & L. 114; 18 L. J. C. P. 297; 13 L. T. O. S. 283; 13 Jur. 961; 137 E. R. 395.

Annotations:—*As to* (1) **Folld.** Millward *v.* Littlewood (1850), 5 Exch. 775. **Consd.** Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854), 18 Jur. 191. **Distd.** Spiers *v.* Hunt, [1908] 1 K. B. 720; Wilson *v.* Carnley, [1908] 1 K. B. 729. **Refd.** Hall *v.* Wright (1859), E. B. & E. 765; Beachey *v.* Brown (1860), 6 Jur. N. S. 345.

PART I. SECT. 2.

b. *Not within Statute of Frauds—Engagement for a year.*]—Pltf. swore "it was to be a year's engagement, & we were to be married in the following Aug.":—*Held*: not an agreement not to be performed within a year &, therefore, not void under the statute, although not in writing.—SMITH *v.* JAMIESON (1889), 17 O. R. 626.—**CAN.**

[illegible] *v.* DUFAULT (1923), 55 O. L. R. 90.—**CAN.**

d. *Promise inferred from conduct.*]—CHAPMAN *v.* SCOTT (1887), 31 L. C. J. 327.—**CAN.**

e. —— *Whether writing necessary.*]—A promise to marry may be made without words. The conduct demeanour, & behaviour of persons towards each other may constitute proof of a contract, but stronger evidence of the promise by the man should be required than that by the woman, & the inference of a promise on his part will not, in an equal degree be deduced from conduct only.—HICKEY *v.* CAMPION (1872), 20 W. R. 752.—**IR.**

15. —— .]—A declaration alleged, that, in consideration that pltf., at deft.'s request, promised to marry him, he promised pltf. to marry her. Averments: that pltf. hath continued & still is unmarried, & until the discovery of deft.'s marriage, was ready & willing to marry him; that, after deft.'s promise, pltf. discovered that deft., at the time of his promise, was, & still is, married, & that pltf. had not, at the time of deft.'s promise, any notice of deft.'s then marriage:—*Held:* the declaration was good; & pltf.'s remaining unmarried was a sufficient consideration to support deft.'s promise. *Qu.:* whether a promise by a married man to marry another woman after his wife's death, is void.—MILLWARD *v.* LITTLEWOOD (1850), 5 Exch. 775; 20 L. J. Ex. 2; 155 E. R. 339; *sub nom.* MILWARD *v.* LITTLEWOOD, 16 L. T. O. S. 128.

Annotations:—**Distd.** Spiers *v.* Hunt, [1908] 1 K. B. 720. **Expld.** Wilson *v.* Carnley, [1908] 1 K. B. 729.

Mutual promises to marry each other.]—*See* CONTRACT, Vol. XII., p. 222, Nos. 1836–1838.

Validity of promises—Made by married persons.]—*See* CONTRACT, Vol. XII., pp. 267–268, Nos. 2186–2190.

Promises made in consideration of marriage.]—*See* CONTRACT, Vol. XII., pp. 220–222, Nos. 1818–1838

SECT. 4.—VALIDITY.

SUB-SECT. 1.—IN GENERAL.

Void & illegal contracts generally, *see* CONTRACT, Vol. XII., pp. 234 *et seq.*

Promises must be mutual.]—*See* Sect. 1, sub-sect. 1, *ante*.

Need not be in writing.]—*See* Sect. 2, *ante*.

Agreements in restraint of marriage.]—*See* BONDS, Vol. VII., p. 170, Nos. 81, 82; CONTRACT, Vol. XII., p. 218, Nos. 2028 *et seq.*

SUB-SECT. 2.—PROMISE BY INFANTS.

See, generally, INFANTS.

16. Right of infant to sue—Promise voidable only.]—(1) An infant may sue on a contract of marriage with a person of full age.

(2) The promise on the part of the infant carries with it an appearance of benefit to the infant, for which reason it is not void, but voidable only (*per* CUR.).

(3) Formerly it was made a doubt whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. Such action will well lie; & that by the man as well as the woman (*per* CUR.).—HOLT *v.* WARD (1732), 2 Stra. 937; 1 Barn. K. B. 455; 2 Barn. K. B. 176; Fitz-G. 175, 275; 93 E. R. 954.

Annotations:—*As to* (1) & (2) **Consd.** Smith *v.* Smith (1745), 3 Atk. 304; Harvey *v.* Ashley (1748), 3 Atk. 607; Burgess [illegible] 2), 4 Taunt. 468. **Refd.** R. *v.* Macclesfield [illegible] r. S. C. 458; Zouch *v.* Parsons (1765), 1 Wm. Bl. [illegible] Warwick *v.* Bruce (1813), 2 M. & S. 205; Tarbuck [illegible]

17. Liability of infant to be sued.]—An infant is not liable in an action for breach of promise of [illegible] E *v.* RUTHVEN (1869), 20 L. T.

18. Effect of ratification after full age—Necessity for fresh promise—Infants Relief Act, 1874 (c. 62), s. 2.]—The above sect. applies to promise of marriage.

Deft., during his infancy, promised to marry pltf., &, after coming of age, recognised without expressly repeating the promise, & eventually broke it. Pltf. sued him for the breach, & was nonsuited:—*Held:* the nonsuit was right; for, assuming that there was a ratification of the promise subsequent to his majority, the right of action upon such ratification was taken away by above sect., & there was no evidence of any fresh promise made after deft. came of age.—COXHEAD *v.* MULLIS (1878), 3 C. P. D. 439; 47 L. J. Q. B. 761; 39 L. T. 349; 42 J. P. 808; 27 W. R. 136.

Annotations:—**Distd.** Northcote *v.* Doughty (1879), 4 C. P. D. 385. **Consd.** Ditcham *v.* Worrall (1880), 5 C. P. D. 410. **Dbtd.** Whitehead *v.* Hall (1887), 31 Sol. Jo. 445. **Consd.** Duncan *v.* Dixon (1890), 44 Ch. D. 211. **Refd.** Holmes *v.* Brierley (1888), 59 L. T. 70.

19. —— —— ——.]—Deft. during his infancy made an offer of marriage to pltf., which she accepted subject to the approval of his parents. He afterwards gave her an engaged ring, which she wore; & two days before he attained his majority he went into the country to visit his father, & on his return, the day after he came of age, he saw pltf. & told her that he had explained all to his father, & that he assented to the engagement, adding, "Now I may & will marry you as soon as I can":—*Held:* it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of above sect.—NORTHCOTE *v.* DOUGHTY (1879), 4 C. P. D. 385.

Annotations:—**Consd.** Ditcham *v.* Worrall (1880), 5 C. P. D. 410. **Expld.** Holmes *v.* Brierley (1888), 59 L. T. 70. **Refd.** Holmes *v.* Brierley (1888), 36 W. R. 795.

20. —.]—In July, 1875, the pltf. & deft., both being then under the age of twenty-one, mutually agreed to marry one another. The engagement continued without any definite understanding as to when the marriage was to take place until Mar. 1879, when, both having attained the age of twenty-one, deft. asked pltf., in the presence of her father, to fix the wedding day. She fixed it for June 5, to which deft. assented; but ultimately he broke his promise. In an action for this breach of promise, in which it was agreed that the damages should be assessed, subject to the opinion of the ct. as to whether or not that which took place in Mar. 1879, was evidence from which the jury might & ought to infer a fresh promise to marry after deft. had attained twenty-one, within above sect., or a mere ratification of the original void promise:—*Held:* what took place in Mar. 1879, when the wedding day was fixed, was a fresh promise made after deft. came of age, & upon a good consideration.—DITCHAM *v.* WORRALL (1880), 5 C. P. D. 410; 49 L. J. Q. B. 688; 43 L. T. 286; 44 J. P. 799; 29 W. R. 59.

Annotations:—**Apprvd.** Whitehead *v.* Hall (1887), 31 Sol. Jo. 415. **Expld.** Holmes *v.* Brierley (1888), 36 W. R. 795. **Refd.** Brown *v.* Harper (1893), 68 L. T. 488; *Re* Foulkes, Foulkes *v.* Hughes (1893), 69 L. T. 183.

21. —— —— ——.]—Infants Relief Act, 1874 (c. 62), does not apply to promises of marriage at all, & even if the Act does apply, the conduct of deft. subsequent to his attaining majority is sufficient evidence of a fresh promise. I do not hesitate to tell the jury that they are entitled to infer a fresh promise from deft.'s conduct since he came of age, & that there is also sufficient material corroborative evidence to satisfy the statute

f. *Sufficiency of ratification.*]—SMITH *v.* JAMIESON (1889), 17 O. R. 626.—CAN.

Sect. 4.—*Validity: Sub-sects.* 2, 3 & 4. *Sect.* 5: *Sub-sects.* 1, 2 & 3. *Sect.* 6: *Sub-sect.* 1, *A., B. & C.*]

(DAY, J.).—WHITEHEAD *v.* HALL (1887), 31 Sol. Jo. 445.

22. —— —— ——.]—Deft., while he was under age, promised to marry pltf. After he came of age pltf. told him that her father's pecuniary circumstances were altered, & offered to release him from his engagement. Deft. was much hurt at this, & said he was ready to marry her then if she thought they were old enough. Pltf. replied that she thought they had better wait till they were older. Subsequently deft. refused to carry out the engagement:—*Held:* there was evidence on which the jury might find that there had been a new promise by deft. after he came of age.—HOLMES *v.* BRIERLEY (1888), 36 W. R. 795; 4 T. L. R. 647, C. A.

SUB-SECT. 3.—PROMISE BY MARRIED PERSONS.

Promisee ignorant that promisor married—Liability of promisor.]—*See* CONTRACT, Vol. XII., p. 267, Nos. 2186, 2187.

Promisee with knowledge that promisor married—Promise void.]—*See* CONTRACT, Vol. XII., p. 267, Nos. 2188, 2189.

Promisee married—Promise to marry conditioned on divorce—Immoral relationship pending decree.]—*See* CONTRACT, Vol. XII., p. 268, No. 2190.

Pre-existing promise to marry another.]—*See* No. 69, *post.*

SUB-SECT. 4.—PROMISE BASED ON IMMORAL CONSIDERATION OR DURESS.

23. Promise in consideration of immoral relations—Effect of subsequent promise.]—Action for breach of promise of marriage. It appeared that the first promise was made by deft. in consideration that pltf. would go to bed with him, which she did; but there was evidence of subsequent promises:—*Semble:* this is not such a *turpis contractus* as to prevent pltf. from recovering.—MORTON *v.* FENN (1783), 3 Doug. K. B. 211; 99 E. R. 618.

Annotation:—**Consd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

24. ——.]—Pltf. instituted proceedings against her husband for divorce. Pending the hearing, she alleged that deft. promised to marry her if she obtained a decree, & thereupon immoral relations took place between them. A decree *nisi* was afterwards granted, pltf. concealing the fact of these immoral relations, & the decree was made absolute. Pltf. then brought an action against deft. to recover damages for breach of the promise to marry her:—*Held:* assuming the promise to have been made, as pltf. only obtained a divorce by deceiving the Divorce Ct., & as the divorce was necessary for the performance of the promise to marry, the action was founded on deceit & immorality, & it was against public policy to allow it to be maintained.—PREVOST *v.* WOOD (1905), 21 T. L. R. 684.

25. ——.]—Deft., who was to the knowledge of pltf. a married man, promised to marry pltf. on the death of his wife. He did so with the intention, known to pltf., of inducing her to commit adultery with him, & she did so after the promise & before the death of deft.'s wife:—*Held:* such a promise was contrary to public policy, & could not be enforced.—SPIERS *v.* HUNT, [1908] 1 K. B. 720; 77 L. J. K. B. 321; 98 L. T. 27; 24 T. L. R. ——.

Annotation:—**Apprvd. & Folld.** Wilson *v.* Carnley, [1908] 1 K. B. 729.

Validity of promises by married persons.]—*See* CONTRACT, Vol. XII., pp. 267, 268, Nos. 2186–2190.

Validity of bonds relating to marriage.]—*See* BONDS, Vol. VII., pp. 169–171, Nos. 72–85.

SECT. 5.—**CONSTRUCTION AND EFFECT.**

SUB-SECT. 1.—GENERAL AND CONDITIONAL PROMISES.

26. General promise to marry—Construed as promise to marry on request—Within reasonable time.]—(1) *Assumpsit* in consideration, pltf. promised to marry deft., she promised to marry him, lies for the man as well as for the woman, because mutual.

(2) A promise to marry which does not ascertain the time, is a promise to marry in a reasonable time upon request.

(3) On a promise to marry upon request, the request need not be made with a parson.

(4) In an action on a promise to marry upon request a declaration which shows that deft. has married another person who is living need not state a request.

(5) A disability by consanguinity may be given in evidence on the general issue in an action for the breach of a promise of marriage.

(6) A promise to marry is not within Stat. Frauds, s. 4. A promise to pay a marriage portion is.—HARRISON *v.* CAGE (1698), Carth. 467; Holt, K. B. 456; 1 Ld. Raym. 386; 5 Mod. Rep. 411; 12 Mod. Rep. 214; 1 Salk. 24; 91 E. R. 1156.

Annotations:—*As to* (1) **Consd.** Smith *v.* Woodfine (1857), 1 C. B. N. S. 660. **Refd.** Beachey *v.* Brown (1860), 6 Jur. N. S. 345. *As to* (4) **Consd.** Short *v.* Stone (1846), 8 Q. B. 358. *Generally*, **Refd.** Finlay *v.* Chirney (1888), 20 Q. B. D. 494.

27. —— —— ——.]—A. states to the father of pltf. that he has pledged himself to marry his daughter in six months, or in a month after Christmas. Although this varies from the promises laid in the special counts, it is evidence from which the jury may infer a promise to marry generally.

The judge left it to the jury, whether they would not presume, from the circumstances, a general promise to marry (which the law would consider as a promise to marry within a reasonable time) & whether the declaration of deft. had any other effect than to render that definite & certain which before was uncertain.—POTTER *v.* DEBOOS (1815), 1 Stark. 82, N. P.

PART I. SECT. 4, SUB-SECT. 3.

g. *Promisee with knowledge that promisor married.*]—Testator, in his wife's lifetime, promised, according to pltf., to marry her, &, after his wife's death, refused to do so, promising her $10,000 to be paid to her at his death: *Held:* the consideration for the promise was illegal, & the promise of no effect n law.—SHEEHAN *v.* MERCANTILE CO. OF CANADA, LTD. (1920), 46 O. L. R. 581; 17 O. W. N. 322; 52 D. L. R. 538.—**CAN.**

h. ——.]—The promise by a married man to marry another woman when his existing marriage shall have been dissolved is against public policy; the ratification of such a promise, though made after dissolution of the marriage, cannot be pleaded as a cause of action.—STAPLES *v.* MARQUARD (1919), C. P. D. 181.—**S. AF.**

PART I. SECT. 5, SUB-SECT. 1.

j. *Conditional promise to marry—"If child mine"—On getting land from father.*]—FISHER *v.* GRAHAM (1880), 31 C. P. 286.—**CAN.**

k. —— *Upon division of father's estate.*]—GRANT *v.* CORNOCK (1888), 16 O. R. 406; 16 A. R. 532.—**CAN.**

28. —— ——.]—ATCHINSON *v.* BAKER, No. 82, *post.*

Whether evidence of request to marry essential in actions for breach.]—*See* Part I., Sect. 6, sub-sect. 4, *post.*

29. Conditional promise to marry—"As soon as business settled"—Necessity to show performance of condition.]—COLE *v.* COTTINGHAM, No. 9, *ante.*

SUB-SECT. 2.—IMPLIED TERMS.

See, generally, CONTRACT, Vol. XII., pp. 607 *et seq.*

Within a reasonable time.]—*See* Nos. 26, 27, *ante.*

SUB-SECT. 3.—EFFECT OF BREACH.

Return of presents.]—*See* GIFTS, Vol. XXV., p. 525, Nos. 172–176.

SECT. 6.—ACTIONS FOR BREACH

SUB-SECT. 1.—RIGHT OF ACTION.

A. In General.

Action maintainable by either party to contract.]—*See* Sect. 6, sub-sect. 3, *post.*

Necessity for offer & acceptance.]—*See* Sect. 1, sub-sect. 2, *ante.*

30. Whether action maintainable.]—RUTTER *v.* HEBDEN (1664), 1 Lev. 147; 83 E. R. 341; *sub nom.* HEBDEN *v.* RUTTER, 1 Sid. 180.

Annotation:—**Refd.** Finlay *v.* Chirney (1888), 20 Q. B. D. 491.

31. ——.]—BURRELL *v.* STRONG (1672), Freem. K. B. 65; 89 E. R. 50.

32. ——.]—HOLCROFT *v.* DICKENSON, No. 4, *ante.*

33. ——.]—HOLT *v.* WARD, No. 16, *ante.*

34. ——.]—COCK *v.* RICHARDS, No. 1, *ante.*

35. —— Performance of promise before time fixed.]—KNIGHT *v.* CHAPLEN (1658), 2 Sid. 77; 82 E. R. 1267.

B. Anticipatory Breach.

See, generally, CONTRACT, Vol. XII., pp. 340 *et seq.*

36. Action maintainable by plaintiff—Promise to marry soon after happening of event—Refusal before occurrence of event.]—Deft. promised to marry pltf. so soon as his (deft.'s) father should die. During the father's lifetime deft. refused absolutely to marry pltf. Pltf. sued for breach of the promise, deft.'s father being still alive:—*Held:* the principle of *Hochster* v. *De La Tour* (1853), 2 E. & B. 678, was applicable to the case of such a promise to marry, & a breach of contract had been committed on which pltf. could sue.—FROST *v.* KNIGHT (1872), L. R. 7 Exch. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471, Ex. Ch.

Annotations:—**Refd.** Cherry *v.* Thompson (1872), L. R. 7 Q. B. 573; Wilson *v.* Carnley, [1908] 1 K. B. 729; Martin *v.* Stout, [1925] A. C. 359. **Mentd.** Brown *v.* Muller (1872), L. R. 7 Exch. 319; Roper *v.* Johnson (1873), L. R. 8 C. P. 167; Metcalfe *v.* Britannia Ironworks Co. (1876), 1 Q. B. D. 613; Dunkirk Colliery Co. *v.* Lever (1879), 41 L. T. 633; Soc. Générale de Paris *v.* Milders (1883), 49 L. T. 55; De Waal *v.* Adler (1886), 12 App. Cas. 141; Johnstone *v.* Milling (1886), 16 Q. B. D. 460; Guerot *v.* Audouy (1893), 62 L. J. Q. B. 633; Synge *v.* Synge, [1894] 1 Q. B. 466; Brace *v.* Calder (1895), 64 L. J. Q. B. 582; Roth *v.* Taysen, Townsend & Grant (1895), 73 L. T. 628; *Re* South African Trust & Finance Co., *Ex p.* Hirsch (1896), 74 L. T. 769; Ellis *v.* Pond, [1898] 1 Q. B. 426; Michael *v.* Hart, [1902] 1 K. B. 482; Palace Shipping Co. *v.* Caine, [1907] A. C. 386; Sapwell *v.* Bass (1910), 102 L. T. 811; Curtis *v.* B.U.R.T. Co. (1912), 28 T. L. R. 353; Credito Italiano *v.* Swiss Bankverein (1916), 85 L. J. K. B. 1477; Veithardt & Hall *v.* Rylands (1917), 86 L. J. Ch. 604; Consorzio Veneziano di Armamento E Navigazione *v.* Northumberland Shipbuilding Co. (1919), 88 L. J. K. B. 1194; Payzu *v.* Saunders, [1919] 2 K. B. 581; Millett *v.* Van Heek, [1921] 2 K. B. 369; Ellis' Trustee *v.* Dixon-Johnson, [1924] 1 Ch. 342; Berners *v.* Fleming, [1925] Ch. 264.

37. —— Promise to marry at time certain—Renunciation before arrival of time fixed.]—An action for breach of promise to marry at a time certain may be maintained, upon renunciation of the promise, before the time fixed has arrived.

In an action for breach of promise to marry, the declaration laid a promise to marry at a time elapsed, & the evidence showed a promise to marry at a time not elapsed, & a renunciation by deft. of such promise:—*Held:* there was power to amend the declaration at the trial, & a rule to enter a verdict for deft. on the ground that such amendment was bad, refused.—DONOGHUE *v.* MARSHALL (1875), 32 L. T. 310.

C. Survival of Right.

See, generally, EXECUTORS, Vol. XXIV., pp. 644 *et seq.*

38. Death of promisee—Action by personal representative—No special damage.]—An administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged.—CHAMBERLAIN *v.* WILLIAMSON (1814), 2 M. & S. 408; 105 E. R. 114.—**CAN.**

Annotations:—**Apld.** Finlay *v.* Chirney (1888), 20 Q. B. D. 494. **Consd.** Quirk *v.* Thomas, [1916] 1 K. B. 516. **Refd.** Kingdon *v.* Nottle (1815), 4 M. & S. 53; Raymond *v.* Fitch (1835), 2 Cr. M. & R. 588; Beckham *v.* Drake (1849), 2 H. L. Cas. 579; Bunbury *v.* Hewson (1849), 3 Exch. 558; Hall *v.* Wright (1859), E. B. & E. 765; Bradshaw *v.* L. & Y. Ry. (1875), L. R. 10 C. P. 189; Twycross *v.* Grant (1878), 4 C. P. D. 40; Jackson *v.* Watson, [1909] 2 K. B. 193.

39. Death of promisor—Action against personal representative—Special damage.]—(1) An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor.

(2) The special damage which would cause the right of action to survive must be damage to the property, & not to the person, of the promisee, & must be within the contemplation of both parties at the date of the promise, & the action can be brought against the exors. for such special damage only, & not for general damages.

(3) In an action for breach of promise of marriage not only are damages always given in respect of the personal injury to pltf. but also damages arising from & occasioned by the personal conduct

---

PART I. SECT. 6, SUB-SECT. 1.—A.

30 i. *Whether action maintainable.]*—BENNING & GRANGE (1870), 13 L. C. J. 290; 13 L. C. J. 126; 14 L. C. J. 284.—**CAN.**

1. —— *When plaintiff has married another.]*—A pltf. who has married another has no action for breach of promise of marriage.—PEPPERAS *v.* LE DUC (1913), 24 O. W. R. 563; 4 O. W. N. 1208; 11 D. L. R. 193.—**CAN.**

m. —— *Services rendered in expectation of marriage.]*—Services were rendered by pltf. to deft. in expectation that the deft. would marry her, but there was no contract of hiring, & the pltf. expressly said that she was not to receive, & did not expect wages or pay:—*Held:* on deft.'s refusal to marry pltf., no action would lie as upon an implied promise to pay the value of such services in money.—ROBINSON *v.* SHISTEL (1873), 23 C. P. 114.—**CAN.**

PART I. SECT. 6, SUB-SECT. 1.—C.

n. *Death of promisor—Action against personal representative.]*—An action will not lie against exor. for a breach by testator in his lifetime of a promise to marry pltf.—O'BRIEN *v.* JOPLIN (1882), 4 N. S. W. L. R. (L.) 14.—**AUS.**

39 i. — *Special damage.]*—GREEN *v.* FORBES (1905), 39 I. L. T. 257.—**IR.**

Sect. 6.—*Actions for breach: Sub-sect.* 1, *C.; sub-sects.* 2, 3, 4 & 5.]

of deft. Evidence of the conduct of both parties is allowed to be given in mitigation or aggravation (LORD ESHER, M.R.).—FINLAY *v.* CHIRNEY (1888), 20 Q. B. D. 494 ; 57 L. J. Q. B. 247 ; 58 L. T. 664 ; 52 J. P. 324 ; 36 W. R. 534 ; 4 T. L. R. 322, C. A.

Annotations :—As to (1) **Consd.** Quirk *v.* Thomas, [1916] 1 K. B. 516. **Refd.** Davies *v.* Hood (1903), 88 L. T. 19. *As to* (2) **Consd.** Quirk *v.* Thomas, [1916] 1 K. B. 516. **Refd.** Harvey *v.* North-Eastern Marine Engineering Co. (1902), 5 W. C. C. 30. *Generally*, **Mentd.** United Collieries *v.* Simpson, [1909] A. C. 383 ; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

40. —— —— ——.]—Pltf. brought an action for breach of promise of marriage against the exor. of the promisor in which she claimed as special damage loss suffered by her through having given up a profitable business at the request of deceased & in consideration of his promise to marry her. The jury having found a verdict for pltf. :—*Held :* (1) pltf. was not entitled to maintain the action ; (2) (SWINFEN EADY & PHILLIMORE, L.JJ.) there was no corroboration of pltf.'s evidence as required by Evidence Further Amendment Act, 1869 (c. 68), s. 2 ; (3) (PHILLIMORE & PICKFORD, L.JJ.) assuming that the action would lie to recover special damage, the loss to pltf. by reason of her having given up her business was not special damage flowing from the breach, & was therefore not recoverable.

(4) *Semble :* an action for breach of promise of marriage will not lie after the death of the promisor to recover special damage.

(5) In such an action the injury is treated as a personal one & damages are awarded in respect of the personal injury to pltf. occasioned by the personal conduct of deft. The conduct of both parties may be taken into account in assessing damages & circumstances of aggravation or mitigation may be given in evidence. Damages may be of a vindictive & uncertain kind not merely to repay pltf. for temporary loss but to punish deft. in an exemplary manner (SWINFEN EADY, L.J.).—QUIRK *v.* THOMAS, [1916] 1 K. B. 516 ; 85 L. J. K. B. 519 ; 114 L. T. 308 ; 32 T. L. R. 197 ; 60 Sol. Jo. 174, C. A.

Annotations :—Generally, **Mentd.** The Adams (1919), 88 L. J. P. 129 ; Jackson *v.* Anglo-American Oil Co., [1923] 2 K. B. 601.

SECT. 2.—JURISDICTION OF COURTS TO ENTERTAIN.

41. Action against foreign independent sovereign —Living in England incognito—As private subject.]—The ct. will not allow process to issue in an action for breach of promise of marriage against an independent foreign sovereign, even though, at the time of the alleged promise, he was in England incognito, passing as a private subject of Her Majesty the Queen.—MIGHELL *v.* JOHORE (SULTAN), [1894] 1 Q. B. 149 ; 63 L. J. Q. B. 593 ; 70 L. T. 64 ; 58 J. P. 244 ; 10 T. L. R. 115 ; 9 R. 447, C. A.

Annotations :—**Refd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139 ; *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176 ; The Gagara, [1919] P. 95 ; The Porto Alexandre, [1920] P. 30 ; Companía Mercantil Argentina *v.* United States Shipping Board (1924), 93 L. J. K. B. 816 ; Duff Development Co. *v.* Kelantan Government, [1924] A. C. 797. **Mentd.** Foster *v.* Globe Venture Syndicate, [1900] 1 Ch. 811 ; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 3 K. B. 532.

Actions by & against foreign sovereigns generally, *see* ACTION, Vol. I., pp. 45–50.

Service of writ outside jurisdiction.] — *See* PRACTICE.

Jurisdiction of county court to entertain—Only by consent.]—*See* County Courts Act, 1888 (c. 43), ss. 56, 64 ; &, *generally*, COUNTY COURTS, Vol. XIII., pp. 456 *et seq.*

SUB-SECT. 3.—BY WHOM MAINTAINABLE.

42. By either party—Remedy mutual.]—HARRISON *v.* CAGE, No. 26, *ante*.

43. —— ——.]—HOLT *v.* WARD, No. 16, *ante*.

By personal representative.]—*See* Sub-sect. 1, *C.*, *ante*.

SUB-SECT. 4.—EVIDENCE OF REQUEST TO MARRY AND REFUSAL.

44. Necessity for request & refusal.] — To support an action for a breach of promise of marriage, if deft. has not married another, there must be evidence of an offer to marry on the part of pltf., & a refusal by deft. But if pltf.'s father go to deft., & ask him if he means to fulfil his engagements to his daughter & he reply, "Certainly not," proof of this will be sufficient.—GOUGH *v.* FARR (1827), 2 C. & P. 631, N. P.

45. Whether necessary to prove request — Marriage of defendant to another.]—HARRISON *v.* CAGE, No. 26, *ante*.

46. —— ——.]—A declaration alleged promise to marry "within a reasonable time after deft. should be thereunto requested by pltf." ; & without averring a request, stated for breach that deft. had wrongfully married another person. Plea, that deft. was never requested to marry pltf. :—*Held :* on special demurrer, the declaration was good, as showing a breach of contract by deft., which dispensed with any necessity for alleging a request ; & the plea was consequently bad.—SHORT *v.* STONE (1846), 8 Q. B. 358 ; 3 Dow. & L. 580 ; 15 L. J. Q. B. 143 ; 6 L. T. O. S. 316 ; 10 Jur. 245 ; 115 E. R. 911.

Annotations :—**Refd.** Lovelock *v.* Franklin & Cox (1846), 15 L. J. Q. B. 146 ; Hochster *v.* De La Tour (1853), 2 E. & B. 678 ; Frost *v.* Knight (1872), L. R. 7 Exch. 111.

47. —— ——.]—Declaration in *assumpsit* for breach of promise of marriage stated, that deft. promised pltf. to marry her ; that pltf. remained & still is sole & unmarried, &, during all the time aforesaid, was ready & willing to marry deft., of which he always had notice ; yet deft. disregarded his promise, & wrongfully married another woman. Plea, that deft. was not, at any time before the commencement of the suit, requested by pltf. to marry her :—*Held :* (1) the plea was bad on special demurrer ; (2) the declaration was good on general demurrer, without an averment of the lapse of a reasonable time.—CAINES *v.* SMITH (1847), 15 M. & W. 189 ; 3 Dow. & L. 462 ; 15 L. J. Ex. 106 ; 6 L. T. O. S. 376 ; 153 E. R. 816.

48. —— ——.]—After verdict in an action for a breach of promise of marriage by a gentleman against a lady, a count, alleging a promise on the

o. —— —— *Motion to arrest judgment.*]—Where a pltf. had recovered a verdict against exors., for a breach of promise of marriage made by testator, the ct. would not on the ground that such action could not lie against personal representatives, arrest the judgment.—DAVY *v.* MYERS (1824), Tay. 89.—**CAN.**

PART I. SECT. 6, SUB-SECT. 4.

44 i. *Necessity for request & refusal.*]

—Where there has been a positive refusal to marry, no formal request is necessary to give a right of action.—STEWART *v.* BYRNES (1858), 2 Legge, 1091.—**AUS.**

part of deft. to marry pltf. within a reasonable time after the request, & averring "that pltf., confiding in the promise, had always remained unmarried, & was still ready & willing to marry deft., & that although a reasonable time for deft. to marry him had elapsed, yet deft., not regarding her promise, did not, nor would within such reasonable time, marry pltf., but had hitherto wholly neglected & refused so to do," is sufficient after verdict, without averring that deft. had any notice of pltf. being ready to marry her during the reasonable time alleged, or averring any request made to deft. to marry pltf., or any averment of a special refusal to marry him.—SEYMOUR *v.* GARTSIDE (1822), 2 Dow. & Ry. K. B. 55; 1 L. J. O. S. K. B. 12.

Annotation :—**Refd.** Short *v.* Stone (1846), 8 Q. B. 358.

49. Sufficiency of refusal—Communicated to third party.]—GOUGH *v.* FARR, No. 41, *ante*.

SUB-SECT. 5.—CORROBORATION OF PLAINTIFF'S TESTIMONY.

See Evidence Further Amendment Act, 1869 (c. 68), s. 2.

50. Necessity for.]—By Evidence Further Amendment Act (c. 68), s. 2, it is provided "that no pltf. in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." If, therefore, pltf.'s testimony is not corroborated by some other material evidence the case must be withdrawn from the jury. The only evidence in this case rests upon the statement of pltf. herself. There is no other material evidence except that of pltf., & I am bound to withdraw the case from the jury (DARLING, J.).—OWEN *v.* MOBERLY (1900), 64 J. P. 88.

51. ———.]—QUIRK *v.* THOMAS, No. 40, *ante*.

52. Whether sufficient evidence to corroborate—Question for jury.]—(1) Whether there is sufficient evidence to corroborate pltf. when called to prove a promise of marriage as required by Evidence Further Amendment Act, 1869 (c. 68), s. 2, is a question for the jury.

(2) The jury may take the fact that deft. does not offer himself as a witness to contradict pltf.'s assertion of a promise of marriage made by him as corroboration of such promise under the statute.—WILLCOX *v.* GOTFREY (1872), 26 L. T. 328, N. P.; *subsequent proceedings, sub nom.* WILCOX *v.* GOTFREY, 26 L. T. 481.

Annotation :—As to (2) **Refd.** Wiedemann *v.* Walpole, [1891] 2 Q. B. 534.

53. What amounts to—Defendant not contradicting plaintiff's assertions—In other proceedings.]—Pltf. brought two actions against deft., one for breach of promise of marriage, the other for money laid out in the purchase of dresses at the request of deft. The verdict in the former action passed for deft., pltf. failing to prove the promise. The second action was referred, & in her evidence on the reference pltf. made certain statements in the presence of deft. tending to prove the supposed promise, & which he was not called to contradict:—*Held:* this could not be considered as legitimate evidence against him in the way of implied admissions in the action for breach of promise of marriage.—THOMAS *v.* SHIRLEY (1862), 11 W. R. 21.

54. ——— **By offering himself as witness.**]—WILLCOX *v.* GOTFREY, No. 52, *ante*.

55. ——— **Failure of defendant to answer plaintiff's letter—Containing allegation of promise to marry.**]—In an action for breach of promise of marriage the mere fact that deft. did not answer letters written by pltf., in which she stated that he had promised to marry her:—*Held:* no evidence corroborating pltf.'s testimony in support of such promise within Evidence Further Amendment Act, 1869 (c. 68), s. 2.—WIEDEMANN *v.* WALPOLE, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114; 7 T. L. R. 722, C. A.

Annotations :—**Refd.** Quirk *v.* Thomas, [1916] 1 K. B. 516 Thomas *v.* Jones, [1921] 1 K. B. 22.

56.]—SPOONER *v.* GODFREY (1908), *Times*, Oct. 16, C. A.

57. ——— **Declarations made to & in presence of third party.**]—In an action for breach of promise of marriage, pltf. having sworn that deft. had seduced her, & had repeatedly promised to marry her, her sister gave evidence that, at an interview she had with deft. when she discovered her sister's condition, she upbraided him for the ruin & disgrace he had brought upon pltf., when he said, "he would marry her & give her anything but I must not expose him." The sister further stated that, after pltf.'s confinement, she overheard a conversation between pltf. & deft., in the course of which pltf. said to deft., "You always promised to marry me, & you don't keep your word," when deft. said he would give her some money to go away:—*Held:* this was "material evidence in support of the promise" to satisfy Evidence Further Amendment Act, 1869 (c. 68), s. 2.—BESSELA *v.* STERN (1877), 2 C. P. D. 265; 46 L. J. C. P. 467; 37 L. T. 88; 42 J. P. 197; 25 W. R. 561, C. A.

Annotations :—**Consd.** Wiedemann *v.* Walpole, [1891] 2 Q. B. 534; Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 723. **Refd.** Reffell *v.* Morton (1906), 70 J. P. 317. **Mentd.** Wildish *v.* Fowler (1888), 5 T. L. R. 44.

58. ——— **Letter making conditional offer—Accepted by plaintiff.**]—In an action for breach of promise of marriage, in addition to the evidence given by pltf., a Danish lady, of the oral promise

PART I. SECT. 6, SUB-SECT. 5.

50 i. *Necessity for.*]—DONEGAN *v.* SHORT (1888), 12 P. R. 589.—**CAN.**

52 i. *Whether sufficient evidence to corroborate—Question for jury.*]—COSTELLO *v.* HUNTER (1886), 12 O. R. 333.—**CAN.**

p. *What amounts to.*]—YARWOOD *v.* HART (1888), 16 O. R. 23.—**CAN.**

q. ———.]—Pltf. having proved promises of marriage by deft., deposed that, on an occasion when she had been in the company of another man, the deft. took her away & placed her in the charge of G., & that, on another occasion, she attended deft. when he happened to be sick, deft. then saying to her in the presence of N., "Who has a better right to take care of me than my wife? & you know, Kate, that no one will ever be my wife but you."

Her evidence as to the first occurrence was corroborated by G. & was borne out by deft., & as to the second was substantiated by N. who said that the words used were "Who has a better right to take care of me than my wife." *Held:* there was sufficient material evidence corroborative of a promise of marriage within 32 & 33 Vict. c. 68, s. 2.

Semble: where a promise is proved in direct terms, evidence of the mutual demeanour of the parties may amount to material corroboration.—HICKEY *v.* CAMPION (1872), 20 W. R. 752.—**IR.**

57 i. ——— *Declarations made to & in presence of third party.*]—Statements made by deft. in conversation with a third person, although not amounting to direct admissions of the promise, are material evidence in support of it, corroborating pltf.'s testimony.—HUGHES *v.* SHAND, 2 J. R. N. S. 27.—**N.Z.**

r. ——— *Nature of corroboration.*]—The corroboration necessary need not go the length of, by itself, proving the promise; it will be sufficient if it supports pltf.'s evidence in respect of the promise, so as to make it appear reasonably probable that her testimony that the promise was given is true. Circumstances which are as consistent with the non-existence of a promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the statute requires.—WATERS *v.* BELLAMY (1888), 5 Man. L. R. 246.—**CAN.**

Sect. 6.—*Actions for breach: Sub-sects.* 5 *&* 6. *Sect.* 7: *Sub-sects.* 1, 2 *&* 3.]

in Denmark, a letter was put in evidence, written by deft. in England to pltf. in Denmark, in which he said: "If I were well would you marry me, little girl? Do tell me all now":—*Held:* the letter was a conditional offer that was accepted by pltf., & therefore there was evidence under the hand of deft. of the offer.—HANSEN *v.* DIXON (1906), 96 L. T. 32; 23 T. L. R. 56.

59. —— Gift of ring—Evidence of mere intention to marry.]—SPOONER *v.* GODFREY (1908), *Times*, Oct. 16, C. A.

60. In respect of what matters—Facts prior & subsequent to engagement.]—By Evidence Further Amendment Act, 1869 (c. 68), s. 2, which enables a pltf. in an action for breach of promise of marriage to give evidence, it is provided that pltf. shall not recover a verdict "unless his or her testimony shall be corroborated by some other material evidence in support of such promise": —*Held:* such corroborative evidence need not be of facts subsequent to the engagement, but may consist of facts prior to it.—WILCOX *v.* GOTFREY (1872), 26 L. T. 481; *previous proceedings, sub nom.* WILLCOX *v.* GOTFREY, 26 L. T. 328, N. P.

Annotations:—**Refd.** Wiedemann *v.* Walpole, [1891] 2 Q. B. 534; Quirk *v.* Thomas, [1916] 1 K. B. 516.

SUB-SECT. 6.—PRACTICE.

See, generally, PRACTICE.

Joinder with other causes of action.]—*See* R. S. C., Ord. 18, r. 1.

Production & inspection—Letters to plaintiff.]—*See* DISCOVERY, Vol. XVIII., pp. 102, 119, Nos. 531, 531a, 690.

—— Letters to defendant.]—*See* DISCOVERY, Vol. XVIII., p. 102, No. 531b.

—— Order under Evidence Act, 1851 (c. 99), s. 6.]—*See* DISCOVERY, Vol. XVIII., p. 67, No. 253.

Discovery of documents—Grant after judgment or decree.]—*See* DISCOVERY, Vol. XVIII., p. 67, No. 253.

Interrogatories—As to means & expectation of means.]—*See* DISCOVERY, Vol. XVIII., p. 202, Nos. 1499, 1500.

61. Stamping of documents—Letter proving contract of marriage—Not subject to duty.]—A letter read to prove a contract of marriage need not be stamped.—ORFORD *v.* COLE (1818), 2 Stark, 351, N. P.

Annotation:—**Refd.** Wrigley *v.* Smith (1834), 3 L. J. K. B. 116.

See, generally, EVIDENCE, Vol. XXII., pp. 262–276; REVENUE.

62. Costs—Discretion to deprive successful party of—"Good cause"—R. S. C., Ord. 65, r. 1.]—In an action for breach of promise of marriage the jury, who were invited by counsel for pltf. & by the judge to award moderate damages, found a verdict for pltf. for £10. The judge deprived pltf. of costs. There was no suggestion of any oppression or misconduct on the part of pltf. in bringing the action or in the conduct of it:—*Held:* there was no "good cause" for depriving pltf. of costs.—TIPPING *v.* JEPSON (1906), 22 T. L. R. 743, C. A.

—— Actions which could have been commenced in county court.]—*See, now,* County Courts Act, 1919 (c. 73), s. 11; PRACTICE.

SECT. 7.—**DEFENCES TO ACTIONS FOR BREACH.**

SUB-SECT. 1.—IN GENERAL.

Defences to actions for breach of contracts generally, *see* CONTRACT, Vol. XII., pp. 437 *et seq.*

63. Disability by consanguinity.]—HARRISON *v.* CAGE, No. 26, *ante.*

64. Defendant already married—Fraudulent concealment of marriage.]—WILD *v.* HARRIS, No. 14, *ante.*

65. Pre-existing promise by plaintiff to marry another—Concealed from defendant.]—BEACHEY *v.* BROWN, No. 69, *post.*

SUB-SECT. 2.—PROMISE INDUCED BY MISREPRESENTATION OR FRAUD.

66. By third person—In letters to defendant—Plaintiff's ignorance of exact contents immaterial.]—(1) If in an action for breach of promise of marriage, the defence set up is, that deft. was induced to make the promise through misrepresentations made to him, & it is proved that pltf. knew that her father wrote letters to deft., in which he made statements respecting her, such letters are evidence for deft., although there is no proof that pltf. had read them, or was acquainted with their exact contents; but pltf. would not be considered answerable for the particular expressions contained in them.

(2) A verbal representation made by pltf.'s father (she not being present) to a third person, who communicated it to deft., is not evidence.—FOOTE *v.* HAYNE (1824), as reported in 1 C. & P. 545, N. P.

Annotations:—**Mentd.** Young *v.* Hutchinson (1843), 1 L. T. O. S. 59; Kinning *v.* Buchanan (1850), 15 L. T. O. S. 305.

67. —— Made orally to another.]—FOOTE *v.* HAYNE, No. 66, *ante.*

68. As to circumstances or character.]—WHARTON *v.* LEWIS, No. 73, *post.*

PART I. SECT. 6, SUB-SECT. 6.

s. *Costs—Certificate—Set-off.*]—In an action for breach of promise of marriage, a certificate for full costs was moved for at the trial, & refused; afterwards pltf. applied for & obtained a certificate to prevent deft. from setting off costs. The certificate was set aside.—MAJOR *v.* MCKENZIE (1873), 23 C. P. 261.—**CAN.**

t. —— *Of preliminary examination.*]—WOODMAN *v.* BLAIR (1879), 8 P. R. 179.—**CAN.**

a. —— *Small damages—Taxation on higher scale.*]—CHIZEK *v.* TRIPP (1912), 20 W. L. R. 648; 4 D. L. R. 369.—**CAN.**

b. *Motion for summary judgment—Admission of no breach before action—Pleading.*]—Deft. moved for summary judgment dismissing an action for breach of promise of marriage, on the grounds: (1) that the statement of claim did not allege that there was a breach of the alleged contract before action, & (2) that pltf. in her examination for discovery admitted that there was no breach before this action. Motion refused, as it was a matter to be left to a jury to say if there was or was not such a breach.—BARNUM *v.* HENRY (1905), 5 O. W. R. 56; 9 O. L. R. 319.—**CAN.**

c. *Appeal—Objection—Not taken in notice of appeal.*]—LOWRY *v.* ROBINS (1919), 45 O. L. R. 84; 15 O. W. N. 365.—**CAN.**

PART I. SECT. 7, SUB-SECT. 1.

d. *Discovery of plaintiff's unpleasant relatives.*]—To a claim for damages for breach of contract to marry deft. admitted the contract & its breach by him, but pleaded justification, in that after engagement he had discovered that one of the woman's uncle's had been hanged for the murder of his wife, that another had married a native woman, & that her brother had been convicted of housebreaking & theft:—*Held:* the plea disclosed no defence to pltf.'s claim.—SCHNAAR *v.* JANSEN (1924), 45 N. L. R. 218.—**S. AF.**

69. Suppression of engagement to another—No defence by itself—Necessity to prove fraud.]—Declaration by a woman on an agreement between herself & deft. to marry one another within a time elapsed before the suit; averment that a reasonable time had elapsed before the suit, & pltf. had always been ready & willing to marry deft.; but deft. had refused. Plea, that, before & at the time of the agreement, pltf. & Y. had agreed to marry one another, which agreement was in full force, as pltf. knew, but of which deft. was then ignorant, & that, though pltf. ought fully to have disclosed the same to deft. before the making of the agreement, & though deft. would not have made the agreement had the same been disclosed to him before the making thereof, pltf., at the time of the agreement, withheld & concealed the same from deft., & deft., made the agreement whilst he was wholly ignorant of the same. On demurrer:—*Held:* a bad plea, there being no express allegation of fraud.—BEACHEY *v.* BROWN (1860), E. B. & E. 796; 1 L. T. 479; 24 J. P. 518; 6 Jur. N. S. 345; 8 W. R. 292; 120 E. R. 706; *sub nom.* BEECHEY *v.* BROWN, 29 L. J. Q. B. 105.

Annotation:—**Refd.** Baker *v.* Cartwright (1861), 10 C. B. N. S. 124.

70. Suppression of existing marriage—New trial.]—Pltf., in an action for breach of promise of marriage the defence to which was a denial of the promise, described herself at the trial as a single woman. The jury found a verdict for pltf. Deft. applied for a new trial on the ground that since the trial he had obtained evidence from two persons, previously unknown to him, to the effect that some years before the trial pltf. had made statements to them which, if true, proved that before the date of the promise pltf. had been married to a man who was still living. Pltf. filed an affidavit in opposition to the application in which she did not deny making the statements, but stated that she had never been married to the man or to any one else:—*Held:* there ought to be a new trial, but it must be confined to the issue whether pltf. was a married woman at the date of deft.'s promise to marry her.—ROBINSON *v.* SMITH, [1915] 1 K. B. 711; 84 L. J. K. B. 783; 112 L. T. 929; 31 T. L. R. 191; 59 Sol. Jo. 269, C. A.

SUB-SECT. 3.—BAD CHARACTER OF PLAINTIFF.

71. General rule—Mere accusation & suspicion insufficient—Charges capable of proof.]—In an action against a woman for a breach of promise of marriage, it is a sufficient justification for non-performance, if the person, to whom she has given the promise, turn out upon inquiry to be a man of bad character; but mere accusation & suspicion are not sufficient. The charges, which she makes against him, must, if capable of proof, be substantiated; or they go only to the damages.—BADDELEY *v.* MORTLOCK (1816), Holt, N. P. 151, N. P.

Annotations:—**Consd.** Jefferson *v.* Paskell, [1916] 1 K. B. 57. **Refd.** Hall *v.* Wright (1858), E. B. & E. 746; Beachey *v.* Brown (1860), E. B. & E. 796; Jones *v.* James (1868), 18 L. T. 243.

72. Unchastity—Previous to promise—Necessity for defendant's ignorance.]—(1) In action for breach of promise of marriage, if on the part of deft. it is proved that pltf. is a loose & immodest woman, & that he broke his promise on that account, it goes in bar of the action; but if it also appear that, when he made the promise, he was aware of these circumstances, it is no defence.

(2) In such an action deft. may, in mitigation of damages, go into evidence that his relations disapproved of the match; & if his father is an incompetent witness on account of his having employed the attorney to conduct the defence, a witness will be allowed to prove that he has heard the father express to deft. his dislike to the marriage.—IRVING *v.* GREENWOOD (1824), 1 C. & P. 350, N. P.

Annotations:—*As to* (1) **Refd.** Hall *v.* Wright (1858), E. B. & E. 746; Beachey *v.* Brown (1860), E. B. & E. 796.

73. —— —— ——.]—In an action for breach of promise of marriage, if it appear that deft. was induced to make the promise, or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family & previous life of pltf., this goes in bar of the action, & not to the damages only; & if deft.'s counsel cross-examines as to certain misrepresentations made towards deft., & deceptions practised on him, this is to be considered as notice to pltf.'s counsel of the line of defence, &, therefore, if he has letters of deft., tending to show that he knew the real state of the facts, pltf.'s counsel ought to give them in evidence before pltf.'s case is closed, & he will not be allowed to put them in as evidence in reply.—WHARTON *v.* LEWIS (1824), 1 C. & P. 529, N. P.

74. —— —— ——.]—To an action for breach of promise of marriage, pleas, that after the promise deft. discovered pltf. to be an immodest, lewd, unchaste, & immoral person, & being unmarried, to have had carnal intercourse with H., & that after his promise deft. discovered that pltf., being unmarried, had committed fornication with some person or persons, to deft. unknown & had been delivered of a bastard:—*Held:* sufficient.—YOUNG *v.* MURPHY (1836), 3 Bing. N. C. 54; 2 Hodg. 144; 3 Scott, 379; 6 L. J. C. P. 180; 132 E. R. 329.

Annotation:—**Expld.** Beachey *v.* Brown (1860), E. B. & E. 796.

75. —— —— —— Remoteness of the unchastity immaterial.]—If a man enter into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, & discovers that before the marriage, & on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place ten or more years ago, & the conduct of the woman may have been since perfectly correct; but, if the man knew, or had reason to know, at the time of the promise, that the woman had such a child, & gave that afterwards as his reason for refusing to marry, that would be no defence in point of law to an action for breach of promise of marriage.—BENCH *v.* MERRICK (1844), 1 Car. & Kir. 463.

76. —— Subsequent to promise.]—YOUNG *v.* MURPHY, No. 74, *ante*.

77. Brutal behaviour—Subsequent to promise.]—Notwithstanding what had passed & the promise of marriage proved, if pltf. had conducted

PART I. SECT. 7, SUB-SECT. 3.

e. *Unchastity—Previous to promise.*]—A man who had promised to marry a woman subsequently ascertained from her that she had borne an illegitimate child 11 years before:—*Held:* he was then entitled to resile.—FLETCHER *v.* GRANT (1878), 6 R. (Ct. of Sess.) 59; 16 Sc. L. R. 15.—**SCOT.**

76 i. —— *Subsequent to promise.*]—POISSANT & BARRETTE (1864), 15 L. C. R. 51.—**CAN.**

76 ii. —— ——.]—Want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry.—GRANT *v.* CORNOCK (1888), 16 O. R. 406; 16 A. R. 532.—**CAN.**

Sect. 7.—*Defences to actions for breach: Sub-sects.* 3, 4, 5, 6 & 7.]

himself in a brutal or violent manner, & threatened to use her ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping; & she might set up such defence, & it would be legal: but though no such evidence appeared, which went to the ground of action, if pltf. appeared to be of gross manners & destitute of feeling; as he complained by this action of an injury in the loss of the society of a woman which he appeared never to have valued, & the pleasures of which society he seemed little calculated to taste, the jury should take it into their consideration in the verdict they were to pronounce (*per* CUR.).—LEEDS *v.* COOK (1803), 4 Esp. 256, N. P.

Annotation:—**Refd.** Hall *v.* Wright (1858), E. B. & E. 746.

78. Intemperance.]—HARBORD *v.* EDGINGTON (1844), 3 L. T. O. S. 51.

79. Admissibility of evidence — To support charge.]—In an action for breach of promise of marriage, where the defence is, that pltf. was a woman of bad character, the character which a witness heard of her in the neighbourhood where she lived, is good evidence.—FOULKES *v.* SELLWAY (1800), 3 Esp. 236, N. P.

Annotation:—**Refd.** Hall *v.* Wright (1858), E. B. & E. 716.

80. —— To rebut charge.]—To an action for breach of promise of marriage deft. pleaded that he made the alleged agreement on the faith & under the belief that pltf. would not so immodestly conduct herself with regard to other men as to give reasonable grounds for believing that she allowed them to have carnal knowledge of her, & that, after the making of the promise, pltf. so immodestly conducted herself with regard to other men as to give reasonable grounds for believing that she allowed them to have carnal knowledge of her, wherefore deft. would not marry her:—*Held:* the plea amounted to a general, & not to a specific charge of immodest conduct on the part of pltf., & therefore she was entitled to give general evidence, in the first instance, of good character for modesty & propriety of demeanour, notwithstanding that deft., at the trial, before such evidence was received, gave the names of the particular men with whom such immodest conduct on her part was alleged to have taken place.—JONES *v.* JAMES (1868), 18 L. T. 243; 16 W. R. 762.

SUB-SECT. 4.—MENTAL OR BODILY INFIRMITY.

81. General rule.]—(1) In an action for breach of promise of marriage deft. alleged in his defence that before the date fixed, for the marriage pltf. had contracted tuberculosis & continued to suffer therefrom, & thus became & still was unfit to marry. Pltf. admitted that on the actual date fixed for the marriage she was so ill, though not from tuberculosis, that she was not then fit to be married:—*Held:* in these circumstances, the burden was in the first instance on pltf. of showing that she became fit to marry within a reasonable time after date; but, on her giving *primâ facie* evidence of her having so become fit, the burden passed to the deft. of proving the allegation in his defence.

(2) To an action for breach of promise of marriage it is no defence that deft. honestly & on reasonable grounds believed pltf. to be unfit for marriage on the date fixed for the marriage or within a reasonable time thereafter, if she was not in fact so unfit.

(3) *Semble:* mental or physical infirmity of pltf. supervening or becoming known to deft. after the date of the promise may in certain cases afford a defence to an action for breach of promise of marriage.—JEFFERSON *v.* PASKELL, [1916] 1 K. B. 57; 85 L. J. K. B. 398; 113 L. T. 1189; 32 T. L. R. 69, C. A.

Annotation:—*As to* (1) **Consd.** Bedford *v.* Cowtan, [1916] 1 K. B. 980.

82. Bodily infirmity—Arising after promise made —Of either party.]—(1) A general promise to marry is a promise to marry on request, & therefore evidence of a promise to marry after a future uncertain event will not support a declaration stating a general promise.

(2) Bodily infirmity arising after the contract is a good reason for either party to break it off. —ATCHINSON *v.* BAKER (1796), Peake, Add. Cas. 103.

Annotation:—*As to* (2) **Refd.** Hall *v.* Wright (1859), E. B. & E. 765.

83. —— —— Of defendant — Unfitness for married state.]—Declaration for breach of promise to marry within a reasonable time, averring that a reasonable time had elapsed, & that deft. refused to marry pltf. Plea, that after the promise & before breach deft. was & still is afflicted with a dangerous disease, by reason whereof deft. became, & was, & thenceforth hitherto has been, & still is capable of marriage, without danger to his life, & therefore unfit for the married state whereof pltf. had notice before action. The jury found the plea proved, except the notice:—*Held:* a party cannot set up as an excuse for the breach of a promise to marry that the performance of the conjugal duties would be dangerous to his life, & the plea disclosed no good defence to pltf.'s claim for damages.—HALL *v.* WRIGHT (1859), E. B. & E. 765; 29 L. J. Q. B. 43; 1 L. T. 230; 6 Jur. N. S. 193; 8 W. R. 160; 120 E. R. 695, Ex. Ch.

Annotations:—**Folld.** Baker *v.* Cartwright (1861), 30 L. J. C. P. 364. **Dbtd.** Cavell *v.* Prince (1866), 4 H. & C. 368. **Consd.** Jefferson *v.* Paskell, [1916] 1 K. B. 57; Gamble *v.* Sales (1920), 36 T. L. R. 427. **Refd.** Beachey *v.* Brown, (1860), E. B. & E. 796; Parkins *v.* Scott (1862), 1 H. & C. 153; Frost *v.* Knight (1870), L. R. 5 Exch. 322. **Mentd.** Brown *v.* Royal Insce. (1859), 1 E. & E. 853; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Boast *v.* Firth (1868), L. R. 4 C. P. 1; Robinson *v.* Davison (1871), L. R. 6 Exch. 269; Turner *v.* Goldsmith (1891), 60 L. J. Q. B. 247; Hick *v.* Raymond & Reid, [1893] A. C. 22; Nickoll & Knight *v.* Ashton, Edridge (1900), 5 Com. Cas. 252; Krell *v.* Henry, [1903] 2 K. B. 740.

84. —— —— Of plaintiff—Onus of proof.]—JEFFERSON *v.* PASKELL, No. 81, *ante*.

85. Mental infirmity—Before promise made—Effect of sanity at time of promise.]—It is no answer to an action for a breach of promise of marriage, that pltf. had before the making of the promise been of unsound mind, & had been confined in a lunatic asylum, provided she was sane at the time of the promise.—BAKER *v.* CART-

i. *Admissibility of evidence — To rebut charge.*]—Deft. attempted by his cross-examination to show pltf.'s unchastity before her acquaintance with him:—*Held:* this gave pltf. the right to repel the imputation involved in such cross-examination, not only by her own evidence, but also to vindicate her character by other testimony.—BURKE *v.* SCRIBNER (1876), 3 Pug. 652.—**CAN.**

80 ii. —— ——.]—Evidence of the good character of pltf., not general evidence, but in regard to particular acts or relations, apparently in answer to evidence, by suggestion, or otherwise, brought out by deft.'s counsel on cross-examination, is not objectionable.—COLLARD *v.* ARMSTRONG (1913), 24 W. L. R. 742; 4 W. W. R. 879; 6 Alta. L. R. 187; 12 D. L. R. 368.—**CAN.**

WRIGHT (1861), 10 C. B. N. S. 124; 30 L. J. C. P. 364; 7 Jur. N. S. 1247; 142 E. R. 397.
Annotations:—**Refd.** Fletcher *v.* Krell (1873), 42 L. J. Q. B. 55. **Mentd.** Pearce *v.* Foster (1885), 2 T. L. R. 76.

86. —— After promise made.]—JEFFERSON *v.* PASKELL, No. 81, *ante*.

Contracts by lunatics & persons of unsound mind, *see, generally*, LUNATICS.

SUB-SECT. 5.—MUTUAL RELEASE.

87. Release in consideration of money payment.]—A promise by deft. to pay £1,000 in consideration of her discharging him from his promise to marry her is good.—BAKER *v.* SMITH (1651), Sty. 295, 303; 82 E. R. 722.
Annotations:—**Refd.** Hebden *v.* Rutter (1664), 1 Sid. 180; Burrell *v.* Strong (1672), Freem. K. B. 65; Finlay *v.* Chirney (1888), 20 Q. B. D. 494; Quirk *v.* Thomas, [1916] 1 K. B. 516.

88. Necessity for proposition to exonerate—Acceded to by defendant.]—To a declaration in *assumpsit* for the breach of a promise to marry in a reasonable time, alleging mutual promises, deft. pleaded, that after the making of the promise in the declaration mentioned, & before any breach thereof by deft., pltf. wholly absolved, exonerated, & discharged deft. from his promise & the performance of the same:—*Held:* a good plea in point of form, but if issue were taken upon it, deft. would not be able to succeed, unless he proved a proposition to exonerate on the part of pltf., acceded to by himself, which, in effect, would be a rescinding of the contract previously made.—KING *v.* GILLETT (1840), 7 M. & W. 55; 10 L. J. Ex. 164; 151 E. R. 676.
Annotations:—**Mentd.** Lewis *v.* Clifton (1854), 22 L. T. O. S. 259; Reid *v.* Hoskins (1856), 6 E. & B. 953; Clay *v.* Turley (1857), 27 L. J. Ex. 2; Dobson *v.* Espie (1857), 26 L. J. Ex. 240; Hobson *v.* Cowley (1858), 27 L. J. Ex. 205.

89. Conduct implying exoneration.]—In an action for breach of promise of marriage, it was proved that deft., having written a letter to pltf. desiring to terminate the engagement, called at her father's house, & a conversation took place respecting the return of letters. Deft. returned pltf.'s letters; pltf. said:—"No, I can't give up your letters; it would be like giving you up altogether." Pltf. left her home & went to reside with an aunt for a long period, & no correspondence took place between the parties for a period of two years:—*Held:* this was evidence from which the jury might infer that pltf. had exonerated deft. from his promise before any breach.—DAVIS *v.* BOMFORD (1860), 6 H. & N. 245; 30 L. J. Ex. 139; 3 L. T. 279; 158 E. R. 101.

90. Mere submission to defendant's wishes insufficient.]—To an action for breach of promise of marriage deft. pleaded that before any breach of the promise "by either party, it was agreed by & between pltf. & deft. that pltf. & deft. should be & they then were absolved & discharged" from the contract. A letter from deft. was put in at the trial, the material passage of which was as follows:—"It will be better to part now than to endeavour to keep up the appearance of confidence for a time, only to end in disappointment, & to have to part at last perhaps in anger. I tell you candidly & plainly that I cannot perform the part which would be expected of me, for by so doing I must neglect other duties, upon which my very subsistence depends. & that being the case, what good can be done by protracting the evil day?" A letter from pltf. in reply was next read; it contained the following sentence, which was relied upon by deft. as his discharge:—"Since it is your wish, we will part":—*Held:* this did not absolve & discharge deft. from his promise, as it amounted to no more than a mere submission by pltf. to deft.'s act.—LAYCOCK *v.* PICKSLAY (1850), 15 L. T. O. S. 279.

SUB-SECT. 6.—ACCORD AND SATISFACTION.

Defence to action for breach of contract generally, *see* CONTRACT, Vol. XII., pp. 437 *et seq.*

91. Effect of new agreement to marry.]—In an action for breach of promise of marriage deft. proposed to plead with six other pleas a plea of accord & satisfaction by a new agreement to marry. This plea was disallowed at chambers as being vexatious. Upon appeal, however, to the ct., it was allowed, upon deft. or her attorney filing an affidavit that there was reasonable & probable cause for pleading it.—SMITH *v.* JENKINS (1873), 28 L. T. 562.

SUB-SECT. 7.—OFFER OF PERFORMANCE.

92. Necessity for plaintiff's refusal before date of writ—Communication of offer to plaintiff's attorney.]—Upon an action for breach of promise of marriage, deft. pleaded that he was ready & willing to marry pltf., but she had refused. To support this plea deft. relied upon a letter he had sent to pltf.'s attorney before action brought offering marriage. The contents of the letter were not communicated to pltf. until after the action was commenced, when she refused to marry deft.:—*Held:* the plea was not proved from his promise.—BELLAMY *v.* ROBERTSON (1915), 30 W. L. R. 935; 8 W. W. R. 205; 21 D. L. R. 415.—**CAN.**

g. *Rescission by guardian on behal of infant—Validity of.*]—PARKS *v.* MAYBEE (1852), 2 C. P. 257.—**CAN.**

PART I. SECT. 7, SUB-SECT. 4.

86 i. *Mental infirmity—After promise made.*]—A fortnight before the date fixed for his marriage, a man, feeling that his mind was giving way, wrote to the father of the lady to whom he was engaged, stating that the marriage could not take place on the date fixed. Ten days later he entered an asylum as a voluntary patient, & was shortly afterwards certified & detained as a lunatic. He never recovered & died in the asylum two years afterwards. After his death the lady raised an action of damages against his testamentary trustees.—*Held:* as the man had done nothing except postpone the marriage, & had never been able subsequently to fulfil his engagement, pursuer was not entitled to damages.—LIDDELL *v.* EASTON'S TRUSTEES, [1907] S. C. 154; 44 Sc. L. R. 140; 14 S. L. T. 479.—**SCOT.**

PART I. SECT. 7, SUB-SECT. 5.

89 i. *Conduct implying exoneration.*]—After promising to marry pltf., deft. visited her & repudiated his promise, whereupon she ordered him out of her house, & refused afterwards to renew the engagement:—*Held:* Whether this was an absolute release was a question for the jury.—REYNOLDS *v.* JAMIESON (1889), 19 O. R. 235.—**CAN.**

f. *What amounts to release.*]—A letter by the woman offering to return "any or all of your gifts as you wish" & requesting the man as a personal favour not to return her the gifts "I have given you from time to time although I know this is perhaps the usual thing to do," & concluding with "for as you say there is no reason why we should not remain friends," is not in itself conclusive evidence of the woman's intention to absolve the man

PART I. SECT. 7, SUB-SECT. 7.

h. *Sufficiency of offer.*]—A marriage was fixed to take place on the morning of June 25. Defender was up all the night of June 23. Early on June 24 he called at pursuer's house & used some angry words, among others: "You will never go a married wife to Letham for me." All parties seem to have regarded this as a hasty expression, not intended to break off the marriage; & he was expected to call during the day & make the final arrangements. He went to bed, a little the worse for liquor, at mid-day,

Part II.—Marriage.

SECT. 1.—NATURE OF.

123. Voluntary union of one man & one woman—For lasting cohabitation—Procreation of children.]—A marriage is not every casual commerce; nor would it be so in the law of nature. A mere casual commerce, without the intention of cohabitation, & bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation & bringing up of children, & for such lasting cohabitation, that, in a state of nature, would be a marriage, & in the absence of all civil & religious institutes, might safely be presumed to be, as it is popularly called, a marriage in the sight of God (SIR WILLIAM SCOTT).

Scottish marriages have been mentioned. The rule prevailed in all times, as the rule of the canon law, which existed in this country & in Scotland, till other civil regulations interfered in this country; & it is the rule which prevails in many countries of the world, at this day, that a mutual engagement, or betrothment, is a good marriage, without consummation, according to the law of nature, & binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree, & pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use & possession should have intervened to complete the *vinculum fidei* (SIR WILLIAM SCOTT).

A marriage purporting to be according to the usages of the Jews is void unless the Jewish law is complied with. The validity of such marriage is determined by the evidence of an expert in the Jewish law, as in the case of foreign marriages.—LINDO *v.* BELISARIO (1795), 1 Hag. Con. 216; 161 E. R. 531; *on appeal* (1796), 1 Hag. Con. App. 7.

Annotations:—**Consd.** R. *v.* Millis (1843), 7 Jur. 911; R. *v.* Millis (1844), 10 Cl. & Fin. 534; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481. **Refd.** Ruding *v.* Smith (1821), 2 Hag. Con. 371; Ardaseer Cursetjee *v.* Perozeboye (1856), 6 Moo. Ind. App. 348. **Mentd.** Nelson *v.* Bridport (1845), 8 Beav. 527; Vander Donckt *v.* Thellusson (1849), 8 C. B. 812; Di Sora *v.* Phillipps (1863), 10 H. L. Cas. 624.

124. —— To exclusion of all others.]—HARROD *v.* HARROD, No. 442, *post.*

—— ——.]—*See, further*, CONFLICT OF LAWS, Vol. XI., pp. 413, 414, Nos. 800–803.

125. Civil contract & religious vow.]—(1) In more modern times, it [the contract of marriage] has been considered in its proper light, as a civil contract, as well as a religious vow, & like all civil contracts will be invalidated by want of consent of capable persons (SIR WILLIAM SCOTT).

(2) It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past incapacity, & also that a defect of incapacity invalidates the contract of marriage as well as any other contract (SIR WILLIAM SCOTT).—TURNER *v.* MEYERS (1808), 1 Hag. Con. 414; 161 E. R. 600.

Annotations:—*As to* (1) **Refd.** Hancock *v.* Peaty (1867), L. R. 1 P. & D. 335; Moss *v.* Moss, [1897] P. 263; R. *v.* Dibden, [1910] P. 57. *As to* (2) **Refd.** Jackson *v.* Jackson (1908), 52 Sol. Jo. 535. *Generally*, **Mentd.** Sherwood *v.* Ray (1837), 1 Moo. P. C. C. 353; R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525.

126. Contract altering relation of parties to public.]—Marriage is a contract by which the relation of parties to the public is materially altered; it is a contract which is to be entered into by the parties with all public notoriety, & which is to be performed in a public place. The high importance of this contract has required by the known law of the country, & every Christian country, that there shall be a publication of banns, to give validity to a contract *sui generis*. The word "banns," in the old German language, signified a publication, meaning that there should be a previous notification generally to the world, that all persons may have notice that such & such persons are going to be married. This condition is never relaxed but by dispensation in the way of licence. If this be so, what is the publication the law requires? I think nothing can be more clear than that the publication should notify, what it is fit the world, for public purposes, should know, that such persons are going to enter into that state & condition of life. A publication that A. & B. were going to be married, when in fact it was C. & D., would be a nullity in itself, & consequently a marriage grafted upon it must be a nullity likewise; & though later times have introduced a very relaxed practice, yet by the known law of the country it requires a publication by banns, at least where not dispensed with by the Ordinary, which the statute law reaffirms & strengthens. Now it has been argued that the true & proper Christian & surname of the party cannot be altered but by proper authority, by the King's licence, or an Act of the Legislature: yet there may be cases, where names acquired by general use & habit may be taken by repute as the true Christian & surname of the parties. If a person has acquired a name by repute, in fact the use of the true name in the banns would be an act of concealment, that would not satisfy the public purposes of the statute; therefore I do say that names so acquired by use & habit might supersede the use of the true name (SIR WILLIAM SCOTT).—FRANKLAND *v.* NICHOLSON (1805), 3 M. & S. 259, n.; 105 E. R. 607.

Annotations:—**Refd.** Wilson *v.* Brockley (1810), 1 Phillim. 132; R. *v.* St. Faith's, Newton (1823), 3 Dow. & Ry. K. B. 348; R. *v.* Tibshelf (1830), 1 B. & Ad. 190; Allen *v.* Wood (1834), 1 Bing. N. C. 8.

127. Status arising out of contract.]—(1) Marriage is based upon the contract of the parties, but is a status arising out of the contract to which each country is entitled to attach its own conditions, both as to the creation & duration.

(2) B., a Portuguese, but domiciled in England, married in England S., a Portuguese lady, domiciled in Portugal. They were first cousins, & by the law of Portugal, were, except by dispensation from the Pope, incapable of contracting marriage:—*Held:* the ignorance of the parties, as to the effect of Portuguese law upon the validity of the ceremony, could not affect the validity of the marriage.—SOTTOMAYER *v.* DE BARROS (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281; 27 W. R. 917.

Annotations:—*As to* (1) **Refd.** Moss *v.* Moss, [1897] P. 263; R. *v.* Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634. *Generally*, **Refd.** Viditz *v.* O'Hagan (1899), 68 L. J. Ch. 553; Ogden *v.* Ogden, [1907] P. 107; Chetti *v.* Chetti, [1909] P. 67.

SECT. 2.—REQUISITES OF A VALID MARRIAGE.

128. Essentials to validity.]—(1) Concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant

by another man does not render the marriage null & void.

(2) The English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication & solemnisation, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.) renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down, that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent but is limited to such fraud as procures the appearance without the reality of consent (SIR FRANCIS JEUNE, P.).—MOSS *v.* MOSS, [1897] P. 263; 66 L. J. P. 154; 77 L. T. 220; 45 W. R. 635; 13 T. L. R. 459.

Annotations:—*As to* (1) **Refd.** Holt *v.* Holt (1908), 72 J. P. Jo. 580. *Generally*, **Refd.** Lieberman *v.* Lieberman (1899), *Times*, Jan. 24; Cramp *v.* Cramp & Freeman, [1920] P. 158.

129. Whether consent of father necessary—Son no longer a minor.]—LEIGH *v.* WINTER (1638), W. Jo. 411; 82 E. R. 215.

Annotations:—**Mentd.** Buller *v.* Waterhouse (1676), T. Jo. 94: West *v.* Berney (1819), 1 Russ. & M. 431.

130. Daughter no longer a minor.] Though a parent has no power to prevent the marriage of his child [daughter aged twenty-six], yet his consent is expected, & by the laws of some countries necessary.—WOODHOUSE *v.* SHEPLEY (1742), 2 Atk. 535; 26 E. R. 721, L. C.

Annotations:—**Refd.** Lowe *v.* Peers (1768), 4 Burr. 2225; Cock *v.* Richards (1805), 10 Ves. 429; Hall *v.* Wright (1858), E. B. & E. 765; Davis *v.* Bonfore (1860), 3 L. T. 279. **Mentd.** Welles *v.* Middleton (1784), 1 Cox, Eq. Cas. 112 c; Heap *v.* Marris (1877), 46 L. J. Q. B. 761.

Consents in case of minors.]—*See* Sect. 7, subsect. 5, *post.*

Capacity to marry.]—*See* Sect. 4, *post.*

Consanguinity & affinity.]—*See* Sect. 5, *post.*

Consent of both parties.]—*See* Sect. 3, *post.*

Forms & ceremonies.]—*See* Sect. 6, *post.*

SECT. 3.—CONSENT OF BOTH PARTIES.

SUB-SECT. 1.—IN GENERAL.

131. Necessity for voluntary consent.]—TURNER *v.* MEYERS, No. 125, *ante.*

132. ——.]—MOSS *v.* MOSS, No. 128, *ante.*

133. Must exist at time of marriage.]—SULLIVAN *v.* SULLIVAN (FALSELY CALLED OLDACRE) (1818), 2 Hag. Con. 238; 161 E. R. 728; *affd. sub nom.* SULLIVAN *v.* OLDACRE (FALSELY CALLED SULLIVAN) (1819), 3 Phillim. 45.

Annotation:—**Refd.** Moss *v.* Moss (1897), 66 L. J. P. 154.

134. Presumption of—Only rebutted by clear & cogent evidence.]—When a person of full age & of sound mind has gone through the ceremony of marriage publicly in the presence of witnesses, who discovered nothing in her demeanour to suggest constraint, & has herself complied with the formality of signing her name & answering questions without apparent difficulty or confusion, very clear & cogent evidence must be given before the presumption of consent can be rebutted & the marriage annulled.

Resp. believed that petitioner, who was his cousin, was possessed of considerable wealth, &, having obtained a licence for his marriage with her at St. Bride's Church, in Fleet St., London, drove her from Notting Hill, where she was staying with friends, to the door of the church under pretence of taking her to attend service at St. Paul's Cathedral. He then threatened that, unless she married him, he would shoot himself; & they thereupon entered the church, & the ceremony of marriage between them was gone through, petitioner saying she was dazed; but nothing occurred to attract the notice of the minister who performed the ceremony. After the ceremony resp. drove petitioner back to her friends, left her there, & never saw her again. The marriage was never consummated, & petitioner never mentioned any of the circumstances to any one until more than two years after, when resp.'s father sent the marriage certificate over to her mother. There was some evidence that petitioner was impressionable. The petitioner prayed for a declaration of nullity of the marriage:—*Held:* the evidence was not sufficient to rebut the presumption of consent arising from going through the ceremony without complaint or apparent reluctance; & the ct. ordered the petition to be dismissed.—COOPER *v.* CRANE, [1891] P. 369; 61 L. J. P. 35; *sub nom.* CRANE (OTHERWISE COOPER) *v.* CRANE, 40 W. R.

SUB-SECT. 2.—MISTAKE.

135. As to character & position.]—(1) Error about the family or fortune of the individual, though produced by disingenuous representations, does not at all affect the validity of the marriage. A man who means to act upon such representations should verify them by his own inquiries; the law presumes that he uses due caution in a manner in which his happiness for life is so materially involved, & it makes no provision for the relief of a blind credulity, however, it may have been produced (SIR WILLIAM SCOTT).

(2) The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual, in order to awaken the vigilance of parents & guardians, & to give them an opportunity of protecting their rights. It therefore requires that the true name should be given to them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of the provisions. Accordingly, this ct. has conceived itself to be carrying the intention of the law into effect, when it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended; upon the ground that such proclamation was no proclamation referring to that marriage, but to another transaction; the marriage therefore was without proclamation of banns, & consequently illegal (SIR WILLIAM SCOTT).—WAKEFIELD *v.* MACKAY (1807), 1 Hag. Con. 394; 1 Phillim. 134, n.; 161 E. R. 593.

Annotations:—*As to* (1) **Refd.** Moss *v.* Moss, [1897] P. 263. *As to* (2) **Refd.** Sullivan *v.* Sullivan (1818), 2 Hag. Con. 238; Allen *v.* Wood (1834), 1 Bing. N. C. 8; Perry *v.* Meddowcroft (1846), 10 Beav. 122. *Generally*, **Mentd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

136. ——.]—EWING *v.* WHEATLEY, No. 317, *post.*

Sect. 3.—*Consent of both parties: Sub-sects.* 2, 3, 4,

137. -.]—SULLIVAN *v.* SULLIVAN (FALSELY CALLED OLDACRE) (1818), 2 Hag. Con. 238; 161 E. R. 728; *affd. sub nom.* SULLIVAN *v.* OLDACRE (FALSELY CALLED SULLIVAN) (1819), 3 Phillim. 45.
Annotation:—**Refd.** Moss *v.* Moss (1897), 66 L. J. P. 154.

138. As to nature & effect of ceremony.]—LIEBERMAN (OTHERWISE SZAPIRA) *v.* LIEBERMAN (1899), *Times*, Jan. 24; *previous proceedings, sub nom.* SZAPIRA (OTHERWISE LIEBERMAN) *v.* SZAPIRA (1898), *Times*, Dec. 22.
Annotation:—**Consd.** Hall *v.* Hall (1908), 24 T. L. R. 756.

139. ——.]—The ct. pronounced a decree of nullity of marriage in a case where the marriage ceremony was gone through at a register office, petitioner not knowing that she was going through a ceremony of marriage, but thinking that they were merely putting their names down to be married in the future, & the marriage never having been consummated.—HALL *v.* HALL (1908), 24 T. L. R. 756.

140. ——.]—An Italian went through a ceremony of marriage with an English girl in England under the belief that the ceremony was one of betrothal only, & did not constitute a marriage. There was no subsequent cohabitation or consummation:—*Held:* there had been no valid marriage, as the husband did not know that he was going to be married, & did not know until later in the day the effect of what had been done, & there was nothing in his subsequent conduct which amounted to a ratification.—VALIER *v.* VALIER (OTHERWISE DAVIS), VALIER *v.* VALIER, VALIER INTERVENING (1925), 133 L. T. 830; 69 Sol. Jo. 746.

141. —— **Mistake induced by duress of petitioner's mother—Acting in concert with respondent.**]—Petitioner was induced by her own mother, acting in concert with resp. to go through the ceremony of marriage with resp. At the time of the marriage the mother, who was shown to have exercised an abnormal amount of control over her daughter, persuaded her that the ceremony she had gone through was merely a ceremony of betrothal:—*Held:* petitioner acted under the duress of her mother, & was not a consenting party of the marriage, & was therefore entitled to a decree of nullity.—FORD *v.* STIER, [1896] P. 1; *sub nom.* CLARKE *v.* CLARKE, 65 L. J. P. 13; *sub nom.* CLARK (FALSELY CALLED STIER) *v.* STIER, 73 L. T. 632; *sub nom.* STIER (OTHERWISE CLARKE) *v.* STIER, 11 R. 668.
Annotations:—**Refd.** Lieberman *v.* Lieberman (1899), *Times*, Jan. 24; Hall *v.* Hall (1908), 24 T. L. R. 756.

SUB-SECT. 3.—DURESS.

See, generally, CONTRACT, Vol. XII., pp. 92 *et seq.*

142. General rule.]—Marriage ought to be free & without compulsion.—KEY *v.* BRADSHAW (1689), 2 Vern. 102; 1 Eq. Cas. Abr. 89, pl. 4; 23 E. R. 675.
Annotations:—**Refd.** Atkins *v.* Far (1739), West *temp.* Hard. 589; Woodhouse *v.* Shepley (1742), 2 Atk. 535.

143. ——.]—Although public policy requires that a marriage should not be lightly set aside, the validity of a contract of marriage must be tested in the same manner as that of an ordinary contract, & therefore a marriage will be annulled if the consent of either party thereto was obtained by means of fraud or duress.

Petitioner, a young woman of twenty-two years of age, entitled to a sum of £26,000 in actual possession & a considerable sum in reversion, had become engaged to resp. & shortly after coming of age was induced by him to accept bills to the amount of £3,325. The persons who had discounted these bills subsequently issued writs against her, & threatened to make her a bkpt. The distress caused by these threats seriously affected her health, & reduced her to a state of bodily & mental prostration, in which she was incapable of resisting coercion & threats, & being assured by resp. that the only method of evading bkpcy. proceedings & exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office. In addition to other threats of ruining her, resp. immediately before the ceremony threatened to shoot her, if she showed that she was not acting of her free will. The marriage was never consummated, & petitioner & resp. separated immediately after the ceremony:—*Held:* there was not such a consent on the part of petitioner as the law requires for the making of a contract of marriage, & that the ceremony before the registrar must be declared null & void.—SCOTT *v.* SEBRIGHT (1886), 12 P. D. 21; 56 L. J. P. 11; 57 L. T. 421; 35 W. R. 258; *sub nom.* SEBRIGHT (OTHERWISE SCOTT) *v.* SEBRIGHT, 3 T. L. R. 79.
Annotations:—**Consd.** Moss *v.* Moss, [1897] P. 263. **Refd.** Cooper *v.* Crane, [1891] P. 369.

144. ——.]—MOSS *v.* MOSS, No. 128, *ante*.

145. Forcible abduction of ward.]—TARRY *v.* BROWNE (1661), 1 Sid. 64; 82 E. R. 972.

146. —— **By guardian.**]—Nullity of marriage, by reason of forcible or fraudulent abduction of a ward of very tender age by her guardian sustained ultimately on appeal on the facts applying to this point.—HARFORD *v.* MORRIS (1776), 2 Hag. Con. 423; 161 E. R. 792.
Annotations:—**Refd.** Portsmouth *v.* Portsmouth (1828), 1 Hag. Ecc. 355; Connelly *v.* Connelly (1851), 7 Moo. P. C. C. 438; Fenton *v.* Livingstone (1859), 33 L. T. O. S. 335; Brook *v.* Brook (1861), 9 H. L. Cas. 193. **Mentd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

147. Threats of violence.]—SCOTT *v.* SEBRIGHT, No. 143, *ante*.

148. ——.]—A man, after paying to a girl of sixteen attentions which she rejected, threatened to blow her brains out if she would not consent to marry him, & produced from his pocket a pistol, which he held at her head. She then promised to marry him on condition that he put away the pistol, which he did. A few days later she went home, & shortly afterwards he intercepted her while on a railway journey, & took her to the office of a registrar of marriages, stating that they were going to see his mother. During the marriage ceremony she fainted, &, as soon as it was over, she got right away. The marriage was never consummated, & the man never insisted upon his marital rights. The ct. pronounced the marriage to be null & void.—BARTLETT (FALSELY CALLED RICE) *v.* RICE (1894), 72 L. T. 122.

PART II. SECT. 3, SUB-SECT. 2.

138 i. *As to nature & effect of ceremony.*]—On the facts:—*Held:* a marriage was void, for want of understanding on the woman's part of the nature of the ceremony, & of any intention to contract.—*Re* AH LIE (1884), 1 B. C. R., pt. 1, 261.—**CAN.**

138 ii. ——.]—Pltf. & deft., who were foreign Jews unacquainted with English, went through the prescribed form of marriage before a magistrate. They did not cohabit, & prior to the date fixed for the religious ceremony in the synagogue pltf. discovered that deft. was an apostate:—*Held:* as pltf. was unaware that she was being married & believed that the ceremony before the magistrate was merely a registration of her engagement, the marriage must be declared null & void.—RUBENS *v.* RUBENS (1909), 26 S. C. 617.—**S. AF.**

149. Evidence insufficient to rebut presumption of consent.]—A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the exors. named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing in the same house, & was fifty-two years of age, to promise to marry him; she withdrew that promise a few days afterwards but was importuned again & prevailed upon to renew it, & the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age & residence in the publication of the banns & in the register of the marriage. There was no cohabitation, nor consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, & by his advice applied for an Act to annul the marriage, the same being considered valid in law:—*Held:* it did not appear by the evidence that the marriage was not solemnised with the free consent of the lady, & the case made was not such as to justify legislative interference.—FIELD'S MARRIAGE ANNULLING BILL (1848), 2 H. L. Cas. 48; 9 E. R. 1010.
Annotation:—**Consd.** Cooper *v.* Crane, [1891] P. 369.

150. —— ——.]—COOPER *v.* CRANE, No. 134, *ante*.

151. Threats of ruin—Woman in state of mental prostration—Incapable of resisting coercion.]—SCOTT *v.* SEBRIGHT, No. 143, *ante*.

152. Pressure exercised by mother of petitioner—Action in concert with respondent.]—FORD *v.* STIER, No. 141, *ante*.

SUB-SECT. 4.—UNDUE INFLUENCE.

See, generally, CONTRACT, Vol. XII., pp. 98 *et seq.*

153. Between trustee & cestui que trust—Cestui que trust of unsound mind—Marriage to daughter of trustee.]—A marriage *de facto* solemnised under circumstances of clandestinity, inferring fraud & circumvention between a person of weak & deranged mind & the daughter of his trustee & solr., who had great influence over him & by whom he was clearly considered & treated as of unsound mind, pronounced null & void & the pretended wife condemned in costs.—PORTSMOUTH (COUNTESS) *v.* PORTSMOUTH (EARL) (1828), 1 Hag. Ecc. 355; 162 E. R. 611.
Annotations:—**Apld.** Wilkinson *v.* Wilkinson (1845), 4 Notes of Cases, 295; Harrod *v.* Harrod (1854), 1 K. & J. 4. **Consd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374. **Refd.** Hall *v.* Wright (1859), E. B. & E. 765; Baker *v.* Baker (1880), 5 P. D. 142; Moss *v.* Moss, [1897] P. 263.

154. Marriage procured by instigation of man's parents—Woman of tender age—Under their custody & control.]—A libel pleading that a marriage was procured by the instigation of the parents of the man, the woman being only fourteen years of age, & under their custody & control, was admitted to proof.—HULL *v.* HULL (FALSELY CALLED M'ARTHUR) (1851), 17 L. T. O. S. 235; 15 Jur. 710.

SUB-SECT. 5.—FRAUD.

155. General rule.]—SCOTT *v.* SEBRIGHT, No. 143, *ante*.

156. —— Nature of fraud invalidating marriages.]—MOSS *v.* MOSS, No. 128, *ante*.

157. Fraud & circumvention—Person of weak & deranged mind.]—PORTSMOUTH (COUNTESS) *v.* PORTSMOUTH (EARL), No. 153, *ante*.

158. —— ——.]—WILKINSON *v.* WILKINSON (1845), 4 Notes of Cases, 295.
Annotation:—**Consd.** Moss *v.* Moss, [1897] P. 263.

159. Concealment of pregnancy by another man.]—MOSS *v.* MOSS, No. 128, *ante*.

As to licence.]—*See* Sect. 7, sub-sect. 3, *post*.

As to banns.]—*See* Sect. 7, sub-sect. 1, *post*.

160. Power of court to dissolve marriage.]—(1) The husband caused the banns to be published without the knowledge of the wife, a minor, to whom he proposed marriage only the day before it took place. For the purpose of concealment, the Christian name of the wife was wrongly stated, & the age & residence of the husband & wife were also falsely described:—*Held:* the marriage was valid, the wife having been unconscious of the irregularity in the publication of the banns.

(2) The ct. has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement.—TEMPLETON *v.* TYREE (1872), L. R. 2 P. & D. 420; 41 L. J. P. & M. 86; 27 L. T. 429; 21 W. R. 81.
Annotations:—*As to* (1) **Refd.** Andrews *v.* Ross (1888), 14 P. D. 15. *As to* (2) **Refd.** Moss *v.* Moss, [1897] P. 263.

SUB-SECT. 6.—DRUNKENNESS.

See, generally, CONTRACT, Vol. XII., pp. 41, 42, Nos. 199–217.

161. Marriage in state of intoxication—Void.]—SULLIVAN *v.* SULLIVAN (FALSELY CALLED OLDACRE) (1818), 2 Hag. Con. 238; 161 E. R. 728; *affd. sub nom.* SULLIVAN *v.* OLDACRE (FALSELY CALLED SULLIVAN) (1819), 3 Phillim. 45.
Annotation:—**Consd.** Moss *v.* Moss (1897), 66 L. J. P. 154.

PART II. SECT. 3, SUB-SECT. 5.

155 i. *General rule.*]—Fraud of the most outrageous & iniquitous character does not prevent the marriage being binding as long as there is actual consent.—HALIMAN *v.* HALIMAN (1914), 26 O. W. R. 1; 5 O. W. N. 976; 15 D. L. R. 842.—**CAN.**

156 i. —— *Nature of fraud invalidating marriages.*]—Fraud is a ground for dissolving a marriage, & there may be a fraud in taking advantage of a person of weak mind & thus bringing about a marriage, & such fraud may be as important as if it had been actually in the marriage itself.—THAKER *v.* JENNISON, [1921] 1 W. W. R. 942.—**CAN.**

p. *Mistake of identity — Induced by fraud.*]—Decree for nullity of marriage pronounced on the ground that there had been an actual mistake of identity & no consent by petitioner to a marriage with resp., the fraud being unquestionably & distinctly proved.—ALLARDYCE (FALSELY CALLED GORDON) *v.* MITCHELL (FALSELY CALLED GORDON) (1869), 6 W. W. & A'B. 45.—**AUS.**

q. *Contract induced by fraud — Adoption by innocent party.*]—A contract of marriage, induced by the fraud of one of the parties, may, like any other contract, be adopted by the innocent party.—ALEXANDER *v.* ALEXANDER, [1920] S. C. 327; 57 Sc. L. R. 423; [1920] 1 S. L. T. 307.—**SCOT.**

r. *Proceedings for annulment — Must be commenced within reasonable time.*]—If either party is entitled to annulment by reason of the fraud of the other, proceedings must be taken within a reasonable time after discovery of the fraud.—HAUPT *v.* HAUPT (1897), 14 S. C. 39.—**S. AF.**

PART II. SECT. 3, SUB-SECT. 6.

s. *Marriage in state of intoxication.*]—In order to render void a ceremony of marriage otherwise valid, on the ground that the man was intoxicated, it must be shown that there was such state of intoxication as to deprive him of all sense & volition, & to render him incapable of knowing what he was about. A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only & may be ratified & confirmed.—ROBLIN *v.* ROBLIN (1881), 28 Gr. 439.—**CAN.**

t. ——.]—An irregular marriage set aside when it was proved that the woman was in such state of intoxication as to be incapable of giving a valid consent.—JOHNSTON *v.* BROWN (1823), 2 Sh. (Ct. of Sess.) 495.—**SCOT.**

SECT. 4.—CAPACITY TO MARRY.

SUB-SECT. 1.—IN GENERAL.

162. General rule.]—TURNER *v.* MEYERS, No. 125, *ante.*

163. ——.]—(1) A voidable marriage cannot be rendered void, after the death of either of the parties.

(2) The canonical disabilities, such as consanguinity, affinity, & certain corporal infirmities, only make the marriage voidable, & not *ipso facto* void, until sentence of nullity be obtained, & such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties (SIR JOHN NICHOLL).

(3) Civil disabilities, such as a prior marriage, want of age, idiotcy & the like make the contract void *ab initio* (SIR JOHN NICHOLL).—ELLIOTT *v.* GURR (1812), 2 Phillim. 16; 161 E. R. 1064.

164. ——.]—MOSS *v.* MOSS, No. 128, *ante.*

165. Petitioner may plead own past incapacity.]—TURNER *v.* MEYERS, No. 125, *ante.*

Consanguinity & affinity.]—*See* Sect. 5, *post.*

SUB-SECT. 2.—AGE.

166. General rule.]—MOSS *v.* MOSS, No. 128, *ante.*

167. Effect of want of age.]—The marriage of the heir by her father *infra annos nubiles* is no complete marriage.—GORGE'S CASE (1598), 6 Co. Rep. 22 a; Moore, K. B. 737; 2 And. 207; 77 E. R. 286.

Annotations:—**Refd.** Holt's Case (1611), 9 Co. Rep. 131 b. **Mentd.** Reve *v.* Malster & Barrow (1635), Cro. Car. 410; Hartley *v.* Manson (1842), 4 Scott, N. R. 728.

168. —— Power to contract second marriage on attaining years of assent.]—WARNER *v.* BABINGTON (1599), Moore, K. B. 575; 72 E. R. 769.

169. —— Marriage void ab initio.]—ELLIOTT *v.* GURR, No. 163, *ante.*

170. ——.]—Nullity of marriage by reason of the minority of the husband, established at the suit of the wife.—TURNER *v.* FELTON (1812), 2 Phillim. 92; 161 E. R. 1088.

171. —— Jewess.]—Nullity of marriage by reason of minority established, the woman being a Jewess.—JONES *v.* ROBINSON (1815), 2 Phillim. 285; 161 E. R. 1146.

Annotation:—**Consd.** R. *v.* Millis (1814), 10 Cl. & Fin. 534.

172. Assent after attaining age of assent—Effect of.]—GORGE'S CASE (1598), 6 Co. Rep. 22 a; Moore, K. B. 737; 2 And. 207; 77 E. R. 286.

Annotations:—**Refd.** Holt's Case (1611), 9 Co. Rep. 131 b. **Mentd.** Reve *v.* Malster & Barrow (1635), Cro. Car. 410; Hartley *v.* Manson (1842), 4 Scott, N. R. 728.

173. —— ——.]—The marriage of an infant before the age of discretion may be made good by subsequent assent.—ASH'S CASE (1702), Freem. Ch. 259; Prec. Ch. 203; 22 E. R. 1196.

174. Marriageable age.]—The law for several purposes takes notice of the age of infants. He may contract matrimony at the age of twelve.—R. *v.* WEEKS (1733), Kel. W. 290; 25 E. R. 620.

175. ——.]—Infants may contract marriage, males at fourteen, females at twelve (LORD HARDWICKE, C.).—HARVEY *v.* ASHLEY (1748), 3 Atk. 607; 26 E. R. 1150, L. C.

Annotations:—**Refd.** Caruthers *v.* Caruthers (1794), 4 Bro. C. C. 500; Campbell *v.* Ingilby (1856), 21 Beav. 567. **Mentd.** Buckinghamshire *v.* Drury (1762), 2 Eden, 60; Durnford *v.* Lane (1781), 1 Bro. C. C. 106; Clinton *v.* Hooper (1791), 1 Ves. 173; Field *v.* Moore, Field *v.* Brown (1855), 25 L. J. Ch. 66.

Consents in cases of minors.]—*See* Sect. 7, subsect. 5, *post.*

Consent of both parties.]—*See* Sect. 3, *ante.*

SUB-SECT. 3.—LUNATICS AND PERSONS OF UNSOUND MIND.

See LUNATICS.

SUB-SECT. 4.—DEAF AND DUMB PERSONS.

176. Necessity for understanding nature of contract.]—HARROD *v.* HARROD, No. 442, *post.*

SUB-SECT. 5.—CIVIL DISABILITY UNDER FORMER MARRIAGE.

Criminal proceedings for offences in relation to marriage, *see* CRIMINAL LAW, Vol. XIV., pp. 735 *et seq.*

177. Effect of—Marriage void.]—A marriage when a former husband or wife is alive is null as well by the spiritual as the common law; & they are not husband & wife *de facto.*—RIDDLESDEN *v.* WOGAN (1601), Cro. Eliz. 858; 78 E. R. 1084.

178. —— ——.]—ELLIOTT *v.* GURR, No. 163, *ante.*

179. —— ——.]—Nullity of marriage, by reason of a former marriage, established.—BAYARD *v.* MORPHEW (1815), 2 Phillim. 321; 161 E. R. 1158.

180. —— —— Decree ex debito justitiæ.]—A petitioner is entitled *ex debito justitiæ* to a declaration of nullity of marriage when resp.'s husband was alive at the time of the second marriage, & the ct. has no discretion as to withholding relief.—BATEMAN *v.* BATEMAN (OTHERWISE HARRISON) (1898), 78 L. T. 472.

181. Proof of existence of former marriage.]—In a suit of nullity of marriage, by reason of a former marriage, the identity of the parties is a most important point.—LEGGE *v.* DUMBLETON (FALSELY CALLED LEGGE) (1845), 9 Jur. 144.

Essential validity of marriage—By what law governed.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 415 *et seq.*

Restrictions on marriage after decree of divorce—Imposed by lex domicilii.]—*See* CONFLICT OF LAWS, Vol. XI., p. 417, Nos. 833, 834.

Recognition of foreign decrees as to marriage.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 428 *et seq.*

Recognition of other modes of divorce.]—*See* CONFLICT OF LAWS, Vol. XI., p. 432, Nos. 955, 956.

SECT. 5.—CONSANGUINITY AND AFFINITY.

SUB-SECT. 1.—IN GENERAL.

182. General rule.]—MOSS *v.* MOSS, No. 128, *ante.*

183. Application of Marriage Act, 1835 (c. 54).]—R. *v.* CHADWICK, R. *v.* ST. GILES IN THE FIELDS

PART II. SECT. 4, SUB-SECT. 1.

a. *Marriage of adulterers.*]—Inasmuch as adultery has ceased to be a crime in South Africa all the pains & penalties of that offence have also fallen away, including the prohibition of intermarriage between persons who have committed adultery together.—ESTATE HEINAMANN *v.* HEINAMANN, [1919] App. D. 99.—**S. AF.**

PART II. SECT. 5, SUB-SECT. 1.

b. *Affinity equivalent to consanguinity.*]—There is by Scots law no difference between consanguinity & affinity as regards the forbidden degrees

(INHABITANTS), ST. GILES IN THE FIELDS *v.* ST. MARY, LAMBETH, No. 201, *post*.

184. What constitutes affinity—Not intercourse without actual marriage.]—WING *v.* TAYLOR (FALSELY CALLING HERSELF WING), No. 426, *post*.

SUB-SECT. 2.—WHAT ARE PROHIBITED DEGREES.

A. In General.

See Table of Kindred & Affinity (Book of Common Prayer); 32 Hen. 8, c. 38; Act of Supremacy, 1558 (c. 1), s. 3.

185. General rule.]—The most certain rule for the extent of the prohibitions is, that it doth extend to those that are near of kin, & to those that are near to those that are his near of kin; so not only the *propinqui*, but the *propinquis propinqui* are also forbid, & that is the utmost extent of it (VAUGHAN, C.J.).—HILL *v.* GOOD (1674), Freem. K. B. 167; Vaugh. 302; 3 Keb. 166; 89 E. R. 120.

Annotations: —**Consd.** R. *v.* Chadwick (1848), 11 Q. B. 205. **Refd.** Wortly *v.* Watkinson (1676), 3 Keb. 660; Butler *v.* Gastrill (1721), Gilb. Ch. 156; Middleton *v.* Crofts (1736), 2 Atk. 650; Brook *v.* Brook (1861), 9 H. L. Cas. 193; Wing *v.* Taylor (falsely calling herself Wing) (1861), 2 Sw. & Tr. 278; R. *v.* Dibden, [1910] P. 57. **Mentd.** Camden *v.* Home (1791), 4 Term Rep. 382; Gare *v.* Gapper (1803), 3 East, 472; Gould *v.* Gapper (1804), 5 East, 345.

186. Whether daughter of wife's sister.]—MANUES CASE (1591), Moore, K. B. 907; 72 E. R. 987; *sub nom.* MAN'S CASE, Cro. Eliz. 228; 4 Leon. 16.

Annotations:—**Refd.** Harrison *v.* Burwell (1670), 2 Vent. 9; Hill *v.* Good (1674), Freem. K. B. 167; Wortesley's Case (1674), Freem. K. B. 287; Butler *v.* Gastrill (1721), Gilb. Ch. 156; R. *v.* Chadwick (1847), 17 L. J. M. C. 33.

187. ——.]—PARSON'S CASE (1605), Co. Litt. 235 a.

Annotations:—**Consd.** R. *v.* Chadwick, R. *v.* St. Giles in the Fields, St. Giles in the Fields *v.* St. Mary, Lambeth (1848), 11 Q. B. 173. **Refd.** Harrison *v.* Burwell (1670), 2 Vent. 9; Hill *v.* Good (1674), Freem. K. B. 167; Wortly *v.* Watkinson (1676), 3 Keb. 660.

188. ——.]—A man may marry his wife's sister's daughter.—HOWARD *v.* SALISBURY (CHANCELLOR) (1669), 1 Mod. Rep. 25; 86 E. R. 704.

189. ——.]—The Spiritual Ct. may proceed to dissolve a marriage between a man & his wife's sister's daughter, for it is within the Levitical degrees.—WORTLEY *v.* WATKINSON (1679), 2 Show. 70; 3 Keb. 660; 2 Lev. 254; T. Jo. 118; 89 E. R. 800; *sub nom.* WORTESLEY'S CASE, Freem. K. B. 287; *subsequent proceedings, sub nom.* WATKINSON *v.* MERGATRON (1682), T. Raym. 464.

Annotations:—**Refd.** Butler *v.* Gastrill (1721), Gilb. Ch. 156; R. *v.* Brighton (1861), 1 B. & S. 447; *Re* Phillips, Charter *v.* Ferguson (1918), 88 L. J. Ch. 27.

190. ——.]—A man cannot marry his wife's sister's daughter, for, by affinity, he is her uncle.—CLEMENT *v.* BEARD (1699), 5 Mod. Rep. 418; 87 E. R. 756; *sub nom.* ABRAHAM (OR KENNESLEY) *v.* BIRD, Freem. K. B. 511.

Annotation:—**Consd.** Ellerton *v.* Gastrell (1719), 1 Com. 318.

191. ——.]—SNOWLING *v.* NURSEY (1702), 2 Lut. 1075; 125 E. R. 598.

Annotation:—**Consd.** Butler *v.* Gastrell (1723), Bunb. 145.

192. ——.]—DENNY *v.* ASHWELL (1717), 1 Stra. 53; 93 E. R. 380.

193. ——.]—A marriage with the wife's sister's daughter was holden to be within the Levitical degrees; so a prohibition was denied to the Spiritual Ct., where a libel for that purpose was exhibited.—ELLERTON *v.* GASTRELL (1719), 1 Com. 318; 92 E. R. 1090.

Annotations:—**Apld.** R. *v.* Brighton (1861), 1 B. & S. 447. **Refd.** *Re* Phillips, *Re* Howard, Charter *v.* Ferguson, [1919] 1 Ch. 128.

194. Daughter of wife's half sister.]—R. *v.* BRIGHTON (INHABITANTS), No. 211, *post*.

195. Daughter of brother of half-blood.]—OXENHAM *v.* GAYRE (1678), 5 Bac. Abr. 7th ed. 294.

196. Step-daughter.]—BLACKMORE & THORP *v.* BRIDER, No. 215, *post*.

197. Not great-uncle's widow.]—HARRISON *v.* BURWELL (1670), 2 Vent. 9; Vaugh. 206; 86 E. R. 278.

Annotations:—**Consd.** R. *v.* Chadwick, R. *v.* St. Giles in the Fields, St. Giles in the Fields *v.* St. Mary, Lambeth (1848), 11 Q. B. 173. **Refd.** Hill *v.* Good (1672), Freem. K. B. 73; Wing *v.* Taylor (1861), 30 L. J. P. M. & A. 258. **Mentd.** Marriot *v.* Marriot (1725), 1 Stra. 666; Camden *v.* Home (1791), 4 Term Rep. 382; R. *v.* Dibden, [1910] P. 57.

198. Father's widow.]—ORCHARD *v.* COBB (1692), Return of Appeals before the High Court of Delegates, p. 46, No. 98 (Parliamentary Papers, 199, April 3, 1868).

Annotation: **Refd.** Combe *v.* Edwards (1878), 42 J. P. 820.

199. Sister of mother of first wife.]—The marriage of a man with his first wife's mother's sister is within the Levitical degrees, & prohibited & a consultation awarded.—BUTLER *v.* GASTRELL (1723), Bunb. 145; Gilb. Ch. 156; 115 E. R. 627.

200. Divorced husband's brother.]—Petitioner in 1890 went through a form of marriage with resp., who had previously been married to petitioner's brother, whom she had divorced. The parties lived together for some years, & a child was born of the union, whom petitioner was educating. In 1892 a deed was entered into by which resp was provided for:—*Held:* a decree of nullity should be granted; the case was not one in which any conditions as to securing an allowance for resp. & the child should be attached to the decree, & resp. was not entitled to costs.—D'ETCHEGOYEN *v.* D'ETCHEGOYEN (1908), 25 T. L. R. 85.

201. Degree prohibited by God's law—28 Hen. 8, c. 7, s. 11.]—(1) The prohibited degrees [in Marriage Act, 1835 (c. 54)] are those declared by 28 Hen. 8, c. 7, s. 11, to be prohibited by God's law, & refer to the decisions of the Ecclesiastical

Scots law is much more stringent on the subject of the forbidden degrees than English law, for it holds all marriages within the forbidden degrees not only to be incestuous but severely punishable, even capitally.—FENTON *v.* LIVINGSTONE (1859), 21 Dunl. (Ct. of Sess.) 11; 3 Macq. 497; 31 Sc. Jur. 578.—**SCOT.**

c. ——.]—In the computation of the degrees within which marriage is prohibited a relation of affinity is equivalent to a relation of consanguinity.—PURVES' TRUSTEES *v.* PURVES (1895), 22 R. (Ct. of Sess.) 513; 32 Sc. L. R. 379; 2 S. L. T. 627.—

PART II. SECT. 5, SUB-SECT. 2.—A.

d. *Degree prohibited by law of land.*]—LOPEZ *v.* LOPEZ (1885), I. L. R. 12 Calc. 706.—**IND.**

e. *Mother's sister.*]—Pltf. brought this action for the nullity of his marriage with deft., who was his mother's sister:—*Held:* the parties were within the prohibited degrees of affinity.—LIDDELL *v.* MOSS (FALSELY CALLED LIDDELL) (1920), 13 Q. S. R. 104.—**AUS.**

f. *Niece, or niece of deceased wife.*]—A man may not marry his own niece neither can he marry the niece of his deceased wife.—PURVES' TRUSTEES *v.* PURVES (1895), 22 R. (Ct. of Sess.) 513; 32 Sc. L. R. 379; 2 S. L. T. 627.—**SCOT.**

g. *Widow of father's brother.*]—A man, whether bachelor or widower, may marry the widow of his father's brother, *i.e.* his aunt by affinity.—MILLS *v.* ASSISTANT RESIDENT MAGISTRATE OF THE CAPE (1901), 18 S. C. 342; 11 C. T. R. 438.—**S. AF.**

h. *Relationship of the "half-blood."*]—The term "prohibited degrees of consanguinity or affinity," in Divorce & Matrimonial Causes Act, 1904, s. 24, includes the "half-blood."—WILSON (OTHERWISE BENNETT) *v.* BENNETT (1906), 26 N. Z. L. R. 112.—**N.Z.**

Sect. 5.—*Consanguinity and affinity: Sub-sects.* 2, *A., B., C. & D.; sub-sects.* 3 & 4. *Sect.* 6: *Sub-sects.* 1 & 2.]

Cts. at that time. Consequently, the marriage of a man with the sister of his deceased wife is prohibited & void.

(2) This law extends to an illegitimate as well as a legitimate child of the late wife's parents.—R. *v.* CHADWICK, R. *v.* ST. GILES IN THE FIELDS (INHABITANTS), ST. GILES IN THE FIELDS *v.* ST. MARY, LAMBETH (1848), 11 Q. B. 173; Cripps' Church Cas. 34; 17 L. J. M. C. 33; 10 L. T. O. S. 155; 11 J. P. 839; 12 Jur. 174; 2 Cox, C. C. 381; 116 E. R. 441.

Annotations:—As to (1) **Consd.** Fenton *v.* Livingstone (1859), 33 L. T. O. S. 335. **Apld.** Brook *v.* Brook (1861), 9 H. L. Cas. 193. **Refd.** R. *v.* Brighton (1861), 1 B. & S. 447; *Re* De Wilton, De Wilton *v.* Monteflore, [1900] 2 Ch. 481; Banister *v.* Thompson, [1908] P. 362; R. *v.* Dibdin, [1910] P. 57.

Marriage with illegitimate relations.]—*See* Subsect. 2, D., *post.*

B. Marriage with Deceased Wife's Sister.

See Deceased Wife's Sister's Marriage Act, 1907 (c. 47).

202. Deceased Wife's Sister's Marriage Act, 1907 (c. 47)—Effect of—Law altered in civil sense only.]—The [above Act] seems to recognise a distinction between the civil & ecclesiastical aspects of marriage, & to alter the law as to the one without purporting to affect the law as to the other. If the Act had merely repealed the statutory prohibition of marriage with a deceased wife's sister, 32 Hen. 8, c. 38, the result as far as ecclesiastical law is concerned, would have been clear. Canon 99, already abrogated by Marriage Act, 1835 (c. 54), with regard to legal proceedings to annul marriages within the prohibited degrees, would, so far as marriages with a deceased wife's sister are concerned, have become repugnant to statute & therefore altogether inoperative: 25 Hen. 8, c. 19, s. 3. But the apparent intention of the recent Act is to alter the law in a civil sense only, so that it cannot be said to have necessarily affected the canon (DEAN OF ARCHES).—BANISTER & WIFE *v.* THOMPSON, [1908] P. 362; 24 T. L. R. 841; *sub nom.* R. *v.* DIBDIN, *Ex p.* THOMPSON, 101 L. T. 106; *subsequent proceedings, sub nom.* THOMPSON *v.* DIBDIN, [1912] A. C. 533, H. L.

203. —— —— Marriage validated for all purposes—Wherever contracted.]—Sect. 1 of above Act validates a marriage between a man & his deceased wife's sister, for all purposes, whether the marriage is contracted within or without the realm, & whether before or after the date of the passing of the Act.—THOMPSON *v.* DIBDIN, [1912] A. C. 533; 81 L. J. K. B. 918; 107 L. T. 66; 28 T. L. R. 490; 56 Sol. Jo. 647, H. L.; *affg.* S. C. *sub nom.* R. *v.* DIBDIN, [1910] P. 57, C. A.

204. —— Retrospective operation of.]—THOMPSON *v.* DIBDIN, No. 203, *ante.*

205. —— —— Death of party before passing of Act.]—(1) Sect. 1 of above Act applies to & makes valid a marriage with a deceased wife's sister although, owing to the death of one of the parties, the assumed relationship of husband & wife has ceased to exist before the date of the passing of the Act.

(2) The *spes successionis* which the brother of a person has during his lifetime to a share of his property, as one of his next of kin, in the event of his dying intestate, is not an "interest in expectancy" protected by sect. 2 of above Act.—*Re* GREEN, GREEN *v.* MEINALL, [1911] 2 Ch. 275; 80 L. J. Ch. 623; 105 L. T. 360; 27 T. L. R. 490; 55 Sol. Jo. 552.

Annotation:—As to (2) **Refd.** *Re* Mudge, [1913] 2 Ch. 92.

206. —— Saving rights under—Spes successionis in property—Not "interest in expectancy."]—*Re* GREEN, GREEN *v.* MEINALL, No. 205, *ante.*

207. —— —— Existing interests not affected.]—(1) A man died in 1902 having by his will given his property upon trust to pay his wife the income thereof while she remained his widow, with a gift over on her death or second marriage. In 1904 she went through the ceremony of marriage with her deceased sister's husband, but this marriage was validated by sect. 1 of above Act, which was passed & came into operation on Aug. 28, 1907:—*Held:* the effect of sect. 2 of the Act was that pltf. was still entitled to receive the income of testator's property.

(2) *Semble:* although the Act renders valid as civil contracts previous marriages with deceased wives' sisters, it does not alter or interfere with any rights of property depending on the previous marriages not being valid.—*Re* WHITFIELD, HILL *v.* MATHIE, [1911] 1 Ch. 310; 80 L. J. Ch. 263; 103 L. T. 878; 27 T. L. R. 203; 55 Sol. Jo. 237.

Annotation:—As to (2) **Refd.** *Re* Springfield, Davies *v.* Springfield (1922), 38 T. L. R. 263.

208. —— —— ——.]—*Re* CROSBY'S TRUSTS, SMITH *v.* METHERELL (1919), 147 L. T. Jo. 66.

209. —— —— ——.]—A marriage settlement executed in 1869 provided that after the death of the husband & wife the income should be held in trust for the children of the husband by the wife & by any future wife. The first wife died in 1874, & in 1884 the husband married his deceased wife's sister. Such a marriage was at that time invalid. There were three children of each marriage, & the three children of the second marriage were born before the passing of above Act:—*Held:* as the three children of the first marriage had, at the passing of the Act, a vested interest in remainder, the case fell within sect. 2 of above Act & the children of the second marriage were not entitled to any share in the settled fund.—*Re* SPRINGFIELD, DAVIES *v.* SPRINGFIELD (1922), 38 T. L. R. 263; 66 Sol. Jo. 268.

Foreign marriages.]—*See* CONFLICT OF LAWS, Vol. XI., p. 414, Nos. 804–806.

C. Marriage with Deceased Husband's Brother.

See Deceased Brother's Widow's Marriage Act, 1921 (c. 24).

PART II. SECT. 5, SUB-SECT. 2.—B.

k. *Deceased Wife's Sister's Marriage Act, 1907—Saving rights under.*]—A testatrix nominated her two sons, A. & B. her residuary legatees. Both A. & B. predeceased testatrix. A. died in 1899, leaving issue a son, X., who survived testatrix. B. died in 1912 without issue. Testatrix had two other children by a second marriage, both of whom survived her. This marriage, which was contracted prior to 1907, was with the husband of her deceased sister:—*Held:* the children of the second marriage were entitled to share in the undisposed of personal estate of testatrix equally with her grandson by her first marriage, just as if the second marriage had always been legal. A prospective next-of-kin of a living person has not got such a title or interest as is saved by Deceased Wife's Sister's Marriage Act, 1907, s. 2.—*Re* BUTLER, JOYCE *v.* BREW, [1918] 1 I. R. 394.—**IR.**

l. *Validity.*]—By English law as adopted in this province in 1792, marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vict. c. 42 (D.), which removed all disabilities.—*Re* MURRAY CANAL, LAWSON *v.* POWERS (1884), 6 O. R. 685.—**CAN.**

PART II. SECT. 5, SUB-SECT. 2.—C.

m. *Validity.*]—A marriage between a woman & her deceased husband's brother is within the prohibited degrees of consanguinity or affinity & is voidable during the life-

Foreign marriages.]—*See* CONFLICT OF LAWS, Vol. XI., p. 415, No. 807.

D. Marriage with Illegitimate Relations.

210. General rule.]—HORNER *v.* LIDDIARD (OTHERWISE WHITELOCK, FALSELY CALLING HERSELF HORNER), No. 366, *post.*

211. ——.]—(1) The marriage of a man with the daughter of the half sister of his deceased wife is null & void by Marriage Act, 1835 (c. 54). (2) No settlement can be derived through such a marriage. (3) A marriage within the prohibited degrees of consanguinity or affinity is null & void, although one of the parties is illegitimate.—R. *v.* BRIGHTON (INHABITANTS) (1861), 1 B. & S. 447; 30 L. J. M. C. 197; 5 L. T. 56; 25 J. P. 630; 9 W. R. 831; 121 E. R. 782.

Annotations:—*As to* (1) **Apld.** *Re* Phillips, *Re* Howard, Charter *v.* Ferguson, [1919] 1 Ch. 128. *As to* (2) **Apld.** *Re* Phillips, *Re* Howard, Charter *v.* Ferguson, [1919] 1 Ch. 128.

212. ——.]—(1) A marriage by a husband with the daughter of his deceased wife's illegitimate brother is void.

(2) A marriage within the prohibited degrees is bad, though one of the parties is illegitimate. Deceased Wife's Sister's Marriage Act, 1907 (c. 47), merely removes one of the prohibited degrees, & does not affect or alter the others. The law on this subject, as ascertained in the Ecclesiastical Cts. is merely sanctioned & confirmed by Marriage Act, 1835 (c. 54).—*Re* PHILLIPS, *Re* HOWARD, CHARTER *v.* FERGUSON, [1919] 1 Ch. 128; 88 L. J. Ch. 27; 120 L. T. 213; 35 T. L. R. 98; 63 Sol. Jo. 116.

213. Within Levitical degrees.]—Marriage with a relation [sister's daughter] though illegitimate, within the Levitical degrees, is illegal.—HAINES *v.* JEFFREYS (1696), 1 Com. 2; Comb. 356; 1 Ld. Raym. 68; 92 E. R. 928; *sub nom.* HAINES *v.* JESCOTT, 5 Mod. Rep. 168.

Annotations:—**Consd.** R. *v.* Brighton (1861), 1 B. & S. 447. **Refd.** Horner *v.* Horner (1799), 1 Hag. Con. 337.

214. Illegitimate daughter of sister.]—HAINES *v.* JEFFREYS, No. 213, *ante.*

215. Illegitimate daughter of wife.]—Incest would arise equally if the woman was the legitimate or the illegitimate daughter of a wife.—BLACKMORE & THORP *v.* BRIDER (1816), 1 Hag. Con. 393, n.; 2 Phillim 359; 161 E. R. 593.

Annotations:—**Refd.** Chick *v.* Ramsdale & Chick (1835), 1 Curt. 34; Woods *v.* Woods (1840), 2 Curt. 516; Combe *v.* Edwards (1878), 3 P. D. 103. **Mentd.** Mackonochie *v.* Penzance (1881), 6 App. Cas. 424.

216. Daughter of wife's illegitimate sister.]—R. *v.* BRIGHTON (INHABITANTS), No. 211, *ante.*

217. Daughter of wife's illegitimate brother.]—*Re* PHILLIPS, *Re* HOWARD, CHARTER *v.* FERGUSON, No. 212, *ante.*

218. Application of Marriage Act, 1835 (c. 54), s. 2.]—R. *v.* CHADWICK, R. *v.* ST. GILES IN THE FIELDS (INHABITANTS), ST. GILES IN THE FIELDS *v.* ST. MARY, LAMBETH, No. 201, *ante.*

Prohibited degrees generally, *see* Sub-sect. 2, A., *ante.*

SUB-SECT. 3.—EFFECT OF MARRIAGE WITHIN PROHIBITED DEGREES.

219. Marriage voidable.]—ELLIOTT *v.* GURR, No. 163, *ante.*

220. Marriage void.]—R. *v.* CHADWICK, R. *v.* ST. GILES IN THE FIELDS (INHABITANTS), ST. GILES IN THE FIELDS *v.* ST. MARY, LAMBETH, No. 201, *ante.*

221. —— No settlement derived therefrom.]—R. *v.* BRIGHTON (INHABITANTS), No. 211, *ante.*

SUB-SECT. 4.—REMARRIAGE OF DIVORCED PERSONS.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 184 (1).

SECT. 6.—**FORMS AND CEREMONIES.**

SUB-SECT. 1.—IN GENERAL.

Celebration.]—*See* Sect. 8, *post.*

Preliminaries to celebration.]—*See* Sect. 7, *post.*

By what law governed—Where conflict of laws.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 417 *et seq.*

SUB-SECT. 2.—CONTRACTS PER VERBA DE PRÆSENTI.

222. Nature & effect of—Former law.]—The first & material point for consideration in this case is, as to the effect, by the law of England, previous to the Marriage Act, of a contract or engagement of matrimony *per verba de præsenti*; by which I understand a contract of present marriage; for that is the sense in which these words are used in all the text-writers & reports of decisions upon the subject. "Spousals de præsenti," Swinburne says, "are a mutual contract or promise of present matrimony; as when the man doth say to the woman, 'I do take thee to my wife; & she then answereth, 'I do take thee to my husband.'" Such a contract entered into between a man & a woman was indissoluble; the parties could not, by mutual consent, release each

n. ——— *Cannot be questioned after death of one party.*]—KIDD *v.* HARRIS (1901), 22 C. L. T. 25; 3 O. L. R. 60; 1 O. W. R. 141.—**CAN.**

PART II. SECT. 5, SUB-SECT. 3.

219 i. *Marriage voidable.*]—Marriages within the prohibited degrees prescribed in 28 Henry VIII. c. 7, are voidable during the lifetime of the parties by the Supreme Ct. of N.S.W. in its Matrimonial Causes Jurisdiction.—MILLER *v.* MAJOR (1906), 4 C. L. R. 219.—**AUS.**

219 ii. ——.]—The intestate, H. M., was married in this province in 1850 to the sister of the deceased wife, by whom he had children, & died in 1856:—*Held:* though the marriage was voidable during the lives of both parties to it, time of the parties.—OBST *v.* OBST, [1912] S. R. Q. 157.—**AUS.**

PART II. SECT. 6, SUB-SECT. 1.

o. *General rule.*]—A clergyman is not bound to perform the ceremony of marriage, but if he does, the rites & usages of his church or denomination, & the accustomed form, although unmeaning, must be followed.—*Re* AH LIE (1884), 1 B. C. R. pt. 1 261.—**CAN.**

PART II. SECT. 6, SUB-SECT. 2.

p. *Validity of.*]—Marriages *per verba de præsenti* were not invalidated by the 7 Will. IV., No. 6.—R. *v.* ROBERTS (1850), 1 Legge, 544.—**AUS.**

q. ——.]—A marriage *per verba de præsenti* is invalid, except where it takes place in a barbarous country, where no legal solemnisation of marriage is obtainable.—*Re* SHERAN (1899), 4 Terr. L. R. 83.—**CAN.**

r. ——.]—A written declaration of marriage *de presenti* signed by both parties, & delivered by the man to the woman, conclusively establishes the contract.—FORSTER *v.* FORSTER (1872), L. R. 2 Sc. & Div. 244.—**SCOT.**

s. ——— *Subsequent conduct of parties inconsistent with marriage.*]—After a family supper, one of the party—a bachelor—put a ring on the finger of one of the daughters, a spinster, & said to her, "Maggie, you are my wife before heaven—so help me, oh God!" The two thereupon kissed each other, & Maggie said, "Oh, Major!" Their health was drunk, & they were

Sect. 6.—*Forms and ceremonies: Sub-sect.* 2. *Sect.* 7: *Sub-sect.* 1, *A., B. & C.* (*a*), (*b*) & (*c*).]

other from the obligation. Either party might, by a suit in the spiritual ct., compel the other to solemnise *in facie ecclesiæ*. It was so much a marriage, that, if they cohabited together before solemnisation, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, & was, therefore, & by reason of its indissoluble nature, styled in the ecclesiastical law "*verum matrimonium*," & sometimes "*ipsum matrimonium*." Another & most important effect of such a contract was, that, if either of the parties afterwards married with another person, solemnising the same *in facie ecclesiæ*, such marriage might be set aside even after cohabitation & the birth of children, & the parties compelled to solemnise the first marriage *in facie ecclesiæ*. Such were the effects of a contract of marriage *per verba de præsenti* (LORD LYNDHURST, C.).

(2) The necessity for the presence of such a clergyman [in episcopal orders] must be qualified with the condition that his attendance may by possibility be procured (LORD CAMPBELL).—R. *v.* MILLIS (1844), 10 Cl. & Fin. 534; 8 Jur. 717; 8 E. R. 844, H. L.

Annotations:—As to (2) **Consd.** Lightbody *v.* West (1902), 87 L. T. 138. **Refd.** Catherwood *v.* Caslon (1814), 13 M. & W. 261; Bevan *v.* M'Mahon (1861), 30 L. J. P. M. & A. 61; Culling *v.* Culling, [1896] P. 116. *Generally*, **Consd.** Beamish *v.* Beamish (1861), 9 H. L. Cas. 274. **Refd.** Maclean *v.* Cristall (1849), 7 Notes of Cases, Supp. xvii; R. *v.* Mainwaring (1856), 7 Cox, C. C. 192. **Mentd.** O'Connell *v.* R. (1844), 11 Cl. & Fin. 155; R. *v.* Chadwick (1846), 11 J. P. 140; Catterall *v.* Catterall (1847), 1 Rob. Eccl. 304, 580; R. *v.* Canterbury (Archbp.) (1848), 11 Q. B. 483; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; A.-G. *v.* Windsor (1860), 8 H. L. Cas. 369; Beachey *v.* Brown (1860), E. B. & E. 796; Sichel *v.* Lambert (1864), 15 C. B. N. S. 781; R. *v.* Fanning (1866), 14 W. R. 701; Exeter (Bp.) *v.* Marshall (1868), L. R. 3 H. L. 17; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Thompson *v.* Ward, Ellis *v.* Burch (1871), 24 L. T. 679; R. *v.* Allen (1872), L. R. 1 C. C. R. 367; Anderson *v.* Morice (1876), 1 App. Cas. 713; Mackonochie *v.* Penzance (1881), 6 App. Cas. 421; Moss *v.* Moss, [1897] P. 263; London Tram. Co. *v.* L. C. C., [1898] A. C. 375; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; R. *v.* Canterbury (Archbp.) (No. 1) (1902), 71 L. J. K. B. 894; Usher's Wiltshire Brewery *v.* Bruce, [1915] A. C. 433.

See, also, cases *infra*.

SECT. 7.—PRELIMINARIES TO CELEBRATION.

SUB-SECT. 1.—PUBLICATION OF BANNS.

A. In General.

223. Necessity for.]—By Act of Uniformity, 1558 (c. 2), & Act of Uniformity, 1662 (c. 4), the laity are bound by the Rubric against marrying without publication of banns, & by the first Act are expressly punishable by the censures of the Church.—MIDDLETON *v.* CROFTS (1736), 2 Atk. 650; Ridg. *temp.* H. 109; 2 Stra. 1056; Cunn. 55, 114; Lee *temp.* Hard. 57, 326; 2 Barn. K. B. 351; Kel. W. 148; 26 E. R. 788.

Annotations:—**Consd.** Wynn *v.* Davies & Weever (1835), 1 Curt. 69. **Mentd.** R. *v.* York (Archbp.) (1795), 6 Term Rep. 490; Dakins *v.* Seaman (1842), 9 M. & W. 777; R. *v.* Chadwick (1846), 11 J. P. 140; Shepherd *v.* Payne (1863), 9 Jur. N. S. 354; Exeter (Bp.) *v.* Marshall (1868), L. R. 3 H. L. 17; R. *v.* Allen (1872), L. R. 8 Q. B. 69; R. *v.* Shouldham (1872), 37 J. P. 310; R. *v.* Morton (1873), 42 L. J. M. C. 58; Jenkins *v.* Cook (1875), L. R. 4 A. & E. 463; Mackonochie *v.* Penzance (1881), 6 App. Cas. 424; R. *v.* York (Archbp.) (1888), 20 Q. B. D. 740; Kutner *v.* Phillips, [1891] 2 Q. B. 267; *Ex p.* Brinckman (1895), 11 T. L. R. 387; Marshall *v.* Graham, Bell *v.* Graham, [1907] 2 K. B. 112; R. *v.* Dibdin, [1910] P. 57.

224. ——.]—By the Canon Law, which is binding on the clergy, it is highly criminal to celebrate marriage without a due publication of banns; which must suppose information as to the residence.—PRIESTLEY *v.* LAMB (1801), 6 Ves. 421; 31 E. R. 1124.

Annotations:—**Consd.** Wynn *v.* Davies & Weever (1835), 1 Curt. 69. **Mentd.** *Re* Martin, *Ex p.* Van Sandan (1846), De G. 303.

225. Object of publication—Notification to world generally.]—FRANKLAND *v.* NICHOLSON, No. 126, *ante*.

226. —— **To awaken vigilance of parents & guardians.**]—WAKEFIELD *v.* MACKAY, No. 135, *ante*.

227. ——.]—HOLMES *v.* SIMMONS (FALSELY CALLED HOLMES), No. 347, *post*.

B. Notice to Clergyman.

See Marriage Act, 1823 (c. 76), s. 7.

228. Seven days' notice—Object of—Clergyman to inquire into residence of parties.]—NICHOLSON *v.* SQUIRE, No. 237, *post*.

See, also, No. 224, *ante*, No. 230, *post*.

229. ——.]—Parties, concerned in the marriage of a male infant ward of the ct., attending by order, the clergyman, appearing exculpated, was discharged, with costs out of pocket from the infant's estate. The others ordered to attend the master on an inquiry, whether the marriage, by false names, was valid; & upon the report a suit for nullity of marriage at the expense of the infant's estate was ordered; & all the parties were restrained by injunction from all intercourse, personal, by correspondence, or otherwise, with the infant.

If the parties have been married by false names, that affects the validity of the marriage; & how is that to be discovered, unless those inquiries are made, which the Act of Parliament [26 Geo. 2, c. 23] directs; declaring, that no minister shall forthwith "bedded," according to an obsolete Scotch fashion:—*Held:* no marriage was contracted.—STEUART *v.* ROBERTSON (1875), L. R. 2 Sc. & Div. 494.—**SCOT.**

t. ——.]—The parties, who had long been on terms of sexual intimacy, went through a ceremony of marriage *per verba de præsenti*. After the ceremony the parties did not take up house together, & the woman continued to use her maiden name to which she had reverted after the divorce, but the man frequently visited her & stayed in her house, as he had done before, & from time to time gave her money. He never told his relatives that he was married, nor did he introduce the woman to any of his friends as his wife. During his last illness he did not send for her, & he stated on his deathbed that she had no claim upon him. He made no provision for her in his will, & the only letter written to him by her which was produced was inconsistent in the mode of address & the style of signature with the status of a wife:—*Held:* the evidence of the circumstances surrounding the ceremony was not so satisfactory & complete as to overcome the conclusion to be drawn from the subsequent conduct of the parties that a genuine marriage had not taken place.—DAVIDSON *v.* DAVIDSON, [1921] S. C. 341.—**SCOT.**

PART II. SECT. 7, SUB-SECT. 1.—A.

223 i. *Necessity for.*]—Regular marriages in *facie ecclesiæ* must be preceded by banns; the proclamation thereof being *inter sacra*, & forming part of the Church discipline; the civil power in this matter supporting the ecclesiastical authority.—HUTTON *v.* HARPER (1876), 1 App. Cas. 464.—**SCOT.**

a. *How governed.*]—M., was married to N. on one calling of banns, a dispensation having been procured from the Roman Catholic Archbishop for the other two calls, both parties belonging to that faith:—*Held:* 26 Geo. II., c. 33, was in force in Canada as to publication of banns.—O'CONNOR *v.* KENNEDY (1888), 15 O. R. 20.—**CAN.**

b. *Effect of—Not an attempt to marry.*]—The act of causing the publication of banns of marriage is an act done in the preparation to marry, but does not amount to an attempt to marry.—R. *v.* PETERSON (1876), I. L. R. 1 All. 316.—**IND.**

be obliged to publish banns between any persons, unless they shall seven days at least before the time required for the first publication deliver to such person, etc., a notice in writing of their true Christian & surnames, & of the house or houses of their respective abodes within such parish, etc., & of the time, during which they have dwelt in such house or houses respectively; most anxiously providing the means of knowing, who the individuals are, for the protection, not only of the clergyman, but also, as this case proves, of the parties themselves, against the frauds, of which they may be mutually the victims (LORD ELDON, C.).—WARTER *v.* YORKE (1815), 19 Ves. 451; 34 E. R. 584.

Annotation:—**Refd.** Wynn *v.* Davies & Weever (1835), 1 Curt. 69.

230. —— Power of clergyman to dispense with —On own responsibility—Liability to Ecclesiastical courts for neglect.]—Articles, against a clergyman, for publishing banns of marriage between persons not parishioners of, nor resident in, his parish; & for marrying such persons, admitted.

These Acts of Parliament [26 Geo. 2, c. 33, & 4 Geo. 4, c. 76] do not, & were not meant to, repeal the authority of the Ecclesiastical Cts. in cases of this description, but one & the other may be put in execution; & this, even in cases where the conduct of the minister may have been such as to render him liable to an indictment & conviction of felony (SIR HERBERT JENNER).

The law is not imperative upon [the clergyman] to require seven days' notice before he publishes the banns, nor would he be punishable for publishing the banns without that particular notice, or the expiration of the seven days; but if he chooses to dispense with the notice which he is entitled to require, & if it should turn out that the parties are not entitled to have the banns published in his parish, he must take upon himself the consequence of his own neglect to do that which the law has provided for his security; he cannot be allowed to shelter himself under the excuse that he was ignorant of the fact of their non-residence in the parish, when he might, & ought to have inquired into the facts (SIR HERBERT JENNER).

The original jurisdiction which the Ecclesiastical Cts. possessed & exercised in cases of this description is not taken away by any of the statutes; the ordinary is still entitled to proceed to the correction of any of his clergy who may offend against the order of the church, in publishing banns & solemnising matrimony in any other manner than that prescribed by the law (SIR HERBERT JENNER). —WYNN *v.* DAVIES & WEEVER (1835), 1 Curt. 69; 163 E. R. 24.

C. The Publication.

(*a*) *Form.*

See Marriage Act, 1823 (c. 76), s. 2.

231. Form in Rubric not strictly obligatory.]—(1) A man who has been in fact married may be a witness to prove such marriage illegal.

(2) The form of words prescribed by the Rubric for the publication of banns need not be precisely followed, this part of the Act of Parliament [26 Geo. 2, c. 33] being merely directory.—STANDEN *v.* STANDEN (1791), Peake, 45, N. P.

Annotations:—*As to* (1) **Refd.** R. *v.* Sourton (1836), 6 Nev. & M. K. B. 575. *As to* (2) **Refd.** Wilkinson *v.* Payne (1791), 4 Term Rep. 468. *Generally*, **Mentd.** Sussex Peerage Case (1844), 11 Cl. & Fin. 85.

(*b*) *Time.*

See Marriage Act, 1823 (c. 76), s. 2.

232. On three successive Sundays At which service & at what stage in the service—Provision for lack of regular Sunday services—Marriage Act, 1823 (c. 76), s. 21.]—R. *v.* BENSON (1856), *Times*, July 12; 1 Phillim. Eccl. Law, 2nd ed. p. 588.

(*c*) *Place.*

See Marriage Act, 1823 (c. 76), ss. 2, 3, 12; Marriage Confirmation Act, 1830 (c. 18), ss. 2, 3; 23 & 24 Vict. c. 24.

Place of solemnisation of marriage—According to rites of Church of England.]—*See* Sect. 8, subsect. 1, B., *post*.

233. Church of adjoining parish—Church being under repair.]—A church being under repair, & shut up, a publication of banns in the church of an adjoining parish held to be sufficient.—STALLWOOD *v.* TREDGER (1815), 2 Phillim. 287; 161 E. R. 1147.

Annotations:—**Expld.** Catterall *v.* Sweetman (1845), 1 Rob. Eccl. 304. **Consd.** Chichester *v.* Mure (1863), 3 Sw. & Tr. 223.

See Marriage Act, 1823 (c. 76), s. 13; 4 Geo. 4, c. 32, s. 1.

234. District chapelry—Effect of formation of Peel parish—Necessity for sanction of marriages in the chapel.]—(1) Where a district chapelry had been carved out of an ancient parochial chapelry, & part of such district chapelry had been formed into a Peel parish, & the incumbent of the ancient parochial chapelry claimed to be entitled to publish banns, & celebrate marriages between persons resident in such district chapelry & Peel parish, & to receive the fees for such offices:—*Held:* when marriages were sanctioned in the chapel attached to the district chapelry, the incumbent of the district chapelry had an exclusive right to publish banns, & celebrate marriages between persons residing in the district chapelry, & to receive the fees for so doing; & the creation of the Peel parish out of the district chapelry did not restore the rights of the incumbent of the ancient parochial chapelry; & therefore, whatever might be the rights as between the incumbents of the district chapelry & Peel parish, the incumbent of the ancient parochial chapelry had no right to perform such offices, or receive the fees in the Peel parish.

(2) Where a licence to marry at a particular church is in proper form, the incumbent of such church is not only entitled, but compellable to perform the ceremony; & the responsibility of ascertaining that one of the persons to be married has dwelt for fifteen days in the district for which the licence has been granted rests on the ordinary granting it, & not on the officiating minister.—TUCKNESS *v.* ALEXANDER (1863), 2 Drew. & Sm. 614; 2 New Rep. 480; 32 L. J. Ch. 794; 8 L. T. 821; 9 Jur. N. S. 1026; 11 W. R. 938; 62 E. R. 752.

Annotations:—*As to* (2) **Consd.** *Ex p.* Brinckman (1895), 11 T. L. R. 387. *Generally*, **Mentd.** Fitzgerald *v.* Fitzpatrick (1864), 12 W. R. 771; Stewart *v.* West Derby Burial Board (1886), 34 Ch. D. 314; Haig *v.* Barlow (1891), Trist. 149.

235. —— Becoming separate parish for "ecclesiastical purposes"—New Parishes Act, 1843 (c. 37), ss. 11, 15—New Parishes Act, 1856 (c. 104), ss. 14, 15.]—The publication of the banns of marriage & the solemnisation of marriage are "ecclesiastical purposes" within New Parishes Act, 1856 (c. 104), s. 14, &, where a district becomes within this sect. a separate & distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, & of receiving the fees for such

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 1, *C.* (*c*), *D. & E.* (*a*) (*b*), *i., ii. & iii.*]

marriages, & consequently the incumbent of the mother parish has no right to solemnise such marriages in the church of the mother parish or to receive the fees for the same.—FULLER *v.* ALFORD (1883), 10 Q. B. D. 418; 52 L. J. Q. B. 265; 48 L. T. 431; 47 J. P. 423; 31 W. R. 522.

Annotation:—**Refd.** R. *v.* Dibdin, [1910] P. 57.

In case of officers, seamen or mariners—On books of one of H.M. ships at sea.]—*See* Naval Marriages Act, 1908 (c. 26), s. 1.

Where one party resident in Scotland.]—*See* Marriages Validity Act, 1886 (c. 3), s. 1.

Chapels licenced by bishop—Persons residing within limited district.]—*See* Births & Deaths Registration Act, 1837 (c. 22), s. 34.

——.]—*See* Births & Registration Act, 1837 (c. 22), s. 33.

D. Residence of Parties.

236. Duty of clergyman to inquire into residence.]—PRIESTLEY *v.* LAMB, No. 224, *ante*.

237. ——.]—Clergymen celebrating marriage by banns without making the inquiry directed by the Marriage Act, liable to ecclesiastical censure, at least, perhaps to other consequences. The marriage however good; though neither party was resident in the parish.

The Act of Parliament [26 Geo. 2, c. 33] has a clause expressly requiring that no person, vicar, minister, or curate shall be obliged to publish banns, unless the persons to be married shall seven days at least before the time required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, etc., a notice in writing of their true Christian name & surnames & of the house or houses of their respective abodes within such parish, etc.; & of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively. The clergyman therefore has only to repair to the house in which they are represented to have lived; & to inform himself whether the statement is true (LORD ELDON, C.).—NICHOLSON *v.* SQUIRE (1809), 16 Ves. 259; 33 E. R. 983, L. C.

Annotations:—**Refd.** Wynn *v.* Davies & Weever (1835), 1 Curt. 69; Tuckness *v.* Alexander (1863), 2 Drew. & Sm. 614.

238. ——.]—WYNN *v.* DAVIES & WEEVER, No. 230, *ante*.

—— **Object of seven days' notice.**]—*See* No. 237, *ante*.

239. One party only resident in parish.]—Marriage by banns legal, though only one of the parties resided in the parish.—ROBINSON *v.* GRANT (1811), 18 Ves. 289; 34 E. R. 327, L. C.

240. Neither party resident in parish.]—The banns were published by the name of Long instead of Longley, & in a parish to which the parties did not belong:—*Held:* a false & fraudulent publication, & the marriage null & void.— —— *v.* LONGLEY (1794), 1 Phillim. 148, n.; 161 E. R. 943.

241. ——.]—NICHOLSON *v.* SQUIRE, No. 237, *ante*.

242. ——.]—On an indictment for bigamy, if the first marriage was by banns, it is no objection that the parties did not reside in the parish where the banns were published & the marriage celebrated.—R. *v.* HIND (1813), Russ. & Ry. 253, C. C. R.

243. ——.]—DIDDEAR (FALSELY CALLED FAWCIT, OTHERWISE SAVILL) *v.* FAUCIT, No. 417, *post*.

244. —— **Admissibility of evidence of non-residence—Marriage Act, 1823 (c. 76), s. 26.**]—By a petition for nullity of marriage a husband alleged that his marriage was null & void on the ground that neither he nor his wife had lived in the parish where the banns were published previous to the ceremony:—*Held:* no evidence could be given in regard to the matter owing to the provisions of above sect.—BODMAN *v.* BODMAN (OTHERWISE PERRY) (1913), 108 L. T. 383; 29 T. L. R. 348; 57 Sol. Jo. 359.

245. —— **Liability of clergyman for publication—Waiver of seven days' notice.**]—WYNN *v.* DAVIES & WEEVER, No. 230, *ante*.

Place of solemnisation of marriage.]—*See* Sect. 8, sub-sect. 1, B., *post*.

E. False Names and Descriptions.

(*a*) *In General.*

246. Publication in false names—No publication.]—A publication of banns in false names is no publication.—EARLY *v.* STEVENS (1785), cited 2 Hag. Con. 147; 161 E. R. 697.

Annotations:—**Folld.** Pouget *v.* Tomkins (1812), 2 Hag. Con. 142. **Refd.** Wright *v.* Elwood (1837), 1 Curt. 662.

247. Banns duly published—Mistake as to surname in register—Erroneous entry by clergyman.]—COPPS *v.* FOLLON (1794), 1 Phillim. 145, n.; 161 E. R. 943.

Annotation:—**Consd.** Wilson *v.* Brockley (1810), 1 Phillim. 132.

Undue publication—Under Marriage Act, 1823 (c. 76), s. 22.]—*See* Sub-sect. 1, E. (*b*), *post*.

—— **Prior to Marriage Act, 1823 (c. 76), s. 22.**]—*See* Sub-sect. 1, E. (*c*), *post*.

(*b*) "*Persons wilfully and knowingly intermarrying without due publication.*"

i. *In General.*

See Marriage Act, 1823 (c. 76), s. 22.

248. General rule.]—Suit of nullity of marriage under Marriage Act, 1823 (c. 76), by reason of undue publication of banns sustained; both parties having "knowingly & wilfully intermarried after such undue publication."

In all cases of this kind, three questions necessarily arise: whether a marriage has been had between the parties to the suit; whether there has been an undue publication of banns; whether both parties were cognisant of the undue publication before the marriage was celebrated (SIR HERBERT JENNER).—TONGUE *v.* ALLEN (1835), 1 Curt. 38; 163 E. R. 13; *affd. sub nom.* TONGUE *v.* TONGUE (1836), 1 Moo. P. C. C. 90, P. C.

Annotations:—**Consd.** Gompertz *v.* Kensit (1872), L. R. 13 Eq. 369; R. *v.* Rea (1872), L. R. 1 C. C. R. 365; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420. **Refd.** Wright *v.* Elwood (1837), 1 Curt. 662; Dormer *v.* Williams (1838), 1 Curt. 870; Clowes *v.* Clowes (1842), 2 Notes of Cases, 1; Orme *v.* Holloway (1847), 5 Notes of Cases, 267.

249. Principles on which court will act.]—(1) Marriage without due publication of banns not void under Marriage Act, 1823 (c. 76), unless both parties cognisant of the undue publication.

(2) *Semble:* a marriage without any publication of banns, would be held to be without due publication of banns under Marriage Act, 1823 (c. 76), s. 22.

(3) In all cases of this description it is the duty of the ct. to be extremely cautious in pronouncing a marriage, solemnised between two parties, null & void, & to examine the whole of the evidence produced in proof of the nullity with great vigilance & jealousy; because, in these cases, opportunities are offered to parties to practise fraud & collusion; & this is the more necessary, where the party, whose interests are apparently

affected, & whose object it is to uphold the marriage endeavoured to be set aside, seems to have afforded every facility to the other party. Where the party before the ct., whose interests are affected abandons his cause, the ct. would be inclined to withhold its interposition for the protection of such a party; but where the interests of third parties & of the public are concerned, it is a duty incumbent on the ct. to be upon its guard against surprise (SIR HERBERT JENNER).—WRIGHT *v.* ELWOOD (1837), 1 Curt. 662; 163 E. R. 231; *previous proceedings* (1835), 1 Curt. 49; (1829), 2 Hag. Ecc. 598.

Annotations:—**Consd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420.

250. Marriage without any publication—Whether without "due publication."]—WRIGHT *v.* ELWOOD, No. 249, *ante*.

251. Distinction between marriages by banns & marriages by registrar's licence.]—PLUMMER *v.* PLUMMER, No. 342, *post*.

Marriages by superintendent registrar's certificate—Or certificate & licence.]—*See* Sub-sect. 4, *post*.

ii. *Knowledge of Parties.*

See Marriage Act, 1823 (c. 76), s. 22.

252. General rule.]—TONGUE *v.* ALLEN, No. 248, *ante*.

253. ——.]—MIDGELEY (FALSELY CALLED WOOD) *v.* WOOD, No. 269, *post*.

254. Knowledge of both parties essential.]—To render a marriage invalid within Marriage Act, 1823 (c. 76), s. 22, it must be contracted by both parties with a knowledge that no due publication has taken place. Therefore, where the intended husband procured the banns to be published in a Christian & surname which the woman had never borne, but she did not know that fact until after the solemnisation of the marriage:—*Held:* the marriage was valid.—R. *v.* WROXTON (INHABITANTS) (1833), 4 B. & Ad. 640; 1 Nev. & M. K. B. 712; 1 Nev. & M. M. C. 479; 2 L. J. M. C. 64; 110 E. R. 597.

Annotations:—**Consd.** Tongue *v.* Allen (1835), 1 Curt. 38; Gompertz *v.* Kensit (1872), L. R. 13 Eq. 369; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420. **Folld.** R. *v.* Kay (1887), 16 Cox, C. C. 292. **Refd.** Wright *v.* Elwood (1837), 1 Curt. 662; Clowes *v.* Jones (1843), 7 Jur. 908; R. *v.* Fanning (1866), 10 Cox, C. C. 411; R. *v.* Rea (1872), L. R. 1 C. C. R. 365.

255. -.]- WRIGHT *v.* ELWOOD, No. 249, *ante*.

256. -.]- -TEMPLETON *v.* TYREE, No. 160, *ante*.

257. -.]—(1) A marriage solemnised after an undue publication of banns will not be held null & void under the provisions of Marriage Act, 1823 (c. 76), unless it be shown that both parties "knowingly & wilfully" concurred in such undue publication. Where an intending husband, then a minor, & desiring to have a secret marriage, gave instructions for the publications of banns, & in such instructions omitted two of his own Christian names & one of the Christian names of his intended wife, also a minor, & the names were entered with such omissions in the register of banns, there being no evidence of how the banns were actually published, & the names were, after the ceremony, signed by the respective parties, with the same omissions, in the register, there being no further evidence besides that of the husband, who deposed that he omitted the names, not thinking or believing he was acting contrary to law, & for brevity's sake only, & the marriage having been reputed good for more than thirty years:—*Held:* the husband was not proved to have committed any offence against the statute.

(2) The husband deposed that prior to the marriage the intended wife neither directly nor indirectly took any step towards the publication of the banns, but left the matter entirely to him. There was no evidence of knowledge on her part beyond her signature of the marriage register with the omission above mentioned, that not being her usual form of signature. She being dead, & the marriage having been reputed good throughout her life, that is to say, for upwards of twenty-four years:—*Held:* the ct. could not impute to the wife knowledge of the omission of the name in the instructions for publication of banns.—GOMPERTZ *v.* KENSIT (1872), L. R. 13 Eq. 369; 41 L. J. Ch. 382; 26 L. T. 95; 36 J. P. 548; 20 W. R. 313.

258. ——.]—In charges of bigamy it is incumbent upon the prosecution to prove the validity of the first marriage. Where, therefore, the first marriage has been contracted without the due publication of banns required by Marriage Act, 1823 (c. 76), the prosecution, in order to show that the case is not within the statute, must prove that the want of due publication was unknown to one of the parties previously to the marriage.

The prisoner went through the form of marriage with a woman whose surname was Abel. In order to conceal the fact, he published her banns in the surname of Anderson, but, except that she signed the register in the name of Anderson, there was no evidence to show that she knew of the misdescription until after the solemnisation of the marriage. Subsequently, & during her lifetime, the prisoner went through the ceremony of marriage with another woman:—*Held:* as in order to render a marriage invalid within Marriage Act, 1823 (c. 76), s. 22, it must be contracted by both parties with a knowledge that no due publication of banns had taken place, it was incumbent on the prosecution to show that one of the parties was unaware of the misdescription, & there was no evidence of such want of knowledge.—R. *v.* KAY (1887), 16 Cox, C. C. 292.

259. —— Positive & direct proof of fraud not necessary.]—Nullity of marriage by reason of undue publication of banns pronounced for, on evidence that both parties were cognisant of the fraud. It is not necessary that there should be positive & direct proof that the false publication was with a view to fraud; but there must be evidence of concert between the parties.—ORME *v.* HOLLOWAY (FALSELY CALLING HERSELF ORME) (1847), 5 Notes of Cases, 267.

260. —— Strict proof of knowledge essential.]—HADLEY *v.* REYNOLDS (*circa* 1835), cited 1 Curt. 47.

Annotations:—**Consd.** Tongue *v.* Allen (1835), 1 Curt. 38. **Refd.** Wright *v.* Elwood (1837), 1 Curt. 662.

iii. *Variations in Christian Names.*

See Marriage Act, 1823 (c. 76), s. 22.

Knowledge of both parties as to undue publication—Essential to invalidate marriage.]—*See* Sub-sect. 1, E. (*b*) ii., *ante*.

261. Addition or suppression of one Christian name—Without fraudulent intent—Consent of both parties.]—In the publication of banns, in 1817, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by or been entitled to. The false name was given to the officiating clergyman without any intention to mislead, nor did any individual having an interest in the marriage appear to have been deceived:—*Held:* the marriage was void. It might have been otherwise if, without any fraudulent intent, there

Sect. 7.—Preliminaries to celebration: Sub-sect. 1, E. (*b*) *iii., iv., v. & vi., (c), F. & G.*]

had been only a partial variation of the name, or the addition or suppression of one Christian name, or the name had been one, which the party had ever used or been known by.—R. *v.* TIBSHELF (INHABITANTS) (1830), 1 B. & Ad. 190; 8 L. J. O. S. M. C. 120; 109 E. R. 758.

Annotations:—**Distd.** R. *v.* Wroxton (1833), 4 B. & Ad. 640. **Refd.** Allen *v.* Wood (1834), 1 Bing. N. C. 8; R. *v.* Kay (1887), 16 Cox, C. C. 292. **Mentd.** R. *v.* Fanning (1866), 10 Cox, C. C. 411.

262. Suppression of Christian name or names—Knowledge of both parties—Marriage void.]—A marriage by banns when by the consent of both parties one of the Christian names of the man, a minor, was omitted for the purpose of concealment is null & void under Marriage Act, 1823 (c. 76), ss. 7, 22. *Qu.:* if only one of the parties knew of the false publication.—WILTSHIRE *v.* PRINCE (1830), 3 Hag. Ecc. 332; 162 E. R. 1176.

Annotations:—**Folld.** Tongue *v.* Tongue (1836), 1 Moo. P. C. C. 90. **Refd.** R. *v.* Wroxton (1833), 4 B. & Ad. 640; Wright *v.* Elwood (1837), 1 Curt. 662; Dormer *v.* Williams (1838), 2 J. P. 809.

263. —— —— ——.]—A marriage by banns, in the publication of which one of the Christian names of the man, a minor, was designedly concealed, & which was solemnised in such imperfect name, held void under Marriage Act, 1823 (c. 76), ss. 7, 22, the judicial committee being of opinion that the circumstance of the man omitting to sign his full Christian names in the register indicated his participation in the previous false publication.—TONGUE *v.* TONGUE (1836), 1 Moo. P. C. C. 90; 12 E. R. 745, P. C.; *affg.* S. C. *sub nom.* TONGUE *v.* ALLEN (1835), 1 Curt. 38.

Annotations:—**Consd.** Gompertz *v.* Kensit (1872), L. R. 13 Eq. 369; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420. **Refd.** Wright *v.* Elwood (1837), 1 Curt. 662; Dormer *v.* Williams (1838), 1 Curt. 870; Clowes *v.* Clowes (1842), 2 Notes of Cases, 1; Orme *v.* Holloway (1847), 5 Notes of Cases, 267; R. *v.* Rea (1872), L. R. 1 C. C. R. 365.

264. —— —— ——.]—Nullity of marriage by reason of undue publication of banns pronounced for; both parties being cognisant of the undue publication.

Taking the whole of the case together it seems to me difficult to come to any other conclusion that can be justified by the evidence than that the omission of the name of "Charles" wilfully & knowingly is sufficiently brought home to both the parties; & I therefore may pronounce a sentence of nullity of marriage (DR. LUSHINGTON).—BREALY *v.* REED (1841), 2 Curt. 833; 1 Notes of Cases, 121; 163 E. R. 601.

265. —— —— ——.]—ORME *v.* HOLLOWAY (FALSELY CALLING HERSELF ORME) (1847), 5 Notes of Cases, 267.

266. —— **Knowledge of one party only—Marriage valid.**]—GOMPERTZ *v.* KENSIT, No. 257, *ante.*

267. Giving false Christian name—Knowledge of one party—Marriage valid.]—R. *v.* WROXTON (INHABITANTS), No. 254, *ante.*

268. —— —— ——.]—TEMPLETON *v.* TYREE, No. 160, *ante.*

269. —— **Knowledge of both parties—Marriage void.**]—A marriage, by banns, where the publication of banns was in the name of "John" instead of "Bower," the Christian name of the man, both parties being at the time of the solemnisation of the marriage aware of such misdescription was pronounced null.—MIDGELEY (FALSELY CALLED WOOD) *v.* WOOD (1859), 4 Sw. & Tr. 267; Sea. & Sm. 70; 30 L. J. P. M. & A. 57; 164 E. R. 1518.

Annotation:—**Consd.** Churchward *v.* Churchward, [1895]

iv. *Variations in Surnames.*

See Marriage Act, 1823 (c. 76), s. 22.

Knowledge of both parties as to undue publication—Essential to invalidate marriage.]—*See* Sub-sect. 1, E. (*b*) ii., *ante.*

270. False surname—Concurrence of both parties—Marriage void—No intent to deceive.]—R. *v.* TIBSHELF (INHABITANTS), No. 261, *ante.*

271. —— —— —— **Widow assuming maiden name.**]—One F. on his death bequeathed to his widow certain rents, with a proviso that they should go over to his children in the event of her marrying again. The widow married one G. by banns, in which she was, for the purpose of concealing the fact of the marriage, described by her maiden name. In an action by testator's daughter against the personal representatives of G., to recover the amount of rents received by him during the life of Mrs. F., & whilst she & G. cohabited as man & wife:—*Held:* the forfeiture did not take place, the marriage being void; & defts. were not estopped from taking advantage of its invalidity.—ALLEN *v.* WOOD (1834), 1 Bing. N. C. 8; 4 Moo. & S. 510; 3 L. J. C. P. 219; 131 E. R. 1020.

272. —— —— —— **Assuming mother's maiden name.**]—ORME *v.* HOLLOWAY (FALSELY CALLING HERSELF ORME) (1847), 5 Notes of Cases, 267.

273. —— —— —— ——.]—The illegitimate daughter of a woman who had lost her original name & acquired another was married by banns published in her original name, not as being the daughter of such mother, but of the mother's brother, who, at the marriage, also represented himself as her father:—*Held:* under the circumstances, which were surrounded with fraud, the marriage was had without due publication of banns, &, both parties being cognisant thereof, was null & void.—TOOTH *v.* BARROW (1854), 1 Ecc. & Ad. 371; 164 E. R. 214.

274. —— —— —— **Rectification just before marriage solemnised.**]—In the publication of banns the woman's name was published as Morumild instead of Wormald. When in the vestry of the church, before the solemnisation of the marriage, the clergyman called out the names from the banns book in the presence of both parties. The woman thereupon stated that her name was Wormald, & it was so entered by the clergyman in the marriage register:—*Held:* an undue publication of banns, & the marriage pronounced null.—WORMALD *v.* NEALE & WORMALD (FALSELY CALLED NEALE) (1868), 19 L. T. 93.

275. —— —— —— **Whether second marriage bigamous.**]—R. *v.* KAY, No. 258, *ante.*

276. —— —— ——.]—Where two persons had knowingly & wilfully intermarried after publication of banns in a false name:—*Held:* the marriage was null & void under Marriage Act, 1823 (c. 76), s. 22.—SMALL *v.* SMALL & FURBER (1923), 67 Sol. Jo. 277.

277. —— **Knowledge of one party only—Marriage valid.**]—R. *v.* WROXTON (INHABITANTS), No. 254, *ante.*

278. Partial variation of surname—No fraudulent intent.]—R. *v.* TIBSHELF (INHABITANTS), No. 261, *ante.*

v. *Acquired Names.*

See Sub-sect. 1, F., *post.*

vi. *False Descriptions.*

See Sub-sect. 1, G., *post.*

(c) *Prior to Marriage Act*, 1823.

See, now, Marriage Act, 1823 (c. 76), s. 22.

279. Assumption of false names.]—LONGLEY (1794), 1 Phillim. 148, n.; FRANKLAND *v.* NICHOLSON (1805), 3 M. & S. 259, n.; WAKEFIELD *v.* MACKAY (1807), 1 Hag. Con. 394; MATHER *v.* NEY (1807), 3 M. & S. 265, n.; WARTER *v.* YORKE (1815), 19 Ves. 451; MEDDOWCROFT *v.* GREGORY (1816), 2 Hag. Con. 207; WYATT *v.* HENRY (1817), 2 Hag. Con. 215; SULLIVAN *v.* SULLIVAN (FALSELY CALLED OLDACRE) (1818), 2 Hag. Con. 238.

280. Assuming additional Christian name.]—TREE *v.* QUIN (1812), 3 M. & S. 266; HEFFER *v.* HEFFER (1812), 3 M. & S. 265, n.; FELLOWES *v.* STEWART (1815), 2 Phillim. 257.

281. —— No explanation offered.]—GREEN *v.* DALTON (1822), 1 Add. 289.

282. Omission of Christian names.]—POUGET *v.* TOMKINS (1812), 2 Hag. Con. 142; STANHOPE *v.* BALDWIN (1822), 1 Add. 93.

283. Impersonation of party whose name published.]—STAYTE *v.* FARQUHARSON (1826), 3 Add. 282.

284. Slight variations.]—DOBBYN *v.* CORNECK (1812), 2 Phillim. 102.

Acquired names.]—*See* Sub-sect. 1, F., *post.*

False descriptions.]—*See* Sub-sect. 1, G., *post*

F. Acquired Names.

See Marriage Act, 1823 (c. 76), s. 22.

Knowledge of both parties as to undue publication—Essential to invalidate marriage.]—*See* Sub sect. 1, E. (*b*) ii., *ante.*

285. General rule.]—FRANKLAND *v.* NICHOLSON, No. 126, *ante.*

286. ——.]—The law certainly requires a publication by the name under which the party is known; the intended marriage must be publicly notified, & can only be notified by using the name by which the party is known; but there can be no doubt but that a name acquired by reputation may be superseded by another name of habit & reputation (*per* CUR.).—WILSON *v.* BROCKLEY (1810), 1 Phillim. 132; 161 E. R. 937.

287. -Nullity of marriage, by a publication of banns in a false name, sustained.

In the present case there is proof that the name of Thomas was given & generally used. . . . Mr. Henry afterwards came to England, but there is no proof as to his life, or actions, for a space of two years. If, during that time, he had adopted the name of Charles in such a way as to supersede that of Thomas; if he had by general use acquired a kind of prescriptive right to it, & it had gone forth to the world as his proper designation, it has been decided both here & in the cts. of common law, that this would be the true name for the purpose of a publication of banns (SIR WILLIAM SCOTT).—WYATT *v.* HENRY (1817), 2 Hag. Con. 215; 161 E. R. 720.

288. ——.]—DIDDEAR (FALSELY CALLED FAWCIT, OTHERWISE SAVILL) *v.* FAUCIT, No. 417, *post.*

289. Abandonment of acquired name — Marriage invalidated by.]—FRANKLAND *v.* NICHOLSON, No. 126, *ante.*

290. —— ——.]—TOOTH *v.* BARROW, No. 273, *ante.*

291. Assumption of acquired name.]—A person whose baptismal & surname was A. was married by banns by the name of G., having been known, in the parish where he resided & was married, by that name only, from his first coming into the parish till his marriage, which was about three years:—*Held:* the marriage was valid, & therefore the wife & children entitled to the husband's settlement.—R. *v.* BILLINGSHURST (INHABITANTS) (1814), 3 M. & S. 250; 105 E. R. 603.

Annotations:—**Refd.** R. *v.* Tibshelf (1830), 1 B. & Ad. 190; Allen *v.* Wood (1834), 1 Bing. N. C. 8.

292. —— No fraudulent intent.]—Where a married woman, upon the death of her husband, assumed her maiden name, & after the lapse of several years was married, by banns, to a second husband in that name, with the description of "widow":—*Held:* in the absence of fraud, such marriage was legal, & her settlement followed that of the second husband.

But when the party has assumed a new name, not for any fraudulent purpose but fairly & openly & has for a considerable period used & been known by that name, then, it has been in several cases decided, a marriage under that name is valid (BAYLEY, J.).—R. *v.* ST. FAITH'S, NEWTON (INHABITANTS) (1823), 3 Dow. & Ry. K. B. 348; 2 Dow. & Ry. M. C. 34.

293. —— Used by party previously.]—R. *v.* TIBSHELF (INHABITANTS), No. 261, *ante.*

294. Marriage in stage name.]—DIDDEAR (FALSELY CALLED FAWCIT, OTHERWISE SAVILL) *v.* FAUCIT, No. 417, *post.*

295. Name acquired by previous marriage — Whether superseded by name acquired by repute—Marriage between parties previously divorced.]—Petitioner having obtained a decree dissolving her marriage with resp., subsequently re-married him. This second marriage was celebrated after publication of banns, in which petitioner was described by her name of marriage, she having in the interval between the decree dissolving her first marriage & the celebration of the second usually passed by her maiden name. On an application to annul such marriage by reason of an undue publication of banns:—*Held:* a name acquired by marriage can only be superseded by a reputed name in cases where the name had been so far acquired by repute as to obliterate the name acquired by marriage.—FENDALL *v.* GOLDSMID (1877), 2 P. D. 263; 46 L. J. P. 70.

Annotation:—**Refd.** Cowley *v.* Cowley, [1901] A. C. 450.

G. False Descriptions.

See Marriage Act, 1823 (c. 76), s. 22.

Knowledge of both parties as to undue publication—Essential to invalidate marriage.]—*See* Subsect. 1, E. (*b*) ii., *ante.*

296. Of status — No obligation as to true description—Woman falsely described as widow.]—There was no fraud on any one, the husband having been previously made acquainted with all the circumstances. The woman is a major, & there is no person on whom fraud could operate. Neither the Act of Parliament nor the Rubric require a description of the status of the parties, & therefore the circumstance of her having been described as a widow is not material (*per* CUR.).—MAYHEW *v.* MAYHEW (1812), 3 M. & S. 266; 2 Phillim. 11; 105 E. R. 611.

Annotations:—**Refd.** Anon. (1857), Dea. & Sw. 295; *Re* Rutter, Donaldson *v.* Rutter, [1907] 2 Ch. 592.

297. —— Married woman described as spinster—Death of first husband after publication—Prior to marriage.]—WRIGHT *v.* ELWOOD (1837), 1 Curt. 662; 163 E. R. 231; *previous proceedings* (1835), 1 Curt. 49; (1829), 2 Hag. Ecc. 598.

Annotations:—**Refd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534; Templeton *v.* Tyree (1872), L. R. 2 P. & D. 420.

298. Of residence & ages of both parties — Knowledge of one party.]—TEMPLETON *v.* TYREE, No. 160, *ante.*

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 1, *H.; sub-sects.* 2 *&* 3, *A., B. & C.* (*a*), (*b*), (*c*)

H. Time within which Marriage celebrated after Publication.

299. Within three months of publication of banns—Marriage Act, 1823 (c. 76), ss. 9, 22.]—The due publication of banns of marriage was completed on July 1, & the marriage took place on Oct. 1 following. Sect. 9 of above Act requires marriages by banns to be solemnised within three months after the complete publication of banns:—*Held:* the marriage was valid, it not being found that the parties knowingly & wilfully intermarried without due publication of banns.—R. *v.* CLARKE (1867), 16 L. T. 429; 15 W. R. 796; 10 Cox, C. C. 474, C. C. R.

SUB-SECT. 2.—SPECIAL LICENCE.

Power of Archbishop of Canterbury to grant.]—*See* 25 Hen. 8, c. 21, ss. 2–12; Marriage Acts, 1823 (c. 76), s. 20; 1836 (c. 85), s. 1.

SUB-SECT. 3.—COMMON LICENCE.

A. In General.

300. Legal authority to clergyman to solemnise marriage—Right to delay on suspicion of fraud.]—A licence from the ordinary is a legal authority to a clergyman to solemnise a marriage, but if a clergyman suspects fraud, delay may be justifiable for the sake of inquiry.

A minister is guilty of a breach of his duty who should refuse to marry pursuant to a proper licence from his ordinary (SIR GEORGE LEE).—ARGAR *v.* HOLDSWORTH (1758), 2 Lee, 515; 161 E. R. 424.

Annotations:—**Consd.** *Ex p.* Brinckman (1895), 11 T. L. R. 387. **Refd.** Banister *v.* Thompson, [1908] P. 362; R. *v.* Dibden, [1910] P. 57. **Mentd.** R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525.

Refusal to marry where licence issued.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 456, Nos. 3028 *et seq.*

301. Intended for use of grantee only.]—COPE *v.* BURT (FALSELY CALLING HERSELF COPE), No. 321, *post.*

302. ——.]—A licence under which marriage has been solemnised, & in which one of the parties is described by a name wholly different from his own, is not void by the misdescription. *Semble:* it would be void if the name of one person had been inserted with a fraudulent intention that the licence should be used by another.

The distinction between banns & licences is clear; & although perhaps if a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid, that is not the case here, & the objection cannot prevail (PATTESON, J.).—LANE *v.* GOODWIN (1843), 4 Q. B. 361; 3 Gal. & Dav. 610; 12 L. J. Q. B. 157; 7 Jur. 372; 114 E. R. 935.

Annotations:—**Refd.** Clowes *v.* Jones (1843), 7 Jur. 908; *Re* Rutter, Donaldson *v.* Rutter, [1907] 2 Ch. 592; Plummer *v.* Plummer (1917), 33 T. L. R. 417.

False names & descriptions.]—*See* Sub-sect. 3, F., *post.*

303. Dispensation from necessity of publication of banns.]—CLOWES *v.* JONES (FALSELY CALLING HERSELF CLOWES), No. 319, *post.*

B. Affidavit previous to Grant.

See Marriage Act, 1823 (c. 76), s. 14.

False names & descriptions in.]—*See* Sub-sect. 3, F., *post.*

False oaths as to age.]—*See* Sub-sect. 3, G., *post.*

304. Layman falsely swearing affidavit—Whether subject to jurisdiction of Court of Arches.]—The Arches Ct. of Canterbury has no jurisdiction to entertain a suit by letters of request against a layman for falsely swearing before a surrogate to an affidavit to lead to the issue of a marriage licence.—PHILLIMORE *v.* MACHON (1876), 1 P. D. 481.

—— **Criminal offence.**]—*See* CRIMINAL LAW, Vol. XV., p. 693, Nos. 7472, 7473.

Jurisdiction of Ecclesiastical Courts, generally, *see* ECCLESIASTICAL LAW, Vol. XIX., pp. 308 *et seq.*

C. Grant of.

(*a*) *In General.*

305. Whether ex debito justitiæ.]—It has been contended that, according to modern usage, licences were issued almost as a matter of course; but although it might have become almost a matter of course to dispense with the ordinary course of law, it is not to be assumed that the grant of a licence is *ex debito justitiæ* & not a matter of grace & favour (DR. NICHOLL).—CAPUA (PRINCE) *v.* DE LUDOLF (COUNT) (1836), 30 L. J. P. M. & A. 71, n.

306. —— Where no legal impediment—Marriage of British subject.]—*Ex p.* BRINCKMAN, No. 309, *post.*

307. Where doubt entertained as to grant—Licence moved for in camera.]—DIVORCE MARRIAGE LICENCES, No. 310, *post.*

Power of archbishop or bishop of diocese to grant.]—*See* 28 Hen. 8, c. 21, ss. 2–12; Ecclesiastical Jurisdiction Act, 1847 (c. 98), s. 5.

(*b*) *To Divorced Persons.*

308. No power to withhold licence.]—*Ex p.* MAYNE (1873), cited in 11 T. L. R. at p. 387.

Annotation:—**Refd.** *Ex p.* Brinckman (1895), 11 T. L. R. 387.

309. ——.]—An application was made to me by Mr. B., who had been resp. in a divorce suit, to order a licence to issue for the celebration of his marriage. Upon his producing a certified copy of the decree dissolving his previous marriage, & upon his satisfying me upon oath that there was no legal impediment to the marriage, I ordered the licence to issue for its celebration by him in the church named, being of opinion that by law I was bound to grant the licence. The late Bishop of London lodged in the registry "an order directing that in future no licence for the marriage of divorced persons should issue." I was informed of this by the proctor who applied for the licence, & who intimated to me that he should contend that the order was *ultra vires*, & that if I held that it was binding on me, as Chancellor, he should contest its validity by *mandamus*. I came to the

PART II. SECT. 7, SUB-SECT. 3. C. (b).

c. *Ground for refusing — Prohibition of remarriage—During period fixed by divorce decree.*]—A decree of divorce obtained in the state of Washington prohibited the marriage of either party for six months from the entry of the decree, that being the time limited for appealing from the decree:—*Held:* the prohibition was not in the nature of a penalty but an integral part of the decree & therefore good ground for refusing a licence to either party to marry in British Columbia before the end of said six months, although such party had become domiciled therein.—*Re* MARRIAGE ACT, *Re* EATON, [1922] 1 W. W. R. 236; 30 B. C. R. 243.—**CAN.**

conclusion that the order was *ultra vires*, & that I was bound by law to grant the licence. The English Church Union by their proctor entered a *caveat* against its being granted. I ordered the application to be made in ct. & directed notice of the holding of the ct. to be given to the opposing proctor. On the case coming on I was informed that the opposition to it had been abandoned, & I granted the licence, stating shortly the grounds on which I held that it ought to issue. . . . In my judgment any British subject who has resided for 15 days in the Diocese of London, upon satisfying me upon oath that there is no impediment recognised by the Law of England to his marrying the other party, also being a British subject, is entitled as of right to a licence for the celebration of such marriage. I am directed by my letters patent to grant marriage licences which "have been used & accustomed to be done by the laws, customs, canons & statutes of the Kingdom of Great Britain." There is no power conferred on me by my letters patent in granting or refusing a marriage licence, to exercise an arbitrary or even judicial discretion in the matter. There is no such power vested in me by statute or by custom. . . . In what mode is a person entitled by law to object to the celebration of a marriage by licence? His proper course is to enter a *caveat* in the Diocesan Registry against such licence issuing, which affords him an opportunity of bringing forward his objections before the Chancellor. If he is prevented from doing so, & the licence issues, he should communicate to the registry his objection. The matter will be inquired into, & if it is a valid one, the licence will be revoked. The next question is whether there is any authority for an appeal from a refusal to grant a licence to the Provincial Ct., & from thence to the Judicial Committee. It is a well-established rule of Ecclesiastical law that there is an appeal from every gravamen alleged to have committed by an Ecclesiastical Judge, except on the question of costs. No citation can issue from the Registry without the fiat of the Chancellor. If the Chancellor refuses his fiat, there is an appeal from his refusal. . . . In the case of Mr. B. I declined to go into particulars, on the ground that it was not discretionary with me to grant or refuse a licence, & that as he was entitled to marry, & there was no legal impediment to it, I was bound to grant the licence (DR. TRISTRAM).—*Ex p.* BRINCKMAN (1895), 11 T. L. R. 387.

310. ——.]—There is an appeal from the refusal of a licence in an uncontested as well as in a contested case. The practice of this ct. is, when the Chancellor entertains any doubt as to the granting, to require the licence to be moved for *in camera*, when he takes evidence on oath to enable him to determine the matter, & if he is satisfied with it he decrees the licence to issue as Vicar-General of the Bishop & Official Principal. If he refuses it, he gives appct., if he desires it, leave to file his petition with a view to an appeal. Cases of this description are brought before me from time to time on which it would be unjust to refuse an appeal. . . . The only remedy the parties have against the objector to a marriage by banns is by an action on the case for damages, & it is for this reason that he is required to give a bond & sureties to meet damages or costs. They have no remedy against him in the Ecclesiastical Ct. But, if he objects to a marriage by licence, the objection should be referred back to the Chancellor & determined summarily by him. I have only to add that, as the Bishop of London considered it objectionable that licences for the marriage of a guilty party should issue in his name & not in mine as Vicar-General & Official Principal, I made an order of ct., under 10 Geo. 4, c. 53, s. 9, that they should issue under my name, & on any guilty party applying for a licence, I inform him that the Bishop of London & many of the Bishops & clergy object to the guilty party being married in a church, & that they may be legally married at the registry, but that if they require it I am bound to grant one to them (DR. TRISTRAM).—DIVORCE MARRIAGE LICENCES (1895), 11 T. L. R. 496.

(c) *Objections to Grant.*

See Marriage Act, 1823 (c. 76), s. 11.

311. Mode of—Entry of caveat against issue—In diocesan registry.]—*Ex p.* BRINCKMAN, No. 309, *ante*.

312. Where licence has issued—Notice of objection to registry.]—*Ex p.* BRINCKMAN, No. 309, *ante*.

(d) *Appeals from Refusal to grant.*

313. Right to—Contested & uncontested cases.]—DIVORCE MARRIAGE LICENCES, No. 310, *ante*.

314. —— To what courts.]—*Ex p.* BRINCKMAN, No. 309, *ante*.

D. Residence of Parties.

315. Sufficiency of—To justify grant—Incumbent under no obligation to inquire.]—TUCKNESS *v.* ALEXANDER, No. 234, *ante*.

E. Effect of Alterations in.

316. By adding name of parish.]—Adding the name of a parish to a licence does not make it void.—R. *v.* BECK (1741), 2 Stra. 1160; 93 E. R. 1100.

317. Clerical error.]—(1) No disparity of fortune, or mistake as to the qualities of the person will impeach the *vinculum* of marriage (SIR WILLIAM SCOTT).

(2) There is no ground shown on which this marriage can be invalidated & the false representations of circumstances, which have been assigned, will not have that effect. They did not lead to the obtaining the licence in any manner, or to the alteration & are wholly unconnected with it & are of no significance whatever by themselves. The variation, in itself, is little more than a clerical error & affords no ground on which, on any evidence of facts which is before the ct., it could pronounce this marriage void (SIR WILLIAM SCOTT).—EWING *v.* WHEATLEY (1814), 2 Hag. Con. 175; 161 E. R. 706.

Annotations:—*As to* (1) **Refd.** MOSS *v.* MOSS, [1897] P. 263
As to (2) **Refd.** Clowes *v.* Jones (1842), 2 Notes of Cases, 1.

F. False Names and Descriptions.

318. Validity does not depend on descriptions—Where no imposition as to identity—Difference between banns & licence.]—COCKBURN *v.* GARNAULT (1792), cited 1 Hag. Con. at p. 435; 161 E. R. 608.

Annotations:—**Folld.** Cope *v.* Burt (1809), 1 Hag. Con. 434; Clowes *v.* Jones (1842), 3 Curt. 185; Lane *v.* Goodwin (1843), 4 Q. B. 361.

319. —— —— ——.]—(1) Suit of nullity of marriage by reason of imposition practised by the wife on the husband, as to her name & condition, the licence being in a false name, unknown to the husband, not sustained, on the ground that there was no error *de persona*, & no fraud in obtaining the licence.

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 3, *F., G. & H.; sub-sect.* 4, *A.*]

(2) In the publication of banns . . . both parties must be cognisant of the fraud. . . . There is a distinction between banns & licences. The publication of banns is a notice to all the world of an intention of the parties to contract a marriage with each other, & the Act directs that the true Christian & surname must be used, & where a different name is used, it is equivalent to a marriage had without publication of banns, &, under the old Act, the marriage was null & void (SIR H. JENNER FUST).

(3) A licence is a dispensation from the necessity of a publication of banns, upon conditions which the ordinary, the authority granting the licence, is willing to accept (SIR H. JENNER FUST).—CLOWES *v.* JONES (FALSELY CALLING HERSELF CLOWES) (1842), 3 Curt. 185; 2 Notes of Cases, 1; 7 Jur. 908; 163 E. R. 697.

Annotation:—**Mentd.** Gosling *v.* Veley (1853), 4 H. L. Cas. 679.

320. —— —— ——.]—A partial departure from the true name of one of the parties to a marriage, in a licence obtained in the altered name by the other party, for the purpose of concealing the intended marriage, is no cause of nullity, if the altered name may represent the person, & if such licence was obtained for, & by the direction of, that person. *Aliter* in the case of a marriage by banns after a publication in such an altered name under similar circumstances.

A marriage was solemnised by virtue of a licence, in which the name of the woman was stated to be "Margaret Bevan," her baptismal name, & that by which she was commonly called, being "Margaret Lea Bevan." The licence was obtained in the altered name by the man, who, knowingly, & by the direction of the woman, suppressed the name "Lea," in order that the surrogate might not know who the woman was, & that the intended marriage might be kept secret from her friends:—*Held:* in a suit of nullity of marriage instituted by the woman on the ground of misnomer in the licence, as the name "Margaret Bevan" might represent her, & the licence was obtained for her, & by her direction, the marriage was not void as having been solemnised without licence.—BEVAN (FALSELY CALLED M'MAHON) *v.* M'MAHON (1861), 2 Sw. & Tr. 230; 30 L. J. P. M. & A. 61; 3 L. T. 820; 7 Jur. N. S. 218; 164 E. R. 983.

False names & descriptions in banns, *see* Sub-sect. 1, E., *ante*.

321. —— —— **Both parties of age.**]—Suit of nullity of marriage, by licence, by reason of the false description of names, not sustained.

If there is no deception as to the identity, it may be asked, what is the fraud that is imputed in this case? There was no imposition on the ordinary, or on the minister, or on either of the parties, as the name had actually been used for a considerable time. There is no averment that a licence, obtained in one name, was transferred to another person. If that case should occur, & it should appear that a licence, procured for one person, was transferred to another it might be a fraud which the ct. would be bound to notice. But there is no such ingredient here. I am of opinion that this case is governed by that which has been referred to, & that I am bound to hold that the mere circumstance, that the licence has been obtained in the name of the person, which she has actually borne, though not the true name, will not authorise the ecclesiastical ct. to pronounce such marriage null & void (SIR WILLIAM SCOTT).—COPE *v.* BURT (FALSELY CALLING HERSELF COPE) (1809), 1 Hag. Con. 434; 161 E. R. 608; *affd.* (1811), 1 Phillim. 224.

Annotations:—**Folld.** Clowes *v.* Jones (1842), 3 Curt. 185; Lane *v.* Goodwin (1843), 4 Q. B. 361.

322. —— —— ——.]—EWING *v.* WHEATLEY, No. 317, *ante*.

323. Deserter assuming name for purposes of concealment.]—A marriage by licence, not in the man's real name, but in the name which he had assumed because he had deserted, he being known by that name only in the place where he lodged & was married, & where he had resided sixteen weeks:—*Held:* a valid marriage.

If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, & to conceal himself from the party to whom he was about to be married, that would have been a fraud on the Marriage Act & the rights of marriage, & the ct. would not have given effect to any such corrupt purpose. But where a name has been previously assumed so as to have become the name which the party has acquired by reputation, that is, within the meaning of the Marriage Act, the party's true name (LORD ELLENBOROUGH, C.J.).—R. *v.* BURTON-UPON-TRENT (INHABITANTS) (1815), 3 M. & S. 537; 105 E. R. 712.

Annotations:—**Refd.** R. *v.* St. Faith's, Newton (1823), 3 Dow. & Ry. K. B. 348; R. *v.* Tibshelf (1830), 8 L. J. O. S. M. C. 120; Clowes *v.* Jones (1842), 3 Curt. 185; Moss *v.* Moss, [1897] P. 263.

324. —— —— ——.]—LANE *v.* GOODWIN, No. 302, *ante*.

325. —— —— **Additional Christian names.**]—A marriage by licence is not invalidated through the husband having been, by mistake, described in the licence as having two additional Christian names.—HASWELL *v.* HASWELL & GILBERT (1881), 51 L. J. P. 15; 30 W. R. 231.

Criminal liability for false oaths before surrogate.]—*See* CRIMINAL LAW, Vol. XV., pp. 693, 694, Nos. 7472 *et seq.*

G. False Oaths as to Age.

Consents in case of minors.]—*See* Sub-sect. 5, *post*.

326. Whether marriage invalidated by — Insufficient evidence of marriage.]—(1) In nullity, by reason of minority, & want of consent, what consent required. Consent, once given, how to be retracted.

This was a case of nullity of marriage, on the part of the wife, by reason of her minority, & the want of consent of her mother. The suit is brought by Miss H. to annul her own marriage, under the provisions of the Marriage Act, 1753 (c. 33), which is made, I will not say in derogation of the liberty of marriage, but as a restriction upon it. As such, it has always been held right that it should be strictly construed. It is enacted, that the marriage of minors celebrated without the consent of parents or guardians, as specified in the Act, should be invalid (SIR WILLIAM SCOTT).

(2) The *onus probandi* lies on the party suing to annul the marriage, who must prove clearly not only the minority, but also the want of the

d. *Whether marriage invalidated by — Absence of statutory provision.*]—Resp. obtained a licence under which he went through the form of marriage with a girl of fifteen by falsely representing to the registrar that the person he proposed to marry was of the age of nineteen & that her father had given consent to the marriage. Similar deception was practised before the clergyman by whom the ceremony of marriage was performed:—*Held:* in the absence of express statutory

requisite consent. It did take place, by virtue of a licence, obtained on the oath of the husband, in which he swears that the young woman is of age. There is no appearance of any consent on the face of that instrument. It is admitted, that she wanted only seventeen days of being of full age, & there is nothing that shows whether that fact was known to the husband or not; though it may reasonably be presumed (SIR WILLIAM SCOTT).

(3) It is undoubtedly true, that consent may be retracted; since the parental authority continues up to the time of marriage. This principle, however, must be taken with reasonable limitations; for it cannot be maintained that this power can be arbitrarily resumed at any moment: that if a parent gives consent on Monday for a marriage the next day, & it is deferred, it would be necessary to renew that consent, or that it would be considered as wearing out or expiring by mere lapse of a short time. When consent has actually been given, it will be necessary that dissent afterwards should be distinctly expressed, & that it should be proved so to have been in the clearest manner (SIR WILLIAM SCOTT).

(4) It will be unnecessary to consider whether the young woman was a minor or not; I will therefore content myself with saying, that if the consent is proved, as I think it is, the minority is not proved on the evidence adduced, opposed as it is to the contrary declarations as to the time of birth. On every part of the case, then, I am of opinion that there is a fatal defect, on the point of consent, by opposite evidence; & on the minority, in the insufficiency of proof, which would restrain the ct. from pronouncing a sentence of nullity on such evidence (SIR WILLIAM SCOTT).—HODGKINSON *v.* WILKIE (1795), 1 Hag. Con. 262; 161 E. R. 546.

327. —— Acquiescence of mother — Presumption of consent.]—OSBORN *v.* GOLDHAM (1808), 1 Phillim. 298, n.; 161 E. R. 990.

Annotations:—**Refd.** Balfour *v.* Carpenter (1811), 1 Phillim. 221; Smith *v.* Huson (1811), 1 Phillim. 287.

328. —— Surviving parent not consenting—Marriage not consummated.]—BRIDGWATER *v.* CRUTCHLEY (1823), 1 Add. 473; 162 E. R. 167.

329. Liability for — Husband committed — Clergyman reprimanded.] — THOMPSON'S CASE (prior to 1801), cited in 6 Ves. at p. 422; 31 E. R. 1124, L. C.

Annotation:—**Refd.** Priestley *v.* Lamb (1801), 6 Ves. 421.

330. —— —— ——.]—Upon a marriage of a ward of the ct., under flagrant circumstances, the husband obtaining licence upon a false oath, that she was of age, the clergyman was ordered to attend, & reprimanded; the husband was committed, & ordered to be indicted. Being convicted & having suffered the punishment, upon his petition to be discharged on executing a settlement, the Chancellor would not approve a proposal giving him any further interest than, in case of his surviving & no children, under her appointment; requiring the fund to be transferred to the Accountant-General: with a trust declared to pay the dividends to her separate use for life, from time to time, & not by way of anticipation; after her decease the capital among all her children by any marriage: if none, he survives, according to her appointment by will; if no appointment, to her next of kin; & if he survives, subject to her appointment, to her, her exors., etc.—MILLET *v.* ROWSE (1802), 7 Ves. 419; 32 E. R. 169, L. C.

Annotations:—**Consd.** Birkett *v.* Hibbert (1834), Coop. *temp.* Brough. 459. **Refd.** Ball *v.* Coutts (1812), 1 Ves. & B. 292.

Criminal liability for false oaths before surrogate.]—*See* CRIMINAL LAW, Vol. XV., p. 693, No. 7472 *et seq.*

II. Knowingly and wilfully intermarrying without Licence.

See Marriage Act, 1823 (c. 76), s. 22.

331. Knowledge of both parties essential—Licence from person not having authority to grant same.]—The marriage of parties under a licence from "a person not having authority to grant same," is not void by Marriage Act (c. 76), s. 22, unless both parties knowingly & wilfully intermarry by virtue of such licence.—DORMER (FALSELY CALLED WILLIAMS) *v.* WILLIAMS (1838), 1 Curt. 870; 2 J. P. 809; 163 E. R. 301.

Annotations:—**Refd.** Clowes *v.* Jones (1842), 3 Curt. 185; Williams *v.* Dormer (1852), 2 Rob. Eccl. 505; Bevan *v.* M'Mahon (1861), 2 Sw. & Tr. 230.

332. —— Issue of licence, day after celebration.]—A. & B. intermarried at the parish church of Bradford, Yorkshire, on June 18, 1857. The licence for their marriage did not issue until June 19, & A., the husband, knew at the time of the marriage that the licence was not in existence, but B., the wife, was ignorant of the fact & believed that all necessary formalities had been observed:—*Held:* the parties had not knowingly & wilfully intermarried without licence within Marriage Act, 1823 (c. 76), s. 22, & the validity of the marriage was pronounced for.

B is entitled to judgment . . . inasmuch as I do not believe that she knew that the licence had not issued when the marriage was solemnised (LORD PENZANCE).—GREAVES *v.* GREAVES (1872), L. R. 2 P. & D. 423; 41 L. J. P. & M. 66; 26 L. T. 745; 20 W. R. 802.

Annotation:—**Refd.** Nathan *v.* Woolf (1899), 15 T. L. R. 250.

—— As to undue publication of banns.]—*See* Sub-sect. 1, E. (*b*) ii., *ante*.

SUB-SECT. 4.—SUPERINTENDENT REGISTRAR'S CERTIFICATE OR CERTIFICATE AND LICENCE.

A. Powers and Duties of Registrars.

333. Power of superintendent registrar to grant—Confined to places of worship within own district.]—The superintendent registrar has no power to grant a certificate for the solemnisation of a marriage in a place of worship not within his own district. The ct. therefore refused an application for a *mandamus* to be directed to the superintendent registrar of the S. union, commanding him to issue his certificate for the solemnisation of a marriage in a Roman Catholic chapel at M., same not being within the district of the S. union.—R. *v.* SALFORD UNION SUPERINTENDENT REGISTRAR (1840), 4 J. P. 59.

334. —— ——.]—The superintendent registrar has no power to grant his certificate, pursuant to Marriage Act, 1836 (c. 85), s. 7, in cases where it is proposed that the marriage shall take place out of his district.—*Ex p.* BRADY (1840), 8 Dowl. 332.

Places where marriage may lawfully be solemnised, *see* Part II., Sect. 8, sub-sect. 1, B., *post*.

provisions imposing dissolution of the marriage as a penalty for such fraud, the marriage, having actually taken place, could not be declared void, the provision of the statute that where fraud is committed at the time of the granting of the licence the marriage shall be null & void to all intents & purposes whatsoever, not being sufficient for that purpose.—HARRIS *v.* MEYERS (1916), 50 N. S. R. 112.—**CAN.**

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 4, *A. & B.* (*a*), (*b*) & (*c*); *sub-sect.* 5, *A. & B.* (*a*).]

335. Power to refuse issue — Lawful impediment shown to his satisfaction—Previous marriage of Mohammedan with Christian woman—Dissolved by "writing of divorcement."]—Applt. was a native of & domiciled in India, professing the religion of Islam. On Mar. 18, 1913, he intermarried with Ruby Pauline Hudd, an Englishwoman, at a registry office in England. On Aug. 27, 1915, he purported by a writing of divorcement in accordance with Mohammedan law to divorce his wife. In Aug. 1916, the marriage not having been dissolved by any ct. of law, he applied to resp., the registrar of marriages, for Hammersmith, for a certificate & licence to marry Violet Louise Ling, an Englishwoman: — *Held:* resp. was entitled to refuse to issue the certificate & licence, as applt.'s marriage with Ruby Pauline Hudd was, according to English law, still subsisting, & a "lawful impediment" had therefore been "shown to his satisfaction" within the words of Marriage & Registration Act, 1856 (c. 120), s. 9.—R *v.* HAMMERSMITH SUPERINTENDENT REGISTRAR OF MARRIAGES, *Ex p.* MIR-ANWARUDDIN, [1917] 1 K. B. 634; 86 L. J. K. B. 210; 115 L. T. 882; 81 J. P. 49; 33 T. L. R. 78; 61 Sol. Jo. 130; 15 L. G. R. 83, C. A.

Recognition of foreign decrees as to marriage, *see* CONFLICT OF LAWS, Vol. XI., p. 428, Nos. 927 *et seq.*

336. Duty to inquire as to age of applicants—Circumstances suggesting inquiry.]—Observations as to the duty of registrars of marriages in the issue of marriage licences to young persons who state that they are of full age, but with regard to whom the circumstances suggest inquiry.—NORSWORTHY *v.* NORSWORTHY (1909), 26 T. L. R. 9.

B. Notice to Superintendent Registrar.

(a) What constitutes "Due Notice."

337. Principles applicable to "due publication" of banns—Inapplicable to marriages under Registration Acts.]—HOLMES *v.* SIMMONS (FALSELY CALLED HOLMES), No. 347, *post.*

338. —— Or to marriages on notice before registrar—Inapplicable to marriages by registrar's licence.]—PLUMMER *v.* PLUMMER, No. 342, *post.*

"Due publication" of banns.]—*See* Sub-sect. 1, C., *ante.*

339. Sufficient if statutory formalities complied with — Though details therein inaccurate.] — HOLMES *v.* SIMMONS (FALSELY CALLED HOLMES), No. 347, *post.*

340. —— —— Evidence as to falsity inadmissible.]—In the case of marriages under Marriage & Registration Act, 1856 (c. 119), the due notice required by the statute is a notice conforming to the formalities prescribed by the statute. The notice will be sufficient, even although the contents thereof in respect of the Christian names or ages of the parties & other details are not strictly true or accurate, & evidence cannot be given in any suit or legal proceedings touching the validity of the marriage, to prove the falsity of the statements in the notice.—PROWSE *v.* SPURWAY & BOWLEY (1877), 46 L. J. P. 49; 26 W. R. 116.

Annotations:—**Apld.** *Re* Rutter, Donaldson *v.* Rutter, [1907] 2 Ch. 592. **Consd.** Plummer *v.* Plummer, [1917] P. 163.

341. Notice containing false statements — To knowledge of both parties—Marriage not invalidated by.]—In order to keep her second marriage secret a widow, whose life interest under her first husband's will ceased on remarriage, was married before a registrar in her maiden name, the previous statutory notice given under the Marriage & Registration Act, 1856 (c. 120), s. 3, being false to the knowledge of both spouses in this & other respects:—*Held:* the marriage was valid & the widow's life interest had ceased.—*Re* RUTTER, DONALDSON *v.* RUTTER, [1907] 2 Ch. 592; 77 L. J. Ch. 34; 97 L. T. 883; 24 T. L. R. 12.

Annotation:—**Apld.** Plummer *v.* Plummer, [1917] P. 163.

342. —— —— ——.]—(1) In the case of a marriage by licence before a superintendent registrar under Marriage Act, 1836 (c. 85), & Marriage & Registration Act, 1856 (c. 119), although the notice or declaration required by the Acts may contain false statements to the knowledge of both parties, the marriage will nevertheless be valid.

In order to keep her marriage secret from her father whose consent was necessary, a minor was married by licence before the registrar in a false name, the previous statutory notice under Marriage Act, 1836 (c. 85), s. 4, being false to the knowledge of both parties in this & other respects. A petition was subsequently presented by the husband for nullity of marriage based on the above facts. The petition was not defended by the wife, & a decree *nisi* was granted by Bargrave Deane, J. There was one child of the marriage, an infant, but her birth was not stated in the petition. The child subsequently obtained leave to intervene in the suit under Matrimonial Causes Act, 1907 (c. 12), s. 3, & to appeal against the decree *nisi*:—*Held:* the marriage being by licence was not invalidated by reason of the false statements in the notice, & the appeal must therefore be allowed, the decree rescinded, & the petition dismissed.

(2) There is no analogy between the case of a marriage by banns or on notice before a registrar & that of a marriage by licence. In the former the main object is publicity: in the latter identity.

There is a distinction as regards the notice required to be given between a marriage by licence & a marriage by banns. In the case of the latter a wilful & fraudulent misstatement in the notice to the knowledge of both parties will invalidate marriage. But in the case of a marriage by licence a licence can be obtained on payment of a certain sum of money, & after the application for it & before the marriage takes place no publicity is necessary, which seems to show that the principles which have been applied to marriages by banns or on notice without licence ought to have no application to a marriage by licence (LORD COZENS-HARDY, M.R.).

(3) In my opinion, therefore, it comes to this: that in the case of a marriage by licence . . . although both parties may make a false statement as to the names for the purpose of the notice & declaration, yet the marriage will be valid, the consequence of giving the false notice being not to invalidate the marriage, but to expose the parties to penalties of perjury (WARRINGTON, L.J.).—PLUMMER *v.* PLUMMER, [1917] P. 163; 86 L. J. P. 145; 117 L. T. 321; 33 T. L. R. 417; 61 Sol. Jo. 558, C. A.

343. Use of acquired name.] — A man may change his surname by use & reputation; & if by use & reputation he has acquired a new one, he is not indictable under Marriage & Registration Act, 1856 (c. 119), s. 2, for using the new name in signing a notice for the purpose of procuring his marriage under Marriage Act, 1836 (c. 85).

In point of law a man cannot change his Christian name, without prejudice to the question, whether he can do so at his confirmation. With regard to surname . . . they can be changed in

various ways, as, for instance, by royal licence. I am bound to add that a person can also change his name by use & reputation. If a man has a name which displeases him, there is nothing in law to prevent his changing it to any other he likes better, provided he can get the public to adopt & use the name he prefers (WILLES, J.).—R. *v.* SMITH (1865), 4 F. & F. 1099.

(*b*) "*Knowingly and wilfully intermarrying without due notice.*"

344. Knowledge of both parties essential — As to false statements in notice.]—HOLMES *v.* SIMMONS (FALSELY CALLED HOLMES), No. 347, *post*.

345. —— ——.]—To make a marriage invalid within Marriage Act, 1836 (c. 85), s. 42, it must be contracted with a knowledge by both parties that no due notice had been given; & therefore, where one of the parties under sect. 4 of the Act, which requires that the notice shall state the name & surname of each of the parties intending marriage, gave a notice stating therein a false Christian name for such party, but the other party did not know that fact at the time of the marriage, the marriage was held valid.—R. *v.* REA (1872), L. R. 1 C. C. R. 365; 41 L. J. M. C. 92; 26 L. T. 484; 36 J. P. 422; 20 W. R. 632; 12 Cox, C. C. 190, C. C. R.

Annotation:—**Refd.** Nathan *v.* Woolf (1899), 15 T. L. R. 250.

346. —— **Omission to give notice.**]—NATHAN *v.* WOOLF (1899), 15 T. L. R. 250.

Effect of notice containing false statements—To knowledge of both parties—Marriage not invalidated by.]—*See* Nos. 341, 342, *ante*.

—— **As to undue publication of banns—To invalidate marriage.**]—*See* Sub-sect. 1, E. (*b*) ii., *ante*.

Effect of making false statements—Liability to penalties for perjury.]—*See* Sub-sect. 4, B. (*c*), *post*.

(*c*) *Effect of making False Statements in.*

347. Liability to prosecution for perjury.]—(1) In a suit for nullity of marriage celebrated before a registrar under the Registration Acts (Marriage Act, 1836 (c. 85), & Marriage & Registration Act, 1856 (c. 119)) on the ground that the parties had wilfully intermarried without due notice given to the proper officer, where the notice untruly stated the Christian names, ages, & residences of the parties to which untrue statements resp. was no party, the ct. pronounced the marriage valid because Marriage & Registration Act, 1856 (c. 119), by providing under the pains & penalties of perjury that the party giving the notice should swear that he or she actually had the required consent, has assimilated marriages by notice before a registrar to marriages by licence. Therefore no analogy can be drawn from the cases decided upon marriages by banns; & if any such analogy could be drawn, the false statements in the notice were not made with the sanction of both parties.

(2) It is doubtful whether the marriage of a minor can be declared null & void by reason of undue publication of banns if there be no parent or guardian whose consent or dissent can be given to such marriage.—HOLMES *v.* SIMMONS (FALSELY CALLED HOLMES) (1868), L. R. 1 P. & D. 523; 37 L. J. P. & M. 58; 18 L. T. 770; 16 W. R. 1024.

Annotations:—*As to* (1) **Folld.** Prowse *v.* Spurway & Bowley (1877), 46 L. J. P. 49; *Re* Rutter, Donaldson *v.* Rutter, [1907] 2 Ch. 592. **Consd.** Plummer *v.* Plummer, [1917] P. 163.

348. ——.]—PLUMMER *v.* PLUMMER, No. 342, *ante*.

See, also, CRIMINAL LAW, Vol. XV., p. 693, Nos. 7472 *et seq*.

SUB-SECT. 5.—CONSENTS IN CASE OF MINORS.

A. Whether Consent necessary.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 9; Sched. I.

349. In case of bastards — Not unless guardian appointed by court.]—HORNER *v.* LIDDIARD (OTHERWISE WHITELOCK FALSELY CALLING HERSELF HORNER), No. 366, *post*.

350. —— **Whether Marriage Act, 1753 (c. 33), applicable.**]—Bastards are within above Act which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns.—R. *v.* HODNETT (INHABITANTS) (1786), 1 Term Rep. 96; 99 E. R. 993.

Annotations:—**Refd.** Horner *v.* Horner (1799), 1 Hag. Con. 337. **Mentd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54; R. *v.* Maude (1842), 11 L. J. M. C. 120.

351. —— ——.]—R. *v.* EDMONTON (INHABITANTS) (1784), Cald. Mag. Cas. 435; 2 Bott. 70.

Annotations:—**Dbtd.** Horner *v.* Horner (1799), 1 Hag. Con. 337. **Refd.** R. *v.* Hodnett (1786), 1 Term Rep. 96.

352. —— ——.]—All marriages, whether of legitimate or illegitimate children, are within Marriage Act, 1753 (c. 33), which requires all marriages to be by banns or licence: & by three judges a marriage of an illegitimate minor had by licence with the consent of her mother is void by sect. 11; the words father & mother in that sect. meaning legitimate parents.—PRIESTLY *v.* HUGHES (1809), 11 East, 1; 103 E. R. 903.

Annotations:—**Folld.** Droney *v.* Archer (1815), 2 Phillim. 327. **Refd.** Fielder *v.* Smith (1816), 2 Hag. Con. 193; R. *v.* Chadwick, R. *v.* St. Giles in the Fields (1847), 11 Q. B. 173.

—— **Consent of guardian appointed by court.**]—*See* Sub-sect. 5, B. (*b*), *post*.

Legal position of bastard generally, *see* BASTARDY, Vol. III., pp. 375 *et seq*.

B. Whose Consent necessary.

(*a*) *In General.*

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 9; Sched. I.

353. Parents.]—HODGKINSON *v.* WILKIE, No. 326, *ante*.

354. ——.]—A marriage annulled by reason of an undue publication of banns, under Marriage Act, 1753 (c. 33).—STANHOPE *v.* BALDWIN (1822), 1 Add. 93; 162 E. R. 33.

355. Surviving parent.]—BRIDGWATER *v.* CRUTCHLEY (1823), 1 Add. 473; 162 E. R. 167.

356. Father.]—CHINHAM *v.* PRESTON (1759), 1 Wm. Bl. 192; 96 E. R. 104; *sub nom.* R. *v.* PRESTON (INHABITANTS), Burr. S. C. 486.

Annotations:—**Distd.** R. *v.* Edmonton (1784), Cald. Mag. Cas. 435. **Mentd.** R. *v.* Llanbedergoch (1797), 7 Term Rep. 105.

357. ——.]—A marriage annulled by reason

PART II. SECT. 7, SUB-SECT. 5.—B. (a).

353 i. *Parents.*]—It is illegal to marry by licence, where either of the parties in under twenty-one, without consent of parents & the want of consent is a breach of the bond given on obtaining such licence, conditioned that there is

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 5,

of the minority of the husband, & the want of his father's consent.

The ct. presumes consent, unless dissent is proved. Here there is proof of the ignorance of the father, & I think of his dissent, for it appears that he was totally ignorant of this marriage, till two years after it was solemnised. The ct. will go to a great length in presuming consent, but here is proof that there was no previous consent (SIR JOHN NICHOLL).—BALFOUR *v.* CARPENTER (FALSELY CALLED BALFOUR) (1811), 1 Phillim. 221; 161 E. R. 966.

Annotations:—**Consd.** Dormer *v.* Williams (1838), 1 Curt. 870. **Refd.** Smith *v.* Huson (1811), 1 Phillim. 287; Sherwood *v.* Ray (1837), 1 Moo. P. C. C. 353.

358. ——.]—The marriage of a minor by licence with the implied consent of the father, established.—SMITH *v.* HUSON (FALSELY CALLED SMITH) (1811), 1 Phillim. 306; 161 E. R. 993.

Annotation:—**Refd.** Harrison *v.* Southampton Corpn. (1853), 4 De G. M. & G. 137.

359. -.]—DAYS *v.* JARVIS (1814), 2 Hag. Con. 172; 161 E. R. 705.

360. Mother.]—OSBORN *v.* GOLDHAM (1808), 1 Phillim. 298, n.; 161 E. R. 990.

Annotations:—**Consd.** Balfour *v.* Carpenter (1811), 1 Phillim. 221; Smith *v.* Huson (1811), 1 Phillim. 287.

361. —— **Right lost on re-marriage.**]—DAYS *v.* JARVIS (1814), 2 Hag. Con. 172; 161 E. R. 705.

362. Guardian.]—HODGKINSON *v.* WILKIE, No. 326, *ante*.

363. —— **Appointed by court.**]—DAYS *v.* JARVIS (1814), 2 Hag. Con. 172; 161 E. R. 705.

364. —— —— **Form of order.**]—*Re* MOORCROFT (1835), 2 Seton's Judgments & Orders, 6th ed. 995.

—— —— **Where minor a bastard.**]—*See* Sub-sect. 5, B. (*b*), *post*.

365. —— **Duly appointed.**]—A marriage declared null because the guardians of a minor were not appointed by an instrument attested by two witnesses.—REDDALL *v.* LEDDIARD (1820), 3 Phillim. 256; 161 E. R. 1318.

(*b*) *Illegitimate Minors.*

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 9; Sched. II.

Legal position of bastards, generally, *see* BASTARDY, Vol. III., pp. 375 *et seq.*

366. Guardian appointed by court.]—(1) Consent of parents, under 26 Geo. 2, c. 33, s. 11, not applicable to the marriage of illegitimate minors. As to the marriage of infants: no consent is necessary in the case of a bastard except where a guardian has been appointed by the ct.

(2) According to the general policy of the law in matters merely moral, a person is said to be restrained from marriage with illegitimate relations as much as with legitimate ones, because the rules of prohibition of marriage arise out of natural relations (LORD STOWELL).—HORNER *v.* LIDDIARD (OTHERWISE WHITELOCK FALSELY CALLING HERSELF HORNER) (1799), 1 Hag. Con. 337; 161 E. R. 573.

Annotations:—*As to* (1) **Folld.** Clarke *v.* Hankin (1814), 2 Phillim. 328, n. *As to* (2) **Folld.** Droney *v.* Archer (1815), Phillim. 327; R. *v.* Brighton (1861), 1 B. & S. 447.

367. ——.]—The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Ct. of Ch., annulled.—CLARKE *v.* HANKIN (1814), 2 Phillim. 328, n.; 161 E. R. 1160.

368. ——.]—The marriage of an illegitimate minor, without the consent of a guardian appointed by the High Ct. of Ch., annulled.—DRONEY (FALSELY CALLED ARCHER) *v.* ARCHER (1815), 2 Phillim. 327; 161 E. R. 1159.

C. Presumption of Consent.

369. Court will presume consent—In absence of proof of dissent.]—OSBORN *v.* GOLDHAM (1808), 1 Phillim. 298, n.; 161 E. R. 990.

Annotations:—**Distd.** Balfour *v.* Carpenter (1811), 1 Phillim. 221. **Consd.** Smith *v.* Huson (1811), 1 Phillim. 287.

370. —— ——.]—BALFOUR *v.* CARPENTER (FALSELY CALLED BALFOUR), No 357, *ante*.

371. —— —— **Mother as consenting party.**]—(1) In 1798 a marriage was solemnised by licence between a man & a female minor. Three years afterwards, in pursuance of a previous agreement, the woman instituted a suit for nullity of marriage, & a decree of nullity was pronounced, on the ground of non-consent of the minor's father. Early in the following year a daughter was born:—*Held:* evidence, showing that the sentence of the ecclesiastical ct. had been obtained by fraud & collusion, was admissible; &, upon its being satisfactorily proved to the ct., the legitimacy of the daughter was established.

(2) Where a marriage of a minor was celebrated by licence, to which the consent of the father was requisite, his consent, the presumption of law being in favour of marriage & legitimacy, & against the commission of any crime or offence, must be presumed, until proved to the contrary; & the mere fact that the mother's name appeared in the register as the consenting party was not sufficient to contravene the presumption.

It then remains only to consider the question upon the whole of the evidence before us & in this view of the case I think that having regard to the general rule which applies to all cases of presumption "*omnia rite acta presumuntur*" & to the particular force of that rule as applied to cases of presumption in favour of marriage & legitimacy & against the commission of any crime or offence . . . we are bound to presume that the father was consenting to the marriage & that it was valid (TURNER, L.J.).—HARRISON *v.* SOUTHAMPTON CORPN. (1853), 4 De G. M. & G. 137; 1 Eq. Rep. 299; 22 L. J. Ch. 722; 21 L. T. O. S. 294; 18 Jur. 1; 1 W. R. 422; 43 E. R. 459, L. JJ.

372. —— **From conduct.**]—SMITH *v.* HUSON (FALSELY CALLED SMITH), No. 358, *ante*.

373. —— —— **Personal acquaintance unnecessary.**]—An additional article to a libel in a cause of nullity of marriage, by reason of minority, rejected.

I do not see how this article is relevant. The mother is to be produced as a witness; it is to be expected she will depose that she gave no consent. . . . It is now pleaded that the mother was totally unacquainted with the man, which I suppose means personally unacquainted. Consent may be given without this; it is usually given under other circumstances, but it is not required by law, or reason on which the law is founded, that there should be a personal knowledge (SIR WILLIAM SCOTT).—CRESSWELL *v.* COSINS (1815), 2 Phillim. 281; 161 E. R. 1145.

374. —— ——.]—The marriage of a minor without the consent of her father, if from acts of the father a subsequent consent may be implied, is a good marriage.—R. *v.* CLARK (1847), 9 L. T. O. S. 180; 2 Cox, C. C. 183.

375. After lapse of twenty-eight years—To avoid forfeiture.]—After a lapse of twenty-eight years, a consent to marriage, so as to avoid a forfeiture, was under the circumstances, presumed.—*Re* BIRCH (1853), 17 Beav. 358; 51 E. R. 1072.

362 l. *Guardian.*]—R. *v.* ROBLIN (1862), 21 U. C. R. 352.—**CAN.**

Effect of want of consent—Forfeiture of interest in property.]—*See* Sub-sect. 5, G. (*b*), *post.*

Presumption of validity of marriage.] — *See* Sect. 11, sub-sect. 1, *post.*

D. Retraction of Consent.

376. Power to retract—Where obtained without misrepresentation.]—Marriage held to have been with consent, where A., whose consent was necessary, agreed to the marriage, provided a proper settlement could be made, & referred to B. to prepare one, which was accordingly done; & though there was afterwards some altercation between A. & the proposed husband, who signified his intention of relinquishing his addresses, yet the consent having been obtained without misrepresentation:—*Held:* it could not be retracted: otherwise, if it had been obtained by deceit or fraud.—MERRY *v.* RYVES (1757), 1 Eden, 1; 28 E. R. 584.

Annotations:—**Consd.** *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120. **Mentd.** Eley *v.* Read (1897), 76 L. T. 39.

377. —— Circumstances within knowledge when consent given—Added terms.]—It would be very dangerous, as a general principle, notwithstanding all the colour there is for saying, it has been acted upon, to hold, that, if at a particular time a person *in loco parentis*, as guardian, upon a conscientious sense of duty thinks himself required to give consent, & previously to the marriage is duly informed of circumstances, that ought to have operated at first to make him withhold his consent, if he has once given it, he shall not afterwards alter his mind. The cases have gone this length; that, if consent is once given, it shall not be withdrawn by adding terms, that do not go to the propriety of giving the consent (LORD ELDON, C.).—DASHWOOD *v.* BULKELEY (LORD) (1804), 10 Ves. 230; 32 E. R. 832, L. C.

Annotations:—**Apld.** *Re* Brown, Ingall *v.* Brown, [1904] 1 Ch. 120. **Consd.** *Re* Whiting's Settlmt., Whiting *v.* De Rutzen, [1905] 1 Ch. 96. **Refd.** Clarke *v.* Parker 19 Ves. 1; Lloyd *v.* Branton (1817), 3 Mer. 108.

378. Knowledge of circumstances acquired after consent given.]—A person *in loco parentis* is justified in altering his mind & withdrawing his consent to a marriage, if circumstances subsequently come to his knowledge which, had they been known at the time, would have caused him originally to withhold his consent. This power of retractation, however, is not unlimited & cannot be exercised for mere caprice or without just & exceptional reasons.—*Re* BROWN, INGALL *v.* BROWN, [1904] 1 Ch. 120; 73 L. J. Ch. 130; 90 L. T. 220; 52 W. R. 173.

379. —— Continues up to time of marriage—Clear proof of dissent essential.]—HODGKINSON *v.* WILKIE, No. 326, *ante.*

380. —— ——.]—The consent of a father is not absolutely binding upon him until the marriage has been actually solemnised, because he may at any time revoke his consent (SIR J. ROMILLY, M.R.).—YONGE *v.* FURSE (1856), 26 L. J. Ch. 117; *sub nom.* YOUNG *v.* FURSE, 27 L. T. O. S. 286; 2 Jur. N. S. 864; *on appeal, sub nom.* YONGE *v.* FURSE (1857), 26 L. J. Ch. 352, L. JJ.

381. —— Only exercised for just & exceptional reasons—Not unlimited.]—*Re* BROWN, INGALL *v.* BROWN, No. 378, *ante.*

E. Consent of the Court.

See Guardianship of Infants Act, 1925 (c. 45), s. 9.

382. When granted — Absence of guardians abroad.]—Application to approve of the marriage of an infant, under 26 Geo. 2, c. 33, the testamentary guardian being in parts beyond the seas. Marriage declared to be a proper marriage.—BLAKE *v.* BLAKE (1772), 2 Dick. 459; 21 E. R. 348, L. C.

383. —— —— Death of father after consenting.]—The judicial declaration, by the Lord Chancellor, of the propriety of a marriage of a minor [whose father had consented to the marriage a few weeks before his death] whose guardians resided abroad, was made, without a reference to the master.—*Ex p.* REIBEY (1843), 12 L. J. Ch. 436; 7 Jur. 589; *sub nom.* ANON., 1 L. T. O. S. 383, L. C.

384. —— In absence of mother abroad — Infant having testamentary guardians.]—A similar application, & a similar order, as in *Blake* v. *Blake*, No. 382, *ante*, with this difference, that the infant had testamentary guardians, & her mother was in the East Indies.—*Ex p.* BARKER (1783), 2 Dick. 612; 21 E. R. 409.

385. —— Where father non compos mentis—Not if father unreasonably withholding consent—Or in absence of father abroad.]—The provision in Marriage Act, 1823 (c. 76), s. 11, does not apply to the case of a father who is beyond the seas, or unreasonably withholds his consent, but only to a case in which he is *non compos mentis.*—*Ex p.* I. C. (1838), 3 My. & Cr. 471; 40 E. R. 1008; *sub nom. Ex p.* COLEGRAVE, 7 L. J. Ch. 236; 2 Jur. 462, L. C.

F. Proof of Want of Consent.

386. Onus of proof—On party seeking to annul marriage.]—HODGKINSON *v.* WILKIE, No. 326, *ante.*

G. Effect of Want of Consent.

(a) On Validity of Marriage.

See, now, Marriage & Registration Act, 1856 (c. 119), s. 17.

387. Marriage not invalidated by—Act requiring consent directory only.]—Where a marriage was solemnised by licence between a man & woman, the former being a minor, whose father was living, &

PART II. SECT. 7, SUB-SECT. 5.—E.

e. *When granted — Not if father unreasonably refuses consent—Father compos mentis.*]—Judge of the Supreme Ct. has no power to consent to the marriage of a minor where the father (being *compos mentis*) has unreasonably refused his consent.—*Re* A. B. (1905), 25 N. Z. L. R. 299.—**N.Z.**

PART II. SECT. 7, SUB-SECT. 5.—G. (a).

387 i. *Marriage not invalidated by—Act requiring consent directory only.*]—Marriage Act, s. 11, requiring the consent of parents to a marriage where a party is under a specified age is directory only; & a marriage is not invalidated by the fact that it was entered into without the required consent, the licence being obtained by means of a false affidavit as to age.—BREEN *v.* BREEN (1923), 19 Alta. L. R. 545; [1923] 3 D. L. R. 600.—**CAN.**

f. —— *No dissent on publication of banns.*]—Where banns have been published & no dissent then expressed by parents or guardians, the husband being under age is no objection.—R. *v.* SECKER (1856), 14 U. C. R. 604.—**CAN.**

g. —— *Even if in contravention of order of court.*]—Although a Hindu father is the proper person to give his daughter in marriage, the rule is now firmly established that a marriage which is duly solemnised & is otherwise valid, is not rendered void because it was brought about without the consent of the guardian in marriage, or even in contravention of an express order of the Court.—GAJJA NAND & KIRPA RAM *v.* R. (1921), I. L. R. 2 Lah. 288.—**IND.**

h. *Marriage of ward of court.*]—A male minor who was entitled absolutely to real estate & was a ward of the ct., married without the consent of the ct., but the ct. directed the marriage ceremony to be celebrated a second time, in order to remove doubts as to the validity of the first marriage, which was accordingly done.—*Re* MURRAY (1842), 5 I. Eq. R. 266; 3 Dr. & War. 183; 2 Con. & Law. 136.—**IR.**

Sect. 7.—*Preliminaries to celebration: Sub-sect.* 5, *G.* (*a*) & (*b*), *i., ii. & iii.; sub-sect.* 6. *Sect.* 8: *Sub-sect.* 1, *A. & B.*]

who did not consent to the marriage:—*Held:* it was nevertheless valid, Marriage Act, 1823 (c. 76), s. 16, which requires such consent, being directory only.—R. *v.* BIRMINGHAM (INHABITANTS) (1828), 8 B. & C. 29; 2 Man. & Ry. K. B. 230; 6 L. J. O. S. M. C. 67; 108 E. R. 954.

Annotations:—**Refd.** Catterall *v.* Sweetman (1845), 1 Rob. Eccl. 304; Chichester *v.* Mure (1863), 3 Sw. & Tr. 223. **Mentd.** Cole *v.* Green (1843), 6 Man. & G. 872.

(*b*) *Forfeiture of Interest in Property.*

i. *In General.*

See Marriage Act, 1823 (c. 76), ss. 23–25.

388. Principles on which court will act—Offending party prevented from acquiring pecuniary benefits by marriage—Without prejudicing pecuniary interests of innocent party & issue.]—In settling the property of a minor, who has been married in fraud of Marriage Act, 1823 (c. 76), the ct. is bound to carry into effect the directions given by the Act for preventing the offending party from deriving any pecuniary benefit from the marriage, as far as may be without prejudicing the pecuniary interests of the innocent party & the issue of the marriage.

In a case where the minor was a female, the ct. refused its sanction to a general power of appointment being given to her, in case she should die before her husband, over one-third of her property, though there should be children, as she might exercise it in favour of her husband to the prejudice of the children; but the ct. approved of a power being given to her in case she survived her husband, though there should be children, of appointing such one-third either by deed or will, as it was for her benefit to be able in that case to make provision for a second marriage. It was no objection to the settlement, that a child dying in the lifetime of the father, after having attained a vested interest under its limitations, might bequeath such interest to the father.—A.-G. *v.* LUCAS (1848), 2 Ph. 753; 18 L. J. Ch. 100; 12 L. T. O. S. 237; 12 Jur. 1011; 41 E. R. 1134, L. C.

Annotation:—**Folld.** A.-G. *v.* Read (1871), L. R. 12 Eq. 38.

389. Who is "party falsely swearing"—Party to marriage knowingly swearing that other party of age.]—(1) An information was filed under Marriage Act, 1823 (c. 76), & some evidence adduced in support of it, which, at the hearing, was deemed insufficient by the ct. Liberty was given to the relator to exhibit interrogatories for the purpose of adducing additional evidence.

(2) Such an information will lie, & a decree may be made on it although the party "not offending" has not any property in possession, remainder, reversion or contingency.

(3) Such an information will lie at the relation of the guardians of a husband, who has no property in possession, remainder, reversion or expectancy, against a wife being the offending party.

(4) One of the parties to the marriage who swears that the other party is of age, he or she knowing the contrary, is a party, "falsely swearing" within the Act.

(5) Where, at the hearing of an information under the Act, an inquiry was directed, & more than a year had elapsed since the marriage, the inquiry was limited to the allegations contained in the information.—A.-G. *v.* SEVERNE (1844), 1 Coll. 313; 13 L. J. Ch. 399; 3 L. T. O. S. 279; 8 Jur. 595; 63 E. R. 435; *subsequent proceedings* (1845), 14 L. J. Ch. 404.

390. Whether information will lie—Where innocent party has no property.]—A.-G. *v.* SEVERNE, No. 389, *ante.*

391. Where husband alone offending party—Court has no discretion to mitigate penalty.]—Where the husband incurs a forfeiture, under Marriage Act, 1823 (c. 76), s. 23, the ct. has no discretion to mitigate the penalty, but is bound to settle & secure all property, present & future, of the wife, for the benefit of herself or the issue of the marriage.—A.-G. *v.* MULLAY (1828), 4 Russ. 329; 38 E. R. 829; *subsequent proceedings* (1844), 7 Beav. 351.

Presumption of consent—To avoid forfeiture.]—*See* No. 375, *ante.*

ii. *Settlements ordered by Court.*

See Marriage Act, 1823 (c. 76), ss. 23–25.

392. Present & future property of wife—Settled for benefit of wife & issue—To entire exclusion of husband.]—MILLET *v.* ROWSE, No. 330, *ante.*

393. —— ——.]—A.-G. *v.* MULLAY, No. 391, *ante.*

394. —— ——.]—A.-G. *v.* AKERS, [1872] W. N. 45.

395. Settlement of wife's property on issue by subsequent marriage—No power to order.]—Where the husband alone incurs a forfeiture under the Marriage Act, 1823 (c. 76), s. 23, the ct. has no authority to order any settlement of the wife's property on the issue of the wife by any subsequent marriage.—A.-G. *v.* MULLAY (1844), 7 Beav. 351; 3 L. T. O. S. 279; 49 E. R. 1101.

396. General power of appointment to wife—In case of wife surviving husband—Notwithstanding issue—Possibility of child bequeathing vested interest to father.]—A.-G. *v.* LUCAS, No. 388, *ante.*

397. —— **In default of children—Without words to exclude husband.**]—(1) In cases of forfeiture under Marriage Act, 1823 (c. 76), where the property of a female minor is settled by the ct., the proper form of limitation comprises a general power to the wife of appointment by will, in default of children, without words to exclude the husband.

(2) Orders under the Act as to settlements ought not to be made without the A.-G. appearing separately from the relator.—A.-G. *v.* READ (1871), L. R. 12 Eq. 38; 24 L. T. 494.

Annotation:—*As to* (2) **Expld.** A.-G. *v.* Teather (1881), 29 W. R. 347.

398. Where fund in possession small—Directed to be transferred into court—Declaration of trusts of funds in possession & reversion.]—A husband procured his marriage with a minor to be solemnised by a licence, contrary to the provisions of Marriage Act, 1823 (c. 76), by falsely swearing to certain matters to which he was required by the Act personally to swear, he wilfully & knowingly so swearing, & thereby incurred a forfeiture of all such estate, right, title, & interest as should then have accrued, or should thereafter accrue to him by force of the marriage. Immediately before the marriage, the wife was entitled absolutely to a sum of stock outstanding in trustees, & she was also entitled to certain reversionary interests in stock expectant on the death of her mother. The fund in possession being small, the ct., instead of ordering a settlement, after declaring the forfeiture, directed the trustees to transfer the residue of the fund into ct. & declared the trusts.—A.-G. *v.* CLEMENTS (1871), L. R. 12 Eq. 32; 40 L. J. Ch. 678; 24 L. T. 384.

Annotation:—**Refd.** A.-G. *v.* Read (1871), L. R. 12 Eq. 38.

iii. *Practice.*

See Marriage Act, 1823 (c. 76), ss. 23–25.

399. Filing of information — Must be with consent of relator—Consent need not be filed.]—Where the authority of a relator had been substantially given to the filing of an information in his name, but his absence abroad prevented the filing of his authority in strict compliance with Chancery Jurisdiction Act, 1852 (c. 86):—*Held:* such information was properly filed, & a motion to take it off the file refused with costs.

All that is required by the statute is that the relator shall be made aware of & consent to the use of his name, & though the consent had not been filed with the information, objection ought not to have been taken (HALL, V.-C.).—A.-G. *v.* WILTSHIRE (1875), 45 L. J. Ch. 53.

400. Attorney-General & relator — Whether separate appearances essential.]—A.-G. *v.* READ, No. 397, *ante.*

401. —— ——.] — (1) Minutes of judgment in an action under Marriage Act, 1823 (c. 76), s. 23, should follow the words of that statute.

(2) In an information under above sect. the A.-G. & the relator need not appear separately.—A.-G. *v.* TEATHER (1881), 43 L. T. 749; 29 W. R. 347.

——.]—*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 481 *et seq.*

402. Information at relation of guardians of husband—Where husband possessed of no property—Wife offending party.]—A.-G. *v.* SEVERNE, No. 389, *ante.*

403. Interrogatories—Circumstances tending to prove husband's offence—Offending husband not liable to give.]—On exceptions to an answer to an information under Marriage Act, 1823 (c. 76), for the ourpose of having it declared that the husband of a minor had forfeited all interest in the wife's property:—*Held:* the husband was not bound to give discovery of any circumstances tending to prove that he had contravened the provisions of the statute.

The rule of protection applies equally whether the forfeiture is to be worked out in equity, or the discovery is required in aid of an action at law.—A.-G. *v.* LUCAS (1843), 2 Hare, 566; 12 L. J. Ch. 506; 7 Jur. 1080; 67 E. R. 234; *subsequent proceedings* (1848), 2 Ph. 753, L. C.

404. —— Ordered where evidence insufficient.]—A.-G. *v.* SEVERNE, No. 389, *ante.*

—— In actions for penalties & forfeiture generally.]—*See* DISCOVERY, Vol. XVIII., pp. 181 *et seq.*

405. Where inquiry directed on information—Limited to allegations contained in information—Lapse of more than year since marriage.]—A.-G. *v.* SEVERNE, No. 389, *ante.*

406. Form of judgment — Should follow words of statute.]—A.-G. *v.* TEATHER, No. 401, *ante.*

407. Costs — Of application for settlement of wife's property—Liability of offending husband for.]—A.-G. *v.* AKERS, [1872] W. N. 45.

SUB-SECT. 6.—CRIMINAL LIABILITY FOR FALSE STATEMENTS.

See CRIMINAL LAW, Vol. XV., p. 693, Nos. 7472 *et seq.*

SECT. 8.—**CELEBRATION.**

SUB-SECT. 1.—ACCORDING TO RITES OF CHURCH OF ENGLAND.

A. By Whom solemnised.

408. Priest in Holy Orders.]—(1) Pltf. in an action of crim. con. is bound to prove a marriage valid in all respects, & it is not sufficient *primâ facie* evidence on his part to show that he & his alleged wife went through a religious ceremony with the *bonâ fide* intention of thereby contracting a valid marriage, & afterwards lived together as man & wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid.

In actions of this nature [crim. con.] as in the indictment for bigamy it is necessary for pltf. to show what the cts. call a marriage in fact which we think is an actual marriage valid or avoidable & yet not avoided (PARKE, B.).

(2) A marriage between English subjects, celebrated according to the rites of the Church of England, but not in the presence of a priest in Holy Orders, is invalid at common law.—CATHERWOOD *v.* CASLON (1844), 13 M. & W. 261; 13 L. J. Ex. 334; 8 Jur. 1076; 153 E. R. 108.

Annotations:—As to (1) **Refd.** R. *v.* Manwaring (1856), Dears. & B. 132; Culling *v.* Culling, [1896] P. 116.

409. ——.]—R. *v.* MILLIS, No. 222, *ante.*

410. —— Marriage of clergyman.]—BEAMISH *v.* BEAMISH, No. 440, *post.*

411. Deacon—Authorised by statute.]—It required a statute to enable a deacon to perform the ceremony of marriage (WILLES, J.).—COPE *v.* BARBER (1872), L. R. 7 C. P. 393; 41 L. J. M. C. 137; 26 L. T. 891; 36 J. P. 439; 20 W. R. 885.

412. Licence to marry at particular church—Incumbent of church—Compellable to perform ceremony.]—TUCKNESS *v.* ALEXANDER, No. 234, *ante.*

413. Effect of deprivation quia mere laicus.]—A sentence of deprivation *quia mere laicus* does not make marriage, or any spiritual act done by the parson, void.—COSTARD *v.* WINDER (1600), Cro. Eliz. 775; 78 E. R. 1005.

Annotation:—**Consd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

414. Person not in Holy Orders.] — CATHERWOOD *v.* CASLON, No. 408, *ante.*

415. Marriage celebrated by person ostensibly in Holy Orders—Not known by parties to be otherwise—Valid.]—It seems to be a generally accredited opinion, that, if a marriage is had by the ministration of a person in the church, who is ostensibly in Holy Orders, & is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for a sight of the minister's letters of orders, & if they saw them could not be expected to inquire into their authenticity (SIR WILLIAM SCOTT).—HAWKE *v.* CORRI (1820), 2 Hag. Con. 280; 161 E. R. 743.

Annotations:—**Consd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534. **Mentd.** Clowes *v.* Jones (1843), 3 Curt. 185; Miles *v.* Chilton (1849), 6 Notes of Cases, 636; Thompson *v.* Rourke, [1892] P. 244; Thompson *v.* Rourke, [1893] P. 70; Cowley *v.* Cowley, [1900] P. 305.

Solemnisation of marriage by unauthorised person—Criminal liability for.]—*See* CRIMINAL LAW, Vol. XV., p. 745, No. 8040.

B. Where solemnised.

Church or chapel where banns published.]—*See* Marriage Act, 1823 (c. 76), s. 2.

PART II. SECT. 8, SUB-SECT. 1.—B.

k. ***Whether solemnisation in church necessary.***]—It is not necessary that marriages should be solemnised in a church.—R. *v.* SECKER (1856), 14 U. C. R. 604.—**CAN.**

Sect. 8.—*Celebration: Sub-sect.* 1, *B. & C.; sub-sect* 2, *A.*]

Church or chapel specified in common licence.]—*See* Marriage Act, 1823 (c. 76), s. 10.

416. Parish in which parties reside.]—(1) The canons must be pursued with the utmost exactness by ecclesiastical persons & a clergyman who presumes to marry a person out of the parishes in which the man & woman reside is liable to penalties.

(2) The giving away a woman at the time of her marriage, as the father, though it is not an essential thing, yet it is a custom or ceremony which clergymen always require, & consequently call for at the time (LORD HARDWICKE, C.).—MORE *v.* MORE (1741), 2 Atk. 157; 26 E. R. 499; *sub nom.* MOOR *v.* MOOR, Barn. Ch. 404, L. C.

Annotations:—*As to* (1) **Consd.** Wynn *v.* Davies & Weever (1835), 1 Curt. 69. *Generally*, **Mentd.** Marshall *v.* Exeter (Bp.) (1860), 7 C. B. N. S. 653.

417. (1) It is the doctrine of all courts that everything is to be presumed in favour of a matrimonial union which has produced children & united parties by a long cohabitation; such an union is not to be dissolved unless by some pressing obligations of law (SIR WILLIAM SCOTT).

(2) The want of consent to a marriage by banns is of no consequence—nor is the non-residence in the parish—as the law has provided that the domicil shall not be looked into (SIR WILLIAM SCOTT).

(3) The native name is *primâ facie* the true name; at the same time the ct. has thrown out that it is possible that a person may have assumed another name so as to bring it within the description required. It is possible such a name may supersede the original native name (SIR WILLIAM SCOTT).

(4) In this case it is not very distinctly established what was the true name & what the putative name. It is said to be the practice & I believe it is for actors to assume names by which they designate themselves; it is said he went by the name of Faucit. That does not satisfy me that Faucit was the name by which he was universally known (SIR WILLIAM SCOTT).—DIDDEAR (FALSELY CALLED FAWCIT, OTHERWISE SAVILL) *v.* FAUCIT (1821), 3 Phillim. 580; 161 E. R. 1421.

418. —— Effect of celebration outside parish—Marriage by banns.]—R. *v.* HIND, No. 242, *ante*.

419. Place where banns usually published—Mode of proof.]—In an action for *crim. con.* if pltf.'s marriage was solemnised in a chapel he must give some evidence that banns were usually published there before the passing of Marriage Act, 1753 (c. 33). But it is *primâ facie* sufficient for this purpose, to produce an old register of marriages solemnised in the chapel before the passing of the Act, & a regular register of banns published there since, & to prove that within the recollection of witnesses who have attended the chapel, marriages have been solemnised & banns published in it from time to time of late years.—TAUNTON *v.* WYBORN (1809), 2 Camp. 297, N. P.

420. Place licenced by bishop—Principles on which bishop will act in granting licence.]—Five hundred members of the congregation of a chapel petitioned the Bishop of London to grant a licence for the celebration of marriages in the chapel by licence. The application was opposed by the rector of the parish on the grounds that the granting of the licence was opposed to the principles of the parochial system, that it might entail a loss of income to future rectors of the parish, & that the vicinity of the chapel being only three-quarters of a mile from the parish church of S., could not be said to be remote from it, so as to bring the case within the preamble of Marriage Act, 1836 (c. 85), s. 26:—*Held:* (1) the bishop, if satisfied that it was for the convenience of the inhabitants in the vicinity of the chapel that marriages should be celebrated in it, ought not to be deterred from granting the licence prayed for by considerations arising from our parochial system, or from possible loss of income in future rectors of the parish; (2) in deciding whether or not this was a proper case in which to grant the licence, the word "remote" as used in the preamble, should be interpreted, not as having a narrow but a wide signification; & when the transit from the district in the vicinity of the chapel was delayed from whatever cause, such as to make a real convenience to those residing in the vicinity of the chapel to be married in it, a licence for marrying in the chapel might properly be granted; (3) before granting the licence, the bishop should have some evidence before him of the convenience that would follow the granting of the licence, & there being no such evidence in the present case, it was the duty of the bishop to reject the present application. — *Re* ST. GEORGE'S, ALBEMARLE STREET, PETITION (1890), Trist. 134.

421. District chapel or church—Power of bishop to licence—Power of ecclesiastical commissioners to licence with bishop's consent.]—The church of C. was built, & had a district assigned to it, under Church Building Act, 1831 (c. 38). In the year 1840 the bishop of the diocese granted, under Marriage Act, 1836 (c. 85), s. 26, his licence for the publication of banns & the solemnisation of marriages in the church, & for taking the same fees in respect thereof as were taken in the mother church by the minister & incumbent thereof for the time being; to which the fees for churchings, baptisms & burials were afterwards added. From the consecration of the church down to the issuing of the writ of *mandamus* in the present case, two churchwardens were chosen for the church in the manner directed by Church Building Act, 1831 (c. 38), s. 16; one by the incumbent, & the other by the pew renters. Upon demurrer to the return to a *mandamus* to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent & the pew renters had the privilege of electing the churchwardens, & that New Parishes Acts, 1843 (c. 37), s. 15; 1856 (c. 104), s. 14, were inapplicable:—*Held:* the return was good. The authority contemplated by New Parishes Act, 1856 (c. 104), s. 14, was not a revocable licence by the bishop, but an authority under an order of the comrs. under sect. 11 of that Act; & therefore the district was not brought within sect. 14 of the Act.

Semble: New Parishes Act, 1843 (c. 37), s. 15, is inapplicable to the case of a district constituted, not under that Act, but under Church Building Act, 1831 (c. 38), with a licence by the bishop under Marriage Act, 1836 (c. 85).—R. *v.* PERRY (1861), 3 E. & E. 640; 30 L. J. Q. B. 141; 3 L. T. 885; 25 J. P. 229; 7 Jur. N. S. 655; 9 W. R. 383; 121 E. R. 583.

422. —— Creation of new district—After parochial chapelry divided into districts.]—TUCKNESS *v.* ALEXANDER, No. 234, *ante*.

423. —— Consolidated chapelries & district churches—Within New Parishes Act, 1856 (c. 104), s. 14.] — Consolidated chapelries & district churches, though differing in origin, are, when once formed, precisely similar in character, & within above sect.—JONES *v.* GOUGH (1865), 3 Moo. P. C. C. N. S. 1; 12 L. T. 31; 29 J. P.

11 Jur. N. S. 251 ; 13 W. R. 509 ; 16 E. R. 1 ; *sub nom.* GOUGH *v.* JONES, 5 New Rep. 381, P. C. ; *affg.* S. C. *sub nom.* GOUGH & CARTWRIGHT *v.* JONES (1863), 9 L. T. 610.

424. —— "New parish for ecclesiastical purposes."]—FULLER *v.* ALFORD, No. 235, *ante*.

425. Proprietory chapel.]—*Re* ST. GEORGE'S, ALBEMARLE STREET, PETITION, No. 420, *ante*.

426. Vestry—Part of church.]—(1) By the law of England affinity is not created by sexual intercourse without marriage. The illicit intercourse of the man with his wife's mother prior to the marriage does not render the marriage void, as being within the prohibited degrees of affinity.

(2) *Primâ facie* the vestry is part of the church. A petition for sentence of nullity, on the ground that a marriage was solemnised in the vestry which does not aver that the vestry formed no part of the church, is insufficient.

(3) Marriage Act, 1823 (c. 76), s. 28, which requires that two witnesses should be present at a marriage, & should sign the register, is merely directory; & the non-compliance with its directions is no ground for annulling the marriage.—WING *v.* TAYLOR (FALSELY CALLING HERSELF WING) (1861), 2 Sw. & Tr. 278 ; 30 L. J. P. M. & A. 258 ; 4 L. T. 583 ; 7 Jur. N. S. 737 ; 164 E. R. 1002.

Annotations :—*As to* (2) **Reld.** Holy Trinity, Stepney (1902), 18 T. L. R. 789 ; L. C. C. *v.* Dundas, [1904] P. 1.

427. When church under repair—Tower of church — Necessity for re-consecration.] — The church of W., consisting of a nave, two aisles, a chancel, & a tower, was repaired under a faculty. The tower remained untouched ; so did the eastern wall, except so far as was necessary for the purpose of tying on new north & south walls. The whole of the nave & interior of the church was renewed. During the repairs, marriages were celebrated in the tower of the church :—*Held :* the church did not require to be re-consecrated.

Semble : when a church is pulled down & rebuilt under a faculty, such church does not require to be re-consecrated.—PARKER *v.* LEACH (1866), L. R. 1 P. C. 312 ; 4 Moo. P. C. C. N. S. 180 ; 36 L. J. P. C. 26 ; 15 L. T. 370 ; 31 J. P. 71 ; 12 Jur. N. S. 911 ; 15 W. R. 204 ; 16 E. R. 284, P. C.

Annotations :—**Refd.** Rugg *v.* Winchester (Bp.) (1868), 19 L. T. 578. **Mentd.** Martin *v.* Mackonochie (1868), L. R. 2 P. C. 365.

428. —— Building adjoining church — Presumption of licence of building.]—Upon an indictment for bigamy it was proved that the first marriage was solemnised not in the parish church of the parish, but in a chamber in a building a few yards from the church while the church was under repair. It was further proved that divine service had several times been performed in the building in question :—*Held :* the building must be presumed to have been licenced & therefore the first marriage was valid & prisoner was properly convicted of bigamy.—R. *v.* CRESSWELL (1876), 1 Q. B. D 446 ; 45 L. J. M. C. 77 ; 33 L. T. 760 ; 40 J. P. 536 ; 24 W. R. 281 ; 13 Cox, C. C. 126, C. C. R.

429. —— —— Evidence of licence of building.]—The parties to a divorce suit were married in a schoolroom adjoining a church as the church was at the time undergoing repairs. Evidence was given that the bishop of the diocese had duly licenced the schoolroom for the celebration of divine service & the solemnisation of marriages during the period that the church was undergoing repairs, & the licence having been produced :—*Held :* the marriage had been validly celebrated, & evidence having been given in support of the petition, the ct. pronounced a decree *nisi*.—WILLIAMS *v.* WILLIAMS (1909), 25 T. L. R. 232.

430. Marriage by common licence—Within jurisdiction of person granting same.]—The article of an allegation admitted which pleaded that a licence granted by the Bishop of Winchester's commissary for Surrey, would not be valid for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary for Surrey.—BALFOUR *v.* CARPENTER (FALSELY CALLED BALFOUR) (1810), 1 Phillim. 204 ; 161 E. R. 961 ; *subsequent proceedings* (1811), 1 Phillim. 221.

Annotation :—**Refd.** Dormer *v.* Williams (1838), 1 Curt. 870.

Publication of banns—Place of publication.]—*See* Sect. 7, sub-sect. 1, C. (*c*), *ante*.

—— **Residence of parties.**] — *See* Sect. 7, sub-sect. 1, D., *ante*.

C. Marriage Fees.

See ECCLESIASTICAL LAW, Vol. XIX., p. 513, Nos. 3747–3753.

SUB-SECT. 2.—ACCORDING TO NON-ANGLICAN RITES.

A. In General.

431. Marriage at Roman Catholic chapel—Presumption as to validity of ceremony after lapse of time—Whether chapel duly licenced—Presence of registrar.]—In order to sustain a plea of coverture, deft. swore that, in 1844, she was married to L. at a Roman Catholic chapel in London, both parties being Roman Catholics ; that the ceremony was performed by a priest, in the way in which Roman Catholic marriages are ordinarily solemnised ; that she cohabited with L. for several years, & until he went to Australia, where he now resided :—*Held :* the ct. & jury might presume that the marriage was valid, though it was not proved either by oral testimony or by the certificate given by the priest on the occasion, that the place where the marriage was solemnised was licenced under Marriage Act, 1836 (c. 85), s. 18, or that the

PART II. SECT. 8, SUB-SECT. 2.—A.

l. *Marriage between member of Church of England & Presbyterian.*]—Marriages contracted in Ireland between members of the Church of England & Presbyterians, celebrated by ministers not belonging to the Church of England, are legalised by Imperial Statute 5 & 6 Vict. c. 26 ; & such marriages celebrated before that Act, are legal.—DOE d. BREAKEY *v.* BREAKEY (1845), 2 U. C. R. 349.—**CAN.**

m. —— ——.]—On an ..... for bigamy, it appeared that the first marriage was celebrated by a Presbyterian clergyman, the husband being a member of the Established Church, & the wife a Presbyterian :—*Held :* the marriage was invalid.—SMITH'S CASE (1841), Ir. Cir. Rep. 287 ; Jebb & B. App. 1.—**IR.**

n. —— ——.]—M'ANERNEY'S CASE (1841), Ir. Cir. Rep. 287.—**IR.**

o. *Between Non-Christians.*] — Marriage between Non-Christians ought to be left to their own officiants or to the registrar.—*Re* AH LIE (1884), 1 B. C. R. pt. 1, 261.—**CAN.**

p. *Christian minister.*] — Proof that at the time of his ordination the minister lived upon his farm, & that he afterwards farmed part of his time & preached part of his time, is not evidence that he was engaged in a secular calling within Rev. Stat. c. 106 —CURRIE *v.* STAIRS (1885), 25 N. B. R. 4.—**CAN.**

q. *By minister of "Latter Day Saints."*]—"The Re-organised Church of Jesus Christ of Latter Day Saints" is a religious denomination within R. S. O. 1887, c. 131, s. 1 ; & a duly ordained priest thereof is a minister authorised to solemnise the ceremony of marriage.—R. *v.* DICKOUT (1893), 24 O. R. 250.—**CAN.**

r. *Mixed marriage by Roman Catholic clergyman—Non-observance of Statutory formalities.*]—Where a ceremony of marriage between a Protestant & a Roman Catholic was per-

Sect. 8.—*Celebration: Sub-sect.* 2, *A. & B.; sub-sects.* 3 & 4. *Sects.* 9 & 10.]

registrar was present,—the contrary not appearing.

Mere cohabitation & reputation are sufficient to prove a marriage provided nothing to the contrary appears, in the case of persons not being dissenters, & I do not see why the same principle should not govern all marriages (ERLE, C.J.).—SICHEL *v.* LAMBERT (1864), 15 C. B. N. S. 781; 3 New Rep. 385; 33 L. J. C. P. 137; 9 L. T. 687; 10 Jur. N. S. 616; 12 W. R. 312; 143 E. R. 992.

B. Jews and Quakers.

See, now, Marriage Act, 1836 (c. 85), s. 2; Marriage (Society of Friends) Acts, 1860 (c. 18), ss. 1, 2; 1872 (c. 10), s. 1.

432. Marriage according to Jewish forms—Valid.]—ANDREAS *v.* ANDREAS (1737), cited in 1 Hag. Con. App. at p. 9; 161 E. R. 638.

Annotations:—**Refd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534; Ardaseer Cursetjee *v.* Perozeboye (1856), 6 Moo. Ind. App. 348.

433. —— ——.]—VIGEVENA & SILVEIRA *v.* ALVAREZ (1794), 1 Hag. Con. App. 7, n.; 161 E. R. 637.

Annotation:—**Refd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

434. —— **Necessity for compliance with Jewish law—Validity determined by evidence of expert in Jewish law.**]—LINDO *v.* BELISARIO, No. 123, *ante.*

435. —— —— **Necessity for two witnesses—Competency of witnesses.**]—Jewish marriage invalid under that law, by reason of the incompetency of witnesses, required as an essential part of the ceremony.

It is not denied that some ceremony has been performed, but it is alleged, that the celebration was not conformable to the law of the Jews. It is not alleged that the ceremony was defective in any other particulars except that it is essentially necessary that it should be performed in the presence of two witnesses, competent & credible, & subject to no disqualification imposed by the Jewish laws; which disqualifications may proceed from certain degrees of consanguinity to either of the parties who marry, or from non-conformity to the ceremonies of the Jewish religion, & it is alleged that the ceremony in this case was not attested by competent witnesses according to these notes (SIR WILLIAM SCOTT).—GOLDSMID *v.* BROMER (1798), 1 Hag. Con. 324; 161 E. R. 568.

Annotations:—**Refd.** Ruding *v.* Smith (1821), 2 Hag. Con. 371; R. *v.* Millis (1844), 10 Cl. & Fin. 534.

436. —— —— **Whether written contract essential to validity.**]—*Semble:* to prove a Jewish marriage, it is not enough to produce witnesses who were present at the ceremony in the synagogue; but the written contract between the parties should be produced, & the execution of it proved.—HORN *v.* NOEL (1807), 1 Camp. 61, N. P.

Annotations:—**Folld.** R. *v.* Althausen (1893), 17 Cox, C. C. 630. **Expld.** R. *v.* Hammer, [1923] 2 K. B. 786.

437. —— —— ——.]—In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the synagogue, a written contract between the parties being essential to the validity of the marriage, production & proof of the execution of such document is necessary.—R. *v.* ALTHAUSEN (1893), 17 Cox, C. C. 630.

Annotation:—**Refd.** R. *v.* Hammer, [1923] 2 K. B. 787.

438. —— —— ——.]—To prove a Jewish marriage it is not necessary to produce the Hebrew written contract.—R. *v.* HAMMER, [1923] 2 K. B. 786; 92 L. J. K. B. 1045; 129 L. T. 479; 87 J. P. 194; 39 T. L. R. 670; 68 Sol. Jo. 120; 27 Cox, C. C. 458; 17 Cr. App. Rep. 142, C. C. A.

—— **Between uncle & niece—Conflict between Jewish & English law.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 416, No. 822.

439. Marriage according to Quaker forms—Sufficiency to support suit for restitution of conjugal rights.]—GREEN *v.* GREEN (prior to 1737), cited in 1 Hag. Con. App. at p. 9, n.; 161 E. R. 638.

Annotation:—**Refd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

SUB-SECT. 3.—THE CEREMONY.

440. Essential parts of ceremony—General rule.]—(1) It being settled by the decision in *R.* v. *Millis*, No. 222, *ante*, that to constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in Holy Orders, the fact that the bridegroom is himself a clergyman in Holy Orders, there being no other clergyman present, will not make the marriage valid.

(2) As to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman & of a layman.

(3) *Semble:* the decision in *R.* v. *Millis*, No. 222, *ante*, is not to be applied to a case where the presence of a minister in Holy Orders is impossible.

(4) The presence of the priest was not merely for the purpose of securing a religious sanction to the contract of marriage, but one of the objects was to prevent the making of an unlawful contract, which could not be secured unless the priest was a person other than either of the two engaged in the act. The directions contained in the Rubric respecting the opening address to the congregation, the adjuration to the persons about to be married as to confessing any lawful impediment to their union, the putting on the ring, etc., are not absolutely essential to the validity of the marriage; the essential part of the service is the reciprocal taking each other for wedded wife & wedded husband.—BEAMISH *v.* BEAMISH (1861), 9 H. L. Cas. 274; 5 L. T. 97; 8 Jur. N. S. 770; 11 E. R. 735, H. L.

Annotations:—*As to* (3) **Refd.** *Re* Bethell, Bethell *v.* Hildyard (1888), 58 L. T. 674. *As to* (4) **Refd.** Lightbody *v.* West (1902), 87 L. T. 138. *Generally,* **Mentd.** Foxwell *v.* Van Grutten (1896), 12 T. L. R. 307; London Tram. Co. *v.* L. C. C., [1898] A. C. 375; I. R. Comrs. *v.* Walker, [1915] A. C. 509; Usher's Wiltshire Brewery *v.* Bruce, [1915] A. C. 433.

441. Whether giving away a woman.]—MORE *v.* MORE, No. 416, *ante.*

442. —— **Whether actual repetition—Of all words of marriage service.**]—(1) The contract of marriage is, in its essence, a consent on the part of a man & woman to cohabit with each other, & with each other only. The religious element does not

formed by a Roman Catholic clergyman, according to the rites of his church, in the sacristy of a Roman Catholic chapel at about four o'clock in the afternoon in the presence of two witnesses, but with closed doors; & no notice was given to the registrar, nor certificate issued by him:—*Held:* notwithstanding the absence of the statutory formalities the marriage was valid.—*Re* KNOX (1889), 23 L. R. Ir. 542.—**IR.**

PART II. SECT. 8, SUB-SECT. 2.—B.

436 i. *Marriage according to Jewish forms—Whether written contract essential to validity.*]—*Held:* a written contract was not essential to the validity of a Jewish marriage, which had been solemnised with all the usual forms & ceremonies of the Jewish service & faith; such marriage was valid, though there existed in relation to it a written contract not produced.—FRANK *v.* (1864), 15 C. P. 135.—**CAN.**

require anything more of the parties; & therefore it is not essential that all the words of the marriage service to be repeated by the man & woman should be actually said; but, the ceremonies required by law, such as the publication of banns & the like, being complied with, when the hands of the parties are joined together, & the clergyman pronounces them to be man & wife, if they understand that by that act they have agreed to cohabit together & with no other person, they are married.

(2) Deaf & dumb persons may marry; & the presumption is in favour of the validity of such a marriage, & of the capacity of the parties to contract it; & the *onus* of proof is upon those who would impeach such a marriage.

(3) Everything is presumed in favour of marriage.

(4) If there be no question of mental capacity, the objection that a deaf & dumb person did not understand the nature of the contract of marriage which she had been induced to enter into is an objection on the ground of fraud.—HARROD *v.* HARROD (1854), 1 K & J. 4; 23 L. T. O. S. 243; 18 Jur. 853; 2 W. R. 612; 69 E. R. 344.

Annotations:—*As to* (1) **Refd.** Beamish *v.* Beamish (1861), 9 H. L. Cas. 274. *As to* (4) **Refd.** Moss *v.* Moss, [1897] P. 263.

443. Witnesses — Presence not essential.] WING *v.* TAYLOR (FALSELY CALLING HERSELF WING), No. 426, *ante*.

444. Must comply with legal requirements.]—MOSS *v.* MOSS, No. 128, *ante*.

SUB-SECT. 4.—CIVIL MARRIAGES AT SUPERINTENDENT REGISTRAR'S OFFICE.

445. Presumption of validity—Marriage within closed doors not invalid—Marriage Act, 1836 (c. 85), s. 42.]—When a marriage has been solemnised in a registrar's office in the presence of the registrar & deputy registrar, the presumption of law is that the requisites sect. 21 of above Act have been complied with.

If it appeared from the evidence that such a marriage took place with closed doors, it would not on that account be held to be invalid, so as to disentitle the husband after the wife's death to have administration granted to him of her effects, a marriage so celebrated not being specified in sect. 42 of above Act as one that is null & void.—CAMPBELL *v.* CORLEY (1856), 28 L. T. O. S. 109; 4 W. R. 675, P. C.

Annotation:—**Refd.** Sichel *v.* Lambert (1864), 12 W. R. 312.

SECT. 9.—MARRIAGES ABROAD.

Foreign marriages.]—*See, generally,* CONFLICT OF LAWS, Vol. XI., pp. 413 *et seq.*

—— Proof of in England.]—*See* Sect. 12, subsect. 2, *post*.

Marriages of British subjects—Doctrine of exterritoriality.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 419, 420, Nos. 857, 858.

—— Compliance with local forms impossible.]—*See* CONFLICT OF LAWS, Vol. XI., p. 420, Nos. 860–864.

—— On His Majesty's ships.]—*See* CONFLICT OF LAWS, Vol. XI., p. 420, No. 869.

Marriages valid by English statutes.]—*See* CONFLICT OF LAWS, Vol. XI., p. 420, Nos. 865–868.

Marriages within lines of British army serving abroad.]—*See* CONFLICT OF LAWS, Vol. XI., p. 421, Nos. 870–872.

Validity of marriages in criminal proceedings.]—*See* CRIMINAL LAW, Vol. XV., pp. 738, 739, Nos. 7978–7989.

446. Marriages within British Empire—Whether Marriage Act, 1835 (c. 54), applicable—Where different law prevails.]—The above Act affects all domiciled English subjects wherever they may be transiently resident. It does not affect them when actually domiciled in British Colonies acquired by conquest, where a different law exists.—BROOK *v.* BROOK (1861), 9 H. L. Cas. 193; 4 L. T. 93; 25 J. P. 259; 7 Jur. N. S. 422; 9 W. R. 461; 11 E. R. 703, H. L.; *affg.* (1858), 3 Sm. & G. 481.

Annotations:—**Consd.** Sottomayor *v.* De Barros (1877), 3 P. D. 1. **Refd.** Fenton *v.* Livingstone (1859), 33 L. T. O. S. 335; Motte *v.* Motte (1859), 1 Sw. & Tr. 416; Simonin *v.* Mallac (1860), 29 L. J. P. M. & A. 97; Chapman *v.* Bradley (1863), 33 Beav. 61; Howarth *v.* Mills (1866), L. R. 2 Eq. 389; *Re* Alison's Trusts (1874), 31 L. T. 638; Pawson *v.* Brown (1879), 13 Ch. D. 202; *Re* De Wilton, De Wilton *v.* Montefiore, [1900] 2 Ch. 481; Ogden *v.* Ogden, [1908] P. 46; Chetti *v.* Chetti, [1909] P. 67; R. *v.* Dibden, [1910] P. 57. **Mentd.** Wing *v.* Taylor (1861), 30 L. J. P. M. & A. 258; *Re* Bozzelli's Settlmt., Husey-Hunt *v.* Bozzelli, [1902] 1 Ch. 751; Mitford *v.* Mitford, [1923] P. 130.

447. —— Whether governed by common law of England.]—Marriages of British subjects in British plantations are governed by the common law of England, unless it is otherwise provided by the Imperial legislature or that of the colony. Therefore, evidence of the solemnisation by a clergyman of the Church of England according to the rites & ceremonies of that church & of cohabitation:—*Held:* sufficient proof of a marriage between British subjects in Norfolk Island, then a British penal settlement.—LIMERICK (COUNTESS) *v.* LIMERICK (EARL) (1863), 4 Sw. & Tr 252; 32 L. J. P. M. & A. 92; 11 W. R. 503; 164 E. R. 1512.

448. —— Celebration by person in Holy Orders—According to rites of Church of England.]—LIMERICK (COUNTESS) *v.* LIMERICK (EARL), No. 447, *ante*.

449. —— Where no Established Church—According to Roman Catholic rites.]—A marriage celebrated between British subjects according to the rites of the Roman Catholic Church in a country subject to British dominion, but where there is no Established Church, is valid.—JAMES *v.* JAMES & SMYTH (1881), 51 L. J. P. 24; 30 W. R. 232.

SECT. 10.—CONFIRMATION OF INVALID MARRIAGES.

450. Marriage solemnised without consent of parent or guardian—"Living together as man &

PART II. SECT. 9.

s. *Marriage of British subjects — On board ship on high seas—No ordained clergyman of Church of England present.*]—A marriage between British subjects, on board ship on the high seas, at the celebration of which no ordained clergyman of the Established Church of England & Ireland intervened, is not valid at common law.—DU MOULIN *v.* DRUITT (1860), 13 I. C. L. R. 212; 13 Ir. Jur. 76.—**IR.**

t. *Marriages within British Empire — Marriage according to Indian rites.*]—Where an Indian woman proves that she has been married according to Indian rites, this marriage will be regarded as binding.—R. *v.* NAW-E-QUIS-A-K (1889), Terr. L. R. 211.—**CAN.**

a. —— *Where no established church —Celebrated by person not in Holy Orders.*]—A marriage between British-born subjects, natives of Europe, members of the Church of England, celebrated at Surat by a minister of the Gospel & missionary not in Holy Orders, belonging to a sect called Congregationalists, or Independents, no person in Holy Orders being present at the marriage:—*Held:* valid.—MACLEAN *v.* CRISTALL (1849), 7 Notes of Cases, Supp. xvii. Supreme Court of Judicature.—**IND.**

PART II. SECT. 10.

b. *Marriage by person having no right to solemnise matrimony—Confirmation by statute.*]—H. P., patentee

Sect. 10.—*Confirmation of invalid marriages.* *Sect.* 11: *Sub-sects.* 1 & 2, *A.*]

wife—3 Geo. 4, c. 75, s. 2.]—A marrage by licence null & void, by reason of minority, & want of legal consent, under 26 Geo. 2, c. 33, held to be rendered a good & valid marriage by the retrospective operation of 3 Geo. 4, c. 75, it being held that the parties, though not actually cohabiting up to the time of the passing of 3 Geo. 4, c. 75, did still "continue to live & reside together as husband & wife" in legal construction, within its time intent & meaning up to that time, sufficiently to render the restrospective provisions of 3 Geo. 4, c. 75, applicable to such their marriage.—KING *v.* SANSOM (OTHERWISE KING) (1826), 3 Add. 277; 162 E. R. 481.

Annotation:—**Consd.** Poole *v.* Poole (1831), 2 Cr. & J. 66.

451. —— —— ——.]—In Feb. 1816, a marriage took place between two minors by licence, without consent. They cohabited until June, 1816, when, from the misconduct of the husband, he was obliged to leave the house where they had been residing. They then lived separate until Oct. 1817, when the husband died. After the separation, in June, 1816, he, on various occasions, insisted that she was not his lawful wife & gave that as a reason for not living with her again. There was some slight evidence of small sums supplied to the wife being allowed in the rent of a farm held under the husband, but under what circumstances did not appear:—*Held:* these parties did not live together as man & wife until the death of the husband, within 3 Geo. 4, c. 75, s. 2.—POOLE *v.* POOLE (1831), 2 Cr. & J. 66; 1 You. 331; 2 Tyr. 76; 1 L. J. Ex. 63; 149 E. R. 28.

452. —— —— ——.]—A marriage, which would be void by reason of its being by licence, without the consent of the parent of the woman, & which, by the terms of 3 Geo. 4, c. 75, s. 2, was rendered valid, does not afterwards become invalid by reason of the woman marrying again during the lifetime of her husband; the third sect. of the Act being, for that purpose, retrospective only.—R. *v.* ST. JOHN DELPIKE (INHABITANTS) (1831), 2 B. & Ad. 226; 9 L. J. O. S. M. C. 79; 109 E. R. 1128.

SECT. 11.—PRESUMPTIONS IN RELATION TO MARRIAGE.

SUB-SECT. 1.—VALIDITY OF MARRIAGE.

453. Omnia præsumuntur rite esse acta—Grant of licence.]—PIERS *v.* PIERS, No. 536, *post.*

454. —— **Consent.**]—HARRISON *v.* SOUTHAMPTON CORPN., No. 371, *ante.*

455. —— **Capacity.**]—HARROD *v.* HARROD, No. 442, *ante.*

456. —— **Compliance with Marriage Act, 1836 (c. 85), s. 21—Presence of registrar & deputy registrar.**]—CAMPBELL *v.* CORLEY, No. 445, *ante.*

457. Celebration in licenced place—Presence of registrar.]—Upon a trial for bigamy, it was proved by a witness who was present, that the first marriage took place in a Wesleyan chapel, in the presence of the registrar of the district; & an examined copy of the entry in the register book of marriages, kept at the office of the superintendent registrar of the district, was also produced & proved. A document purporting to be a certificate by the superintendent registrar of the fact that the chapel had been duly registered, was also produced by a witness who stated that he saw the register book, & that it was correctly extracted:—*Held:* even if the certificate was inadmissible, there was evidence of a valid marriage, as the ct. must presume, from the facts proved, that the chapel was duly registered.—R. *v.* MANWARING (1856), Dears. & B. 132; 20 J. P. 804; 5 W. R. 119; *sub nom.* R. *v.* MAINWARING, 26 L. J. M. C. 10; 28 L. T. O. S. 189; 2 Jur. N. S. 1236; 7 Cox, C. C. 192, C. C. R.

Annotations:—**Consd.** Sichel *v.* Lambert (1864), 15 C. B. N. S. 781. **Refd.** R. *v.* Cradock (1863), 7 F. & F. 837.

458. —— —— ——.]—SICHEL *v.* LAMBERT, No. 431, *ante.*

459. —— **Compliance with necessary ceremonies.**]—According to the Roman-Dutch law there is a presumption in favour of marriage rather than of concubinage. According to the law of Ceylon, as in England, where a man & woman are proved to have lived together as man & wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, & not in a state of concubinage. Where it is proved that they have gone through a form of marriage, & thereby shown an intention to be married:—*Held:* those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed.—SASTRY VELAIDER ARONEGARY *v.* SEMBECUTTY VAIGALIE (1881), 6 App. Cas. 364; 44 L. T. 895; *sub nom.* SASTRY VELAIDER ARONEGARY & SEMBACUTTY SINNEPULLEI *v.* KASSANADER SAMBONADE, 50 L. J. P. C. 28, P. C.

Annotation:—**Apld.** *Re* Shephard, George *v.* Thyer, [1904] 1 Ch. 456.

460. —— ——.]—*Re* SHEPHARD, GEORGE *v.* THYER, No. 472, *post.*

461. —— **Performance of ceremony—By duly authorised person—Foreign marriage.**]—It being found that a religious ceremony, valid according to the Hebrew religious law, had in fact been performed between the parties at a village in Poland, then in the Russian Empire, & that petitioner was not at the time of such ceremony of marriage below the age prescribed by the Russian law as that below which a male could not lawfully be married, but that there was no evidence that the marriage had been registered, nor had it been affirmatively proved that the ceremony had been performed by a person authorised by the Russian law to celebrate Jewish marriages:—*Held:* registration was not shown to have been an

---

of land, was married to G. by a Methodist minister, who had no right to solemnise matrimony. She conveyed to M., but, being told that her marriage was illegal, executed the deed by the name of Pringle, as if she were sole, her husband Green being the witness. After the passing of 11 Geo. IV. c. 36, her heir brought ejectment, contending that the statute confirmed the marriage, so as to avoid her conveyance executed as a *feme sole*:—*Held:* the Act has not such a retrospective effect as to destroy the deed.—PRINGLE *v.* ALLAN (1859), 18 U. C. R. 575.—**CAN.**

PART II. SECT. 11, SUB-SECT. 1.

c. *Omnia præsumuntur rite esse acta—Celebration de facto.*]—Except in cases of bigamy & actions for crim. con., there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto.*—HEDGE *v.* MORROW (1914), 32 O. L. R. 218; 20 D. L. R. 561; 6 O. W. N. 279.—**CAN.**

d. —— ——.]—Where the fact of celebration of marriage is proved letters of orders need not be proved as the ceremony is presumed to have been performed by a competent person.—LEGEY *v.* O'BRIEN (1834), Milw. 325.—**IR.**

e. ——*Presumption supported by presumption of death.*]—The presumption of a person's death from his unaccountable absence for seven years without news of him applies to support the validity of the subsequent marriage of his wife to another in a suit brought by her against her second husband foralimony.—HOMANUKE *v.* HOMANUKE (1920), 3 W. W. R. 749; 13 Sask. L. R. 186.—**CAN.**

essential element of a marriage of Russian Jews in 1889 & the ct. should in the circumstances presume that the person who performed the ceremony was either a rabbi or his duly authorised assistant.

The marriage was therefore, apart from any question of marriage by repute, a good & valid one.—GOLDSTONE *v.* GOLDSTONE (1922), 127 L. T. 32; *sub nom.* GOLDSTONE *v.* SMITH (OTHERWISE GOLDSTONE), 38 T. L. R. 403.

462. —— Effect of lapse of time—Bonâ fide & open marriage.]—LAUDERDALE PEERAGE, No. 537, *post*.

463. Onus of proof—On party seeking to disturb presumption.]—HARROD *v.* HARROD, No. 442, *ante*.

Presumption of existence of marriage—From lapse of time.]—*See* Sub-sect. 2, B. (*d*), *post*.

464. —— ——.]—Once the actual ceremony of marriage has been established by the party seeking to prove it, the *onus* of proving that such ceremony is invalid rests on the party disputing the validity of the marriage.—CARLIN *v.* CARLIN (1906), 70 J. P. 143.

—— —— **Of existence of marriage.**]—*See* Sect. 12, sub-sect. 1, H., *post*.

465. Effect of proof of earlier marriage.]—A legal marriage cannot be inferred from mere cohabitation where the actual fact of an earlier marriage is proved.—TAYLOR *v.* TAYLOR (1756), 2 Lee, 274; 161 E. R. 339.

466. —— **Earlier marriage illegal.**]—WILKINSON *v.* PAYNE (1791), 4 Term Rep. 468; 100 E. R. 1123.

Annotation:—**Mentd.** Doe d. Lewis *v.* Davies (1837), 2 M. & W. 503.

—EXISTENCE OF MARRIAGE FROM COHABITATION.

A. In General.

467. General rule.]—(1) A man & woman, after a known illicit connection, cohabited together in such a way as to create a repute, though a divided one, of their being married persons; & the man, get lodgings in the houses of persons of & to save the woman from rude nt by one of his companions when drunk, lodged that the woman was his wife:— the facts & circumstances were not sufficient r a marriage.

(2) In cases of cohabitation, presumption is in favour of its legality; *secus*, if the connection is known to have been in its origin illicit.

(3) Repute, to raise presumption of marriage, must be founded on general not singular opinion; & a divided repute is, on such a subject, no evidence at all.—CUNNINGHAMS *v.* CUNNINGHAMS (1814), 2 Dow, 482; 3 E. R. 939, H. L.

Annotations:—*As to* (1) **Refd.** Longworth (or Yelverton) *v.* Yelverton (1867), L. R. 1 Sc. & Div. 218. *As to* (2) **Refd.** Lapsley *v.* Grierson (1848), 1 H. L. Cas. 498; Breadalbane Case, Campbell *v.* Campbell (1867), L. R. 1 Sc. & Div. 182; Dysart Peerage Case (1881), 6 App. Cas. 489. *As to* (3) **Refd.** Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98.

468. ——.]—DIDDEAR (FALSELY CALLED FAWCIT, OTHERWISE SAVILL) *v.* FAUCIT, No. 417, *ante*.

469. ——.]—PIERS *v.* PIERS, No. 536, *post*.

470. —— **Presumption in absence of evidence to contrary.**]—SASTRY VELAIDER ARONEGARY *v.* SEMBECUTTY VAIGALIE, No. 459, *ante*.

471. —— ——.]—Without going into the earlier cases that have been cited as to the presumption of marriage from common reputation, I consider myself bound by the more modern cases & especially *Piers* v. *Piers*, No. 536, *post*, decided by the House of Lords in 1849. The presumption is not one of law—that is to say, one which can not be rebutted—but, according to the authorities & upon the facts, there is a presumption of marriage in the absence of evidence to the contrary (WORTH, J.).—*Re* DUVALL, DUVALL *v.* CRADDOCK (1892), 36 Sol. Jo. 398.

472. —— ——.]—Where a man & woman are proved to have lived together as man & wife for a considerable time, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage.

Where it is proved that there was an intention to marry, & that some form was gone through to perfect that intention, those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies were performed according to law.

An English man & woman travelled to France with the intention of getting married, & there purported to go through a form of marriage; & they had since lived together in England as man & wife for thirty years & had several children. There was some evidence of recognition of the children by the family. It was assumed by the ct. that a marriage such as was alleged was impossible

463 i. *Onus of proof—On party seeking to disturb presumption.*]—A married woman was deserted by her husband in 1896, & from that time she heard nothing of him. In 1909 she married O.:—*Held:* in proceedings against O. for leaving her without means of support, on proof of the above facts, the *onus* was upon O. to establish the existence of the first husband at the time of the second marriage.—OUSLEY *v.* OUSLEY, [1912] V. L. R. 32.—**AUS.**

463 ii. —— ——.]—In a suit by children to enforce payment of their portions, their legitimacy was questioned by the next tenant for life, a deft. A marriage *de facto* was established:—*Held:* it then lay on the party impeaching the marriage to prove it illegal & void.—PIERS *v.* TUITE (1838), 1 Dr. & Wal. 279.—**IR.**

f. *Presumption where no issue of marriage—Invalidity admitted by parties to marriage.*]—The presumption of law in favour of the validity of a marriage is less strong where there is no issue, & where the parties to the marriage admit its invalidity.—*Re* M'LOUGHLIN'S ESTATE (1878), 1 L. R. Ir. 421.—**IR.**

g. *Promise of marriage followed by concubitus.*]—In a suit for a declarator of marriage founded on a promise *subsequente copula* there was no direct evidence of the promise, but of facts & circumstances, & letters written by defender to pursuer, defender having destroyed the letters written by pursuer to him:—*Held:* there was sufficient ground to warrant the inference that a promise of marriage had been given & accepted previous to the *concubitus*.—HONYMAN *v.* CAMPBELL (1831), 2 Dow. & Cl. 265.—**SCOT.**

PART II. SECT. 11, SUB-SECT. 2.—A.

467 i. *General rule.*]—Evidence of cohabitation & reputation of marriage will be sufficient in dower; it is not necessary to prove the marriage by persons who were present at the ceremony.—STONER *v.* WALTON (1842), 6 O. S. 190.—**CAN.**

467 ii. ——.]—Where a marriage ceremony was performed by a Protestant clergyman in Ireland in 1880, between two persons who intended to be married but who for the purpose of concealment used false names, & they afterwards lived together in Ireland as man & wife for two years, when they came to this province & continued so to live together:—*Held:* in the absence of any evidence as to the law of marriage in Ireland, it would be presumed that the marriage there was lawful, although the parties themselves had doubts about its legality in consequence of their having used false names, & went through another marriage ceremony here in 1885.—*Re* TIERNAY (1885), 25 N. B. R. 286.—**CAN.**

467 iii. ——.]—Cohabitation with the required repute, as husband & wife, is proof that the parties between themselves have mutually contracted the matrimonial relation.—CAMPBELL *v.* CAMPBELL (1867), L. R. 1 Sc. & Div. 182; 5 Macph. (Ct. of Sess.) 115; 39 Sc. Jur. 576.—**SCOT.**

467 iv. ——.]—The law of Scotland accepts the continued cohabitation of a man & woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland.—DYSART PEERAGE CASE (1881), 6 App. Cas. 489.—**SCOT.**

h. *Necessity for cohabitation.*]—In a competition for the distribution of an intestate estate, certain of the claimants averred that a marriage had taken place in 1819 between D.

Sect. 11.—*Presumptions in relation to marriage: Sub-sect. 2, A. & B. (a), (b) & (c).*]

according to French law & the habits of law-abiding people in France:—*Held:* this fact was not sufficient to rebut the presumption in favour of marriage arising from the long-continued cohabitation of the parties as man & wife.—*Re* SHEPHARD, GEORGE *v.* THYER, [1904] 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249.

Annotation:—**Refd.** Goldstone *v.* Goldstone (1922), 127 L. T. 32.

Rebuttal of presumption.]—*See* Sub-sect. 2, C., *post.*

473. Cohabitation from date of ceremony.]—POLLARD *v.* POLLARD (1842), 1 Notes of Cases, 532.

474. Effect of proof of earlier marriage.]—TAYLOR *v.* TAYLOR, No. 465, *ante.*

475. —— Finding of jury as to subsequent legal marriage not disturbed—Though contrary to evidence.]—Where the jury have found a verdict for pltf. upon a presumption contrary to evidence, the ct. will not grant a new trial if pltf. be entitled to recover in conscience & equity.—WILKINSON *v.* PAYNE (1791), 4 Term Rep. 468; 100 E. R. 1123.

Annotation:—**Mentd.** Doe d. Lewis *v.* Davies (1837), 2 M. & W. 503.

B. Factors determining Strength of Presumption.

(a) Duration of Cohabitation.

476. General rule.]—LINDO *v.* BELISARIO, No. 123, *ante.*

477. ——.]—A marriage may be made out not only by showing the actual marriage, but also by cohabitation, & by the parties treating each other as man & wife. This last evidence will be more or less strong according to length of time & circumstances (TINDAL. C.J.).—POSTMAN *v.* HARRELL (1833), 6 C. & P. 225, N. P.

478. Many years.]—Cohabitation by a man, for many years, with a woman, & introducing her as his wife, admitted as some evidence of a marriage, in an action by a third party against him as her husband, for necessaries or money supplied to her. There is no authority in law, in a married woman, living apart from her husband, to borrow money on his credit.—PAULE *v.* GODING (1861), 2 F. & F. 585, N. P.

479. ——.]—In a suit for dissolution formal proof of the marriage is not indispensably necessary, but sufficient evidence must be produced to satisfy the ct. of the fact of the marriage. Evidence that a man & woman residing at S. had left S. together, stating that they intended to get married at G.; that they had returned to S. & stated that they had been married at G.; & that they afterwards cohabited for many years at S. as husband & wife:—*Held:* no better evidence being procurable, to be sufficient proof of the marriage.—PATRICKSON *v.* PATRICKSON (1865), L. R. 1 P. & D. 86: 35 L. J. P. & M. 48; 13 L. T. 567; 12 Jur. N. S. 30; 14 W. R. 212.

480. Four years.]—Proof that deft. & the person alleged in the plea to be her husband have cohabited together as husband & wife for four years, is some evidence of the marriage, which the judge will leave to the jury.—WOODGATE *v.* POTTS (1847), 2 Car. & Kir. 457, N. P.

481. Five years.]—ROOKER *v.* ROOKER & NEWTON, No. 540, *post.*

482. Ten years.]—*Re* THOMPSON, LANGHAM *v.* THOMPSON, No. 527, *post.*

483. Fifteen years.]—*Re* HAYNES, HAYNES *v.* CARTER, No. 534, *post.*

484. Twenty years.]—A. was committed by the justices for deserting his wife & family. It appeared that they had been known as man & wife for twenty years, & their daughter, aged thirty-seven, said she had always looked upon them as married; he had compromised a previous charge of the same nature by agreeing to pay five shillings a week. In 1858 A. was married to another woman, was charged with bigamy & discharged. On the hearing of the charge of desertion, it was contended that there was no proof of deft.'s marriage; it was then proposed to call the woman, but he objected to this on the ground that her evidence was not admissible. The justices committed A., & refused to grant a case for the opinion of this ct.:—*Held:* they had well determined.—R. *v.* YEOMANS (1860), 1 L. T. 369; 24 J. P. 149.

485. Thirty years.]—Cohabitation as man & wife for thirty years is such a presumptive proof of marriage as will entitle the children of the parties to the settlement of their parents under it.—R. *v.* STOCKLAND (1762), Burr. S. C. 508; 2 Bott. 6th ed. 58.

Annotation:—**Refd.** Russell *v.* Russell, [1924] A. C. 687.

486. ——.]—COLLINS *v.* BISHOP, No. 520, *post.*

487. ——.]—*Re* SHEPHARD, GEORGE *v.* THYER, No. 472, *ante.*

(b) Acknowledgment.

488. Strong acknowledgment—For long period.]—Strong acknowledgment of marriage for eighteen years together sufficient to establish it *inter* though no actual proof can be had: the supposed marriage being previous to 1751.—HERVEY *v.* HERVEY (1773), 2 Wm. Bl. 877; 96 E. R. 516.

Annotation:—**Apld.** Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98.

489. By the parties themselves.]—A marriage at the Fleet sufficiently established to entitle the asserted widow to the administration of her husband's effects.

Upon the evidence there being some proof of a pact of marriage by one witness & cohabitation & an uniform owning of both parties & their relations . . . I pronounced for the marriage (SIR GEORGE LEE).—PLUNKETT *v.* SHARP (1754), 2 Lee, 35; 161 E. R. 255

490. ——.]—A copy of the register of a foreign chapel is not evidence to prove a marriage; but in every civil case, except for crim. con. general reputation, the acknowledgment of the parties, & reception by their friends as man & wife, is sufficient proof of a marriage.—LEADER *v.* BARRY (1795), 1 Esp. 353, N. P.

Annotation:—**Refd.** Coode *v.* Coode (1838), 1 Curt. 755.

491. ——.]—POSTMAN *v.* HARRELL, No. 477, *ante.*

492. ——.]—HOGGAN *v.* CRAIGIE, No. 517, *post.*

493. —— Express acknowledgment.]—HILL *v.* HIBBIT, No. 519, *post.*

& A. & that their father was the legitimate offspring. No direct evidence of the marriage was adduced, nor was it shown that D. or any of his family had ever acknowledged the marriage or made any allusion thereto, or that the parties had ever lived publicly together or enjoyed the status of married persons:—*Held:* the marriage had not been proved.—DEANS' JUDICIAL FACTOR *v.* DEANS, [1912] S. C. 441.—**SCOT.**

PART II. SECT. 11, SUB-SECT. 2.—B. (b).

k. *By relations.*]—Irrespective of general reputation there was evidence that deft. had told a third party he was to give demandant's husband, his brother, $100 to bring out his wife & children from Scotland, & that the husband was to execute to deft. in return a deed of the land in question. Deft. afterwards said he had received the deed, & that the wife would bar her dower on her arrival here. On

494. Covenant to bar "the wife's free-bench."]—DOE d. GIBSON *v.* BARTON (1837), Hubback's on Evidence of Succession, 255.
Annotation:—**Refd.** Lyle *v.* Ellwood (1874), 44 L. J. Ch. 164.

495. —— Entries in baptismal register—Giving evidence on oath as man & wife.]—GOODMAN *v.* GOODMAN, No. 567, *post.*

496. —— ——.]—COLLINS *v.* BISHOP, No. 520, *post.*

497. —— —— Putting child out to nurse—Acknowledgment of woman as wife.]—ELLIOTT *v.* TOTNES UNION, No. 528, *post.*

498. —— Separation deed executed on footing of man & wife.]—HAVILAND *v.* MORTIBOY, No. 568, *post.*

499. By relations—Description in will.]—It was necessary to prove that W. T. married M. D.; there was no certificate of marriage found, but the will of her uncle T. D. was produced. It was in these words: "All this I give to my nephew, W. T.," who was identified as the W. T. in question. The Act Book from Doctors' Commons was produced, granting administrations to "W. T. nephew, minor, & universal legatee." Received as proof that a marriage had taken place between W. T. & M. D.—SHREWSBURY PEERAGE CASE (1858), 7 H. L. Cas. 1; 11 E. R. 1, H. L.
Annotations:—**Mentd.** Berkeley Peerage (1861), 8 H. L. Cas. 21; Frend *v.* Buckley (1870), 10 B. & S. 973; Sturla *v.* Freccia (1880), 50 L. J. Ch. 86; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437.

500. —— ——.]—The strongest evidence in favour of the marriage was that Mrs. Bennett's father described her in his will as the wife of Bennett. There was no divided reputation. The general reputation was that she was a married woman, the only evidence to the contrary was that, her brother chose to say, & had persuaded her children to say, that he believed Bennett was married before (PEARSON, J.).—*Re* IVORY, CHIPPENDALE *v.* IVORY (1886), 2 T. L. R. 468.

501. —— Recognition of children.]—COLLINS *v.* BISHOP, No. 520, *post.*

502. —— ——.]—LAUDERDALE PEERAGE, No. 537, *post.*

503. —— ——.]—*Re* SHEPHARD, GEORGE *v.* THYER, No. 472, *ante.*

504. —— ——.]—*Re* THOMPSON, LANGHAM *v.* THOMPSON, No. 527, *post.*

505. —— Description of party in marriage register.]—The ct., in the absence of any official record, accepted, as sufficient *primâ facie* evidence of a marriage of the parents of an intestate, a statement contained in an extract from a Scottish marriage register of 1868, the bridegroom being the intestate's brother, in which, under the heading "Name, surname, & rank or profession of father," appeared the names & descriptions of both parents of the bridegroom.—WIGLEY *v.* TREASURY SOLICITOR, [1902] P. 233; 71 L. J. P. 115; 87 L. T. 745.

506. Acknowledgment for purposes of concealment—Insufficient to raise presumption.]—CUNNINGHAMS *v.* CUNNINGHAMS, No. 467, *ante.*

507. By War Office—Grant of pension as "widow."]—LAUDERDALE PEERAGE, No. 537, *post.*

(*c*) *Reputation.*

508. General reputation—Necessity for.]—CUNNINGHAMS *v.* CUNNINGHAMS, No. 467, *ante.*

509. —— ——.]—Cohabitation, with the required repute, as husband & wife, is proof that the parties between themselves have mutually contracted the matrimonial relation. It demonstrates that interchange of consent which alone constitutes marriage in Scotland. The law of habit & repute, however, is not peculiar to Scotland; although in countries where the facilities of matrimony are less than in Scotland, the evidence to establish the marriage must be stronger. Marriage, technically, is not constituted, but evidenced, by habit & repute, which, for that purpose, must be uniform & positive. A connection commencing in adultery may, on ceasing to be adulterous, become matrimonial by consent, & may be evidenced by habit & repute, the parties being at liberty to intermarry. The alteration in the character of the connection from adultery to matrimony, need not be indicated by any public act, or by any observable change in the outward demonstration. It is not necessary to prove the specific period when the consent was interchanged.

You must infer the consent to have been given at the first moment when you find the parties able to contract (LORD WESTBURY).

Proof of the legitimacy of the offspring is proof of the validity of the marriage (LORD CHELMSFORD, C.).

It is in the last degree important that cts. of justice should look with the utmost suspicion on the conduct of parties who intentionally keep secret matters at the time when they might be explained, in order to divulge them only when lapse of years may have made contradiction or explanation impossible (LORD CRANWORTH).—BREADALBANE CASE, CAMPBELL *v.* CAMPBELL (1867), L. R. 1 Sc. & Div. 182, H. L.
Annotations:—**Consd.** Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98; Dysart Peerage Case (1881), 6 App. Cas. 489; Fox *v.* Bearblock (1881), 45 J. P. 648. **Apld.** *Re* Haynes, Haynes *v.* Carter (1906), 94 L. T. 431. **Mentd.** Newton *v.* Judges of the High Court, North-Western Provinces (1871), L. R. 4 P. C. 18.

510. —— ——.]—Habit & repute is not a mode of constituting but of proving a marriage; & when a true & undivided habit & repute is shown, a presumption of the marriage arises by the law of Scotland (LORD SELBORNE).—DE THOREN *v.* A.-G. (1876), 1 App. Cas. 686, H. L.
Annotations:—**Apld.** Fox *v.* Bearblock (1881), 44 L. T. 508. **Consd.** *Re* Haynes, Haynes *v.* Carter (1906), 94 L. T. 431. **Apld.** Goldstone *v.* Goldstone (1922), 127 L. T. 32. **Refd.** Ditcham *v.* Worrall (1880), 5 C. P. D. 410; Sastry Velaider Aroegary *v.* Sembecutty Vaigalio (1881), 6 App. Cas. 361; Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895.

511. —— Whether sufficient to raise presumption.]—To prove that a woman was married antecedent to the birth of her child, cohabitation, reputation, & other circumstances, may be given in evidence; but an answer given in Chancery by the mother respecting this fact, is not admissible during her life, for she may be examined to it *vivâ voce*; nor are proceedings in the Spiritual Ct. admissible.—HILLIARD *v.* PHALY (1723), 8 Mod. Rep. 180; 88 E. R. 132.

---

her arrival, deft. received her into his house as his brother's wife, & recognised her as such until his brother's death:—*Held:* good *primâ facie* evidence of marriage.

Semble: the recognition of demandant as his brother's wife would alone have been sufficient *primâ facie* evidence of their marriage, as against —BEATTY *v.* BEATTY (1867), 17 C. P. 484.—**CAN.**

PART II. SECT. 11, SUB-SECT. 2. B. (c).

511 i. *General reputation—Whether sufficient to raise presumption.*]—Habit & repute is not a mode of constituting but of proving a marriage; & when a true & undivided habit & repute is shown, a presumption of the marriage arises by the law of Scotland.—DE THOREN *v.* A.-G., [1876] 1 App. Cas. 686; 3 R. (Ct. of Sess.) 28, H. L.—**SCOT.**

511 ii. —— ——.]—The Roman-Dutch law allows a valid marriage to be established by evidence of cohabitation & repute: & so does the law of the Cape of Good Hope, even in an action for divorce.—FITZGERALD *v.* GREEN, [1911] E. D. L. 432.—**S. AF.**

Sect. 11.—*Presumptions in relation to marriage: Sub-sect.* 2, *B.* (*c*) & (*d*).]

512. —— ——.]—The Fleet Books are no evidence. But the general reputation of the family that the parties were married in the Fleet is good evidence. The registration of a marriage is not absolutely necessary to make it valid.—REED *v.* PASSER (1794), Peake, 303; *sub nom.* READ *v.* PASSER, 1 Esp. 213, N. P.

Annotation:—**Refd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534.

513. —— —— **Civil cases.**]—LEADER *v.* BARRY, No. 490, *ante*.

514. —— —— **Criminal proceedings.**]—If a man & woman be jointly indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, & that she had lived with the man for two years, & was reputed his wife; but such evidence must be given as to satisfy the jury that prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties.—R. *v.* HASSALL (1826), 2 C. & P. 434.

515. —— —— ——.]—CATHERWOOD *v.* CASLON, No. 408, *ante*.

516. —— **Party seeking to recover as heir-at-law—Parents still living.**]—Reputation is good evidence of marriage, though the party adducing it as evidence seeks to recover as heir-at-law, & his parents are still living.—DOE d. FLEMING *v.* FLEMING (1827), 4 Bing. 266; 12 Moore, C. P. 500; 5 L. J. O. S. C. P. 169; 130 E. R. 769.

Annotations:—**Apld.** Goodman *v.* Goodman (1858), 23 J. P. 53; Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98. **Refd.** Elliott *v.* Totnes Union (1892), 57 J. P. 151.

517. —— —— **Conduct of parties.**]—(1) It is not necessary to prove the contract itself; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place. Upon this principle, the acknowledgement of the parties, their conduct towards each other, & the repute consequent upon it, may be sufficient to prove a marriage (LORD COTTENHAM, C.).

(2) *Qu.*: as to the application of the rule of law in reference to promise *subsequente copulâ*, in cases in which cohabitation has also preceded the promise.

(3) *Qu.*: as to the effect of a release of a promise of marriage intervening between the promise & a subsequent *copulâ*.—HOGGAN *v.* CRAIGIE (1839), Macl. & Rob. 942; 9 E. R. 350, H. L.

Annotations:—*As to* (1) **Consd.** Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98. *As to* (2) **Refd.** Yelverton *v.* Longworth (1864), 11 L. T. 118.

518. —— —— **Cohabitation originally illicit.**]—BREADALBANE CASE, CAMPBELL *v.* CAMPBELL, No. 509, *ante*.

519. —— —— **Nature of evidence required.**]—Suit for the administration of the estate of an intestate, in which S. A. H. claimed to be co-heiress & one of the next-of-kin, through her mother H. H. Claimant proved that she was the daughter of H. H. & J. H., who had gone through the ceremony of marriage in New York; but it was contended that J. H. had been previously married to E. P., who was still living. J. H. had formed an illicit connection with E. P. in London. He subsequently moved with her to Glasgow, where they lived together for a year and a half. J. H. introduced her to his family, & acknowledged her as his wife. They afterwards went separately to America, & lived separately for more than thirty years, E. P. resuming her maiden name:—*Held:* there was sufficient evidence of the change in the nature of the connection between J. H. & E. P., & the consensus being proved, the marriage of those parties was valid, & not effected by the short duration of the cohabitation, or the subsequent separation.

Claim of S. A. H. rejected, without prejudice to any question whether she could claim any part of the personal estate as issue of a putative marriage.

The evidence of neighbours & mere acquaintances of habit & repute must extend through a long series of years to raise the presumption of an agreement on both sides to live together as husband & wife, but if the consensus be once proved, lapse of time is unimportant; & where there is evidence of express acknowledgment, a very short cohabitation in accordance therewith will be sufficient for the purpose.—HILL *v.* HIBBIT (1870), 25 L. T. 183; 19 W. R. 250, L. C.

520. —— —— **Absence of positive evidence in support—From members of family.**]—A. & B. cohabited together as man & wife for thirty years, & until B.'s death in 1835. There was no evidence of any marriage having been solemnised, nor was there any affidavit in support of the marriage made by any member of the family; but there was general reputation that they were married, & proof of the registry of the baptism of several of their children as of A. & B. his wife. C., the brother of B., by his will made in 1871, gave a legacy to one of these children, describing her as "his niece":—*Held:* these children were entitled, as legitimate children of A. & B., to share, as next-of-kin, in a fund as to which C. had died intestate. *Semble:* a marriage may be established by repute, even though there be no positive evidence in support of the marriage from any member of the family.—COLLINS *v.* BISHOP (1878), 48 L. J. Ch. 31.

Annotation:—**Refd.** Elliott *v.* Totnes Union (1892), 57 J. P. 151.

521. —— —— **After long cohabitation.**]—GOODMAN *v.* GOODMAN, No. 567, *post*.

—— — —.]—SICHEL *v.* LAMBERT, No. 431, *ante*.

523. —— — —.]—FOX *v.* BEARBLOCK, No. 545, *post*.

519 i. —— —— *Nature of evidence required.*]—*In the Estate of* BEATTY, TRUSTEES EXECUTORS & AGENCY CO., LTD. *v.* JOHNSTON, [1919] V. L. R. 81.—**AUS.**

519 ii. ——————.]—The Roman-Dutch law allows presumptive proof of marriage by evidence of cohabitation & repute. So likewise does the law of the Cape Province. Where there is some conflict in the evidence, a marriage may be established by preponderating repute & conduct, even though the repute be divided.—FITZGERALD *v.* GREEN (1911), E. D. L. 432.—**S. AF.**

521 i. —— —— *After long cohabitation.*]—On the trial of a suit for dissolution of marriage, petitioner relied for proof of marriage on evidence that petitioner & resp. left a certain place together for the purpose of proceeding to a registrar of marriage, with a view to being married, & that they subsequently returned & lived together for a number of years as husband & wife & were generally reputed as such:—*Held:* the marriage was sufficiently proved.—SLATER *v.* SLATER (1868), 2 S. A. L. R. 77.—**AUS.**

521 ii. —— ——.]—Where a man & woman have cohabited for such a length of time & in such circumstances as to have acquired the reputation of being man & wife, a lawful marriage between them will be presumed, although there may be no positive evidence of any marriage having taken place.—JOHNSTON *v.* HAZEN (1914), 43 N. B. R. 154.—**CAN.**

521 iii. —— ——.]—There is a strong *primâ facie* presumption, which is not lightly to be repelled, that, when a man & woman have long lived together as man & wife & have been so treated by their friends & neighbours, that they are & have been what they profess to be.—HAIRMAN *v.* CRAWLEY, O. P. D. 3.—**S. AF.**

524. ——.]—ANDREWES *v.* UTHWATT, No. 546, *post.*

525. —— —— ——.]—*Re* DUVALL, DUVALL *v.* CRADDOCK, No. 471, *ante.*

526. —— —— **Acknowledgment by relatives.**]—*Re* IVORY, CHIPPENDALE *v.* IVORY, No. 500, *ante.*

527. —— —— ——.]—From 1856 to 1866 a man & woman lived together as man & wife & had five children. There was evidence that they had been treated as man & wife by friends & neighbours, & that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised:—*Held:* the presumption in favour of a marriage having taken place had been established.—*Re* THOMPSON, LANGHAM *v.* THOMPSON (1904), 91 L. T. 680.

528. —— —— **No direct evidence of marriage.**]—E. was summoned by the guardians of T. union, for that G., a girl, aged eight, was chargeable to the common fund & that E. was her father & able to maintain her. The child's birth was registered as the child of E. & of the mother, who was then living with E. as his wife; & E. called & treated her as such. The child was put out by E. to be nursed at his expense. The mother having died, & E. having married again & having denied he was ever married, the justices disbelieved E., & held that though no direct evidence of marriage was given the reputation was sufficient:—*Held:* the justices were right.—ELLIOTT *v.* TOTNES UNION (1892), 57 J. P. 151; 9 T. L. R. 35.

529. Restricted repute — Restricted to persons.]—In an action against husband & wife, on the note of the wife made *dum sola*, a witness stated that he knew A. B. (the wife) formerly, & had heard that she afterwards married E. F. (the husband). The witness was not cross-examined:—*Held:* sufficient *primâ facie* evidence of marriage.—EVANS *v.* MORGAN (1832), 2 Cr. & J. 453; 2 Tyr. 396.

Annotation:—**Refd.** Shedden *v.* A.-G. (1860), 30 L. J. P. M. & A. 217.

530. —— —— **Localities — Periods.**]—ANDREWES *v.* UTHWATT, No. 546, *post.*

531. Divided repute — Whether sufficient to raise presumption.]—CUNNINGHAMS *v.* CUNNINGHAMS, No. 467, *ante.*

532. —— ——.]—A marriage may be established by preponderating repute & by conduct even though the repute be divided.—LYLE *v.* ELLWOOD (1874), L. R. 19 Eq. 98; 44 L. J. Ch. 164; 23 W. R. 157.

Annotations:—**Apld.** *Re* Thompson, Langham *v.* Thompson (1904), 91 L. T. 680. **Consd.** *Re* Haynes, Haynes *v.* Carter (1906), 94 L. T. 431.

533. —— ——.]—ANDREWES *v.* UTHWATT, No. 546, *post.*

534. —— ——.]—A. & B. lived together with two children from about 1878 to 1893. They were generally reputed to be husband & wife & the children their lawful children, although there was some evidence dividing the repute. The eldest child, a daughter, was born in 1873 in her maternal grandmother's house, & registered by B. in her maiden name. The second child, a son, was born in 1879, while A. & B. were living together, & was registered in A.'s name. No record of any marriage could be found:—*Held:* A. & B. had been husband & wife, but the son was their only legitimate child.—*Re* HAYNES, HAYNES *v.* CARTER (1906), 94 L. T. 431.

535. Cohabitation for sake of appearances only — Insufficient to raise presumption.]—A. B., a widow entitled to a pension *durante viduitate*, cohabited with C. D. in Scotland. In regard to society, they held themselves out as man & wife; but with respect to the pension, they acted as if they were unmarried, & A. B. half-yearly made solemn declarations of widowhood for the purpose of obtaining the pension:—*Held:* he was right in finding that no valid marriage had taken place.

. . . The evidence . . . shows, that so far as these parties cohabited in such a manner as to create a habit & repute, from which marriage might be inferred, they did so for the sake of appearances only, & without any notion or consent by either party that a marriage would thereby be constituted or evidenced (LANGDALE, M.R.).—ROBERTSON *v.* CRAWFORD (1840), 3 Beav. 102; 49 E. R. 40.

Recognition by English Court of foreign marriage by repute.]—*See* CONFLICT OF LAWS, Vol. II., p. 416, No. 825.

(*d*) *Lapse of Time after Ceremony.*

536. General rule.]—The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, & this presumption must be met by strong, distinct, and satisfactory disproof.

The factum of marriage, celebrated by a clergyman of the Church of England in the year 1815, being proved, the maxims "*Semper presumuntur pro matrimonio*" & "*Omnia presumuntur rite et solemniter acta*," which raised the presumption of law that a special licence existed authorising the marriage, can only be repelled by strong, distinct, satisfactory, & conclusive evidence to the contrary, & every reasonable possibility of a fact in favour of the presumption must be rebutted.

Where, therefore, two persons had shown a distinct intention to marry, & a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, & the parties, by their acts at the time, showed that they believed such marriage to be a real & valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; & though the bishop of the diocese, during whose episcopacy the matter occurred, when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.—PIERS *v.* PIERS (1849), 2 H. L. Cas. 331; 13 L. T. O. S. 41; 13 Jur. 569; 9 E. R. 1118, H. L.

Annotations:—**Consd.** De Thoren *v.* A.-G. (1876), 1 App. Cas. 686; Sastry Velaider Aronegary *v.* Sembecutty Vaigalie (1881), 6 App. Cas. 364. **Apld.** Lauderdale Peerage (1885), 10 App. Cas. 692. **Consd.** Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895. **Apld.** *Re* Duvall, Duvall *v.* Craddock (1892), 36 Sol. Jo. 398; Goldstone *v.* Goldstone (1922), 127 L. T. 32. **Refd.** Sichel *v.* Lambert (1864), 15 C. B. N. S. 781; Collins *v.* Bishop (1878), 48 L. J. Ch. 31; Fox *v.* Bearblock (1881), 44 L. T. 568; *Re* Shephard, George *v.* Thyer, [1904] 1 Ch. 456.

537. —— **Bonâ fide & open marriage.**]—(1) Where a marriage is proved to have been solemnised *de facto* one hundred & thirteen years

---

531 i. *Divided repute—Whether sufficient to raise presumption.*]—When it is sought to establish the fact of marriage by repute, it is essential that such repute should be general & uniform; a divided repute will not suffice for that purpose.—HENDERSON *v.* WEIS (1877), 25 Gr. 69.—**CAN.**

Sect. 11.—*Presumptions in relation to marriage: Sub-sect.* 2, *B.* (*d*) & (*e*), *C.*, *D.* & *E.* *Sect.* 12: *Sub-sect.* 1, *A.*]

ago by people who intended that it should be a good marriage & it is done *bonâ fide* & openly, the maxim *omnia rite acta præsumuntur* applies.

(2) A., then ill of the malady of which he died, &, two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced (*inter alia*) in support of the marriage from the custody of the family a certificate signed by C. that he had married A. & B. according to the rites of the Church of England as by law established, & an affidavit, signed by the mayor of New York, to the effect that C. had made an oath of the truth of the statements in the certificate: a will of date anterior to the marriage, by which A. left all his property to B., & of the children then born; copies of letters showing that one of the exors. wrote to his co-exor. in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed himself in A.'s surname: that the children were recognised & taken care of by members of the family as A.'s children; & also War Office records showing that B. received a pension as A.'s widow:—*Held:* there was ample proof of a legal marriage.—LAUDERDALE PEERAGE (1885), 10 App. Cas. 692, H. L.

Annotations:— Generally, **Mentd.** Lovat Peerage (1885), 10 App. Cas. 763; Winans *v.* A.-G., [1904] A. C. 287; Casdagli *v.* Casdagli, [1919] A. C. 145.

538. Sentence of nullity—Evidence of collusion.]—HARRISON *v.* SOUTHAMPTON CORPN., No. 371, *ante.*

539. Roman Catholic marriage.]—SICHEL *v.* LAMBERT, No. 431, *ante.*

Presumption of validity of marriage.]—*See* Sub-sect. 1, *ante.*

(*e*) *Special Conditions in Foreign Country.*

540. Virginia—No ceremony necessary—No registry kept—Effect of war.]—In a suit for dissolution of marriage, it appeared that petitioner & resp. had lived together for five years in Virginia, & were received in society as man & wife; that by the law in force in Virginia, when the cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept; & that in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not now be obtained:—*Held:* there was sufficient proof of the marriage.—ROOKER *v.* ROOKER & NEWTON (1863), 3 Sw. & Tr. 526; 33 L. J. P. M. & A. 42; 9 Jur. N. S. 1329; 12 W. R. 807; 164 E. R. 1379.

541. New Zealand—Ceremony alleged according to native usages—No registry kept—No Christian minister.]—Property was bequeathed to the children of J. A., provided he should marry an English lady. J. A., in 1859, married a woman named Hannah Tuhi Tuhi, one of the offspring of an alleged marriage between a British subject & a native woman of New Zealand named Tuhi Tuhi. The only evidence of the marriage was that of the alleged husband himself, who said that he was a British subject, born abroad, in 1801, of British parents. He further said that he came to reside in New Zealand, in or about 1828, & had resided there ever since; that in 1829 he intermarried with Tuhi Tuhi, & that such marriage was solemnised at a place in New Zealand according to the laws, customs, & usages then in force in New Zealand; that New Zealand was not then a British colony, & there was not then a minister of any Christian church, nor any register of marriages in the island, & that from & after the marriage Tuhi Tuhi had lived & still lived with him as his wife. The deponent did not state the names of his parents. He said that Hannah, before her marriage, was called Tuhi Tuhi, & not by her father's name, in conformity with the customs of the natives of New Zealand; but there was no evidence as to what the laws & customs of the natives of New Zealand were:—*Held:* the evidence was insufficient to enable the ct. to presume a marriage.—ARMITAGE *v.* ARMITAGE (1866), L. R. 3 Eq. 343.

C. Rebuttal of Presumption.

542. Strong & cogent evidence necessary.]—PIERS *v.* PIERS, No. 536, *ante.*

543. ——.]—HAVILAND *v.* MORTBOY, No. 568, *post.*

544. ——.]—SASTRY VELAIDER ARONEGARY *v.* SEMBECUTTY VAIGALIE, No. 459, *ante.*

545. ——.]—Where the question is whether a certain marriage has or has not taken place, & the fact of cohabitation is established, together with reputation of marriage, a presumption is created in favour of the marriage having taken place, which can only be rebutted by strong & weighty evidence to the contrary.

Marriage held to have taken place under such circumstances, notwithstanding some evidence leading to the contrary conclusion, & absence of any positive evidence in corroboration.—FOX *v.* BEARBLOCK (1881), 17 Ch. D. 429; 50 L. J. Ch. 489; 44 L. T. 508; 45 J. P. 648; 29 W. R. 661.

546. ——.]—The English law required a marriage ceremony to validate the marriage contract, but undoubtedly a marriage might be proved by reputation. The reputation might be strong or weak. The presumption of marriage which arose from reputation, LORD CAIRNS said was something much stronger than presumption raised with regard to other facts, & that from cohabitation with reputation a marriage was to be presumed unless there was strong & cogent evidence to the contrary. The reputation again

PART II. SECT. 11, SUB-SECT. 2.—C.

542 i. *Strong & cogent evidence necessary.*]—Where a man & woman have cohabited for such length of time & in such circumstances as to have acquired the reputation of being man & wife, a lawful marriage between them will be presumed & the presumption can be rebutted only by strong & weighty evidence to the contrary.—JOHNSTON *v.* HAZEN (1914), 43 N. B. R. 154.—**CAN.**

l. *Same presumption raised in respect of another man.*]—The presumption arising from reputation may be rebutted by proof that the woman formerly lived with another man so as to raise the same presumption of marriage with him.—GEORGE *v.* THOMAS (1853), 10 U. C. R. 604.—**CAN.**

m. *By presumption of innocence.*]—A married man, persuaded pltf. to go through a pretended marriage ceremony, & afterwards to cohabit with him:—*Held:* the presumption that deft. had not been guilty of a crime, rebutted any presumption of a marriage ceremony to be drawn from the cohabitation proved.—WRIGHT *v.* SKINNER (1886), 17 C. P. 317.—**CAN.**

n. *Evidence of one party.*]—After the death of the man the evidence of the woman alone was received for the purpose of rebutting the presumption of marriage, although she was then interested in negativing the fact of marriage.—PRESTON *v.* LYONS (1876), 24 Gr. 142.—**CAN.**

o. *Proof of facts negativing marriage.*]—The fact that a woman was living under the control & protection of a man, who generally lived with her & acknowledged her children as his will raise a strong presumption that she is the wife of that man. This presumption will however be rebutted by proof of facts which show that no marriage could have taken place.—CHELLAMMAL *v.* RANGANATHAM PILLAI (1910), I. L. R. 34 Mad. 277.—**IND.**

p. *Proof of illicit intercourse.*]—Applt.'s success depended on his proving his status as the legitimate son of his parents:—*Held:* the pre-

might be general. It might be continuous, it might be undivided or divided, or partially or totally discontinuous. The strength of the presumption must depend on the strength of the case adduced in support of the reputation. The law as to reputation was founded on decency & on morality, & also on improbability of error on the part of the persons among whom the reputation existed & especially so in the case where the reputation was general. The reputation might be among the relations on both sides, among all the friends, among all the acquaintances accompanying the parties throughout their lives, or it might be restricted to persons, or as to localities. Now the present case was, shortly, one of the latter class. The proper mode was to take the evidence as a whole & thus to see whether the presumption of the marriage was sufficiently rebutted (CHITTY, J.).—ANDREWES *v.* UTHWATT (1886), 2 T. L. R. 895.

Annotation :—**Mentd.** *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600.

547. ——.]—*Re* DUVALL, DUVALL *v.* CRADDOCK, No. 471, *ante*.

548. ——.]—*Re* SHEPHARD, GEORGE *v.* THYER, No. 472, *ante*.

Onus of proof—On persons seeking to disturb presumption.]—*See* Sect. 12, sub-sect. 1, H., *post*.

D. Proceedings in which Presumption entertained.

549. All civil cases.]—LEADER *v.* BARRY, No. 490, *ante*.

550. Administration proceedings by daughter—Marriage of parents.]—Where the interest of a daughter, claiming administration to her father, is denied, it will be sufficient if she established the marriage of her parents by reputation & cohabitation; but she is bound to show the time & place of her own birth.—MAYO (LADY) *v.* BROWN (1753), 1 Lee, 271; 161 E. R. 100; *subsequent proceedings* (1757), 2 Lee, 391.

551. Action against husband & wife—Debt due by wife dum sola.]—Presumptive evidence of a marriage is sufficient in an action against husband & wife for a debt due by the wife, *dum sola*, without strict proof of the celebration of the marriage.—TRACEY *v.* M'ARLTON (1839), 7 Dowl. 532; *sub nom.* TACEY *v.* MACARLTON, 1 Will. Woll. & H. 550; *sub nom.* DACEY *v.* MCCARTER, 3 Jur. 124.

552. Action against married women—Plea of coverture—Presumptive evidence of husband's prior marriage.]—On a plea of deft.'s coverture her marriage being regularly proved, evidence admitted on the part of pltf. of cohabitation of the alleged husband before the marriage with another woman, reputed to be his wife, & shown to have been living, after deft.'s marriage, with him.—HAMBLIN *v.* SHELTON (1862), 3 F. & F. 133, N. P.

E. Proceedings in which Presumption not entertained.

Proof of marriage, generally, *see* Sect. 12, *post*.

553. Action for crim. con.]—In this kind of action, an action for crim. con. with pltf.'s wife, there must be evidence of a marriage in fact acknowledgment & cohabitation & reputation are not sufficient to maintain this action. . . . In prosecutions for bigamy a marriage in fact must be proved (LORD MANSFIELD, C.J.).—MORRIS *v.* MILLER (1767), 4 Burr. 2057; 1 Wm. Bl. 632; 98 E. R. 73.

Annotations :—**Distd.** R. *v.* Hassall (1826), 2 C. & P. 434. **Consd.** Catherwood *v.* Caslon (1844), 13 M. & W. 261. **Refd.** Birt *v.* Barlow (1779), 1 Doug. K. B. 171; Read *v.* Passer (1794), 1 Esp. 213.

554. ——.]—An action for crim. con. is the only civil case where it is necessary to prove an actual marriage. In other cases cohabitation, reputation, etc., are equally sufficient since the Marriage Act as before (LORD MANSFIELD, C.J.).—BIRT *v.* BARLOW (1779), 1 Doug. K. B. 171; 99 E. R. 113.

Annotations :—**Consd.** Catherwood *v.* Caslon (1844), 13 M. & W. 261. **Mentd.** Pain *v.* Terry (1865), 12 L. T. 269; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

555. ——.]—LEADER *v.* BARRY, No. 490, *ante*.

556. ——.]—CATHERWOOD *v.* CASLON, No. 408, *ante*.

557. Prosecution for bigamy.]—MORRIS *v.* MILLER, No. 553, *ante*.

558. ——.]—CATHERWOOD *v.* CASLON, No. 408, *ante*.

——.]—*See, further*, CRIMINAL LAW, Vol. XV., pp. 735 *et seq.*

Proof of marriage—In matrimonial causes.]—*See* Part XIII., Sect. 5, sub-sect. 1, C., & Sect. 11, sub-sect. 2, *post*.

—— **In actions against husband for ante-nuptial obligations of wife.**]—*See* Part VII., Sect. 1, sub-sect. 3, *post*.

SECT. 12.—PROOF OF MARRIAGE.

SUB-SECT. 1.—IN ENGLAND.

A. Matters not necessary to be proved.

559. Where marriage proved by person present—Reading of marriage service.]—*Semble :* evidence of a marriage, by a person present, is sufficient, without proving expressly the reading of the service.—HEMMINGS *v.* SMITH (1784), 4 Doug. K. B. 33: 99 E. R. 753.

560. —— **Registration, licence or banns.**]—Bigamy. If the marriages are proved by a person present at them, it is not necessary to prove the registration, or licence, or banns, & it seems that the assuming a fictitious name upon the second marriage will not prevent the offence from being complete.—R. *v.* ALLISON (1806), Russ. & Ry. 109, C. C. R.

Annotation :—**Mentd.** R. *v.* Fanning (1866), 10 Cox, C. C. 411.

561. Archbishop's special licence—Evidence of cohabitation & reputation confirmed.]—Lessor of pltf. in ejectment claimed as remainderman in

sumption of marriage which might have arisen from their prolonged cohabitation did not apply because the mother before she was brought to the father's house was admittedly a prostitute.—GHAZANFAR ALI KHAN *v.* KANIZ FATIMA (1910), I. L. R. 32 All. 345.—**IND.**

q. ——.]—The presumption for a marriage arising from cohabitation & open profession or acknowledgment of each other as man & wife is removed by proof of illicit intercourse.—MAXWELL *v.* MAXWELL (1832), Milw. [illegible] —**IR.**

r. *Existence of legal bar to marriage—Lawful spouse alive.*]—Testator was married in 1855, to the widow of his deceased brother; she survived testator. In 1884 & 1885 testator was living with another woman :—*Held :* the presumption arising from testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive.—KIDD *v.* HARRIS (1901), 22 C. L. T. 25; 3 O. L. R. 60; 1 O. W. R. 141.—**CAN.**

s. ——.]—So long as a legal bar exists against marriage between persons cohabiting together as & reputed to be husband & wife, no inference of a lawful marriage can arise from such cohabitation & repute.—WILLIAMSON *v.* AUCKLAND ELECTRIC TRAMWAYS CO., LTD. (1911), 31 N. Z. L. R. 161.—**N.Z.**

t. *Onus of proof—On persons seeking to disturb presumption.*]—The *onus* of rebutting a marriage by habit & repute is thrown on those who deny it.—DE THOREN *v.* A.-G., [1876] 1 App. Cas. 686; 3 R. (Ct. of Sess.) 28, H. L.—**SCOT.**

PART II. SECT. 11, SUB-SECT. 2.—E.

553 i. *Action for crim. con.*]—HEDGE *v.* MORROW (1914), 32 O. L. R. 218; 20 D. L. R. 561; 6 O. W. N. 279.—**CAN.**

557 i. *Prosecution for bigamy.*—HEDGE *v.* MORROW (1914), 32 O. L. R. 218; 20 D. L. R. 561; 6 O. W. N. 279.—**CAN.**

Sect. 12.—*Proof of marriage: Sub-sect.* 1, *A., B., C., D., E., F., G. & H.; sub-sect.* 2, *A., B., C. & D.; sub-sects.* 3, 4 & 5. *Sect.* 13.]

tail. To establish the pedigree, he proved cohabitation, & reputation of marriage between his alleged father & mother. He also produced a parish register signed by them, stating the performance of a marriage ceremony between them at a private house; & the archbishop's fiat for a special licence, with the affidavit upon which the fiat was obtained. No search had been made for the licence; & it appeared that there was no regular place of custody for such licences:—*Held:* the affidavit, fiat & register were admissible evidence, without production of the licence, to confirm the evidence of cohabitation & reputation, & as showing that parties bearing the names of the alleged father & mother had been engaged in taking measures for contracting a marriage.—DOE d. EGREMONT (EARL) *v.* GRAZEBROOK (1843), 4 Q. B. 406; 3 Gal. & Dav. 334; 12 L. J. Q. B. 221; 7 Jur. 530; 114 E. R. 951.

562. Statutory requisites where presence of registrar proved.]—CAMPBELL *v.* CORLEY, No. 445, *ante*.

563. Performance of necessary ceremonies according to law—Proof of intention to marry—Ceremony gone through to perfect intention.]—SASTRY VELAIDER ARONEGARY *v.* SEMBECUTTY VAIGALIE, No. 459, *ante*.

564. ——— ——— ———.]—*Re* SHEPHARD, GEORGE *v.* THYER, No. 472, *ante*.

In prosecution for bigamy.]—*See* CRIMINAL LAW, Vol. XV., p. 735, Nos. 7950 *et seq.*

In matrimonial causes.]—*See* Part XIII., Sect. 5, sub-sect. 1, C., & Part XIII., Sect. 11, sub-sect. 2,

In actions against husband for ante-nuptial obligations of wife.]—*See* Part VII., Sect. 1, subsect. 3, *post*.

B. Marriage Certificates.

See EVIDENCE, Vol. XXII., pp. 322, 323, Nos. 3169–3172.

In prosecutions for bigamy.]—*See* CRIMINAL LAW, Vol. XV., p. 735, Nos. 7950 *et seq.*

565. Admissible as evidence—Whether proof of identity essential.]—Certificates of births, baptisms, marriages, or deaths, are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established.—HUBBARD *v.* LEES & PURDEN (1866), L. R. 1 Exch. 255; 4 H. & C. 418; 35 L. J. Ex. 169; 14 L. T. 367: 30 J. P. 663.

——— ———.]—*See, further*, EVIDENCE, Vol. XXII., pp. 322, 323, Nos. 3170, 3171.

Identification—Whether cohabitation with person of same name sufficient.]—*See* CRIMINAL LAW, Vol. XV., p. 737, Nos. 7961 *et seq.*

C. Parish Registers.

To prove fact of marriage.]—*See* EVIDENCE, Vol. XXII., pp. 337, 338. Nos. 3379–3387.

To prove time of marriage.]—*See* EVIDENCE, Vol. XXII., p. 338, No. 3388.

How proved—Transcript to diocesan registry.]—*See* EVIDENCE, Vol. XXII., pp. 334, 335, Nos. 3330–3333.

——— **Extracts.**]—*See* EVIDENCE, Vol. XXII., p. 335, Nos. 3334, 3335.

——— **Production from proper custody.**]—*See* EVIDENCE, Vol. XXII., p. 335, Nos. 3336–3343.

——— **Copy of examined copy.**]—*See* EVIDENCE, Vol. XXII., p. 258, No. 2427.

D. Episcopal Registers and Records.

See EVIDENCE, Vol. XXII., p. 339, Nos. 3403, 3404.

E. Non-Anglican Church Registers and Records.

See EVIDENCE, Vol. XXII., p. 343, No. 3466.

F. Prison Registers.

See, now, Non-Parochial Registers Act, 1810 (c. 92), s. 20.

G. Competency of Witnesses.

566. Party to marriage—To prove illegality of marriage.]—STANDEN *v.* STANDEN, No. 231, *ante*.

Where marriages celebrated out of England.]—*See* EVIDENCE, Vol. XXII., pp. 625 *et seq.*, Nos. 6895 *et seq.*

H. Onus of Proof.

567. On party seeking to disturb presumption.]—A., a Jew, & B., a Christian woman, cohabited as man & wife for twenty-eight years, & until B.'s death. They had several children, who were brought up as Christians. They cohabited partly in England & partly in foreign parts. There was no evidence of any marriage having been solemnised, but there was general reputation that the parties were married, & proof of the registry of the baptism in England of several of the children as of A. & B. his wife, & that on a judicial proceeding the parties gave evidence on oath as "A. & B. his wife." The relatives of A. never recognised the fact of a marriage, & some of them swore that they did not know even of the reputation of marriage. A., in his will, referred to such of the children as were living as "my legatees." One of the Vice-Chancellors decided that the children were entitled as legitimate children of A. & B. to a fund belonging to A.'s next of kin; & that the *onus* of proof lay upon those who sought to disturb the general reputation & presumption of marriage under the foregoing circumstances: &, on appeal, the decision was affirmed.—GOODMAN *v.* GOODMAN (1859), 28 L. J. Ch. 715; 33 L. T. O. S. 70; 5 Jur. N. S. 902, L. JJ.

Annotations:—**Consd.** Collins *v.* Bishop (1878), 48 L. J. Ch. 31; Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895. **Refd.** Lyle *v.* Ellwood (1874), L. R. 19 Eq. 98.

568. ———.]—In Mar. 1821, a lady was married who signed her name "Mary Jones," the husband signing his name "James Masters." Ten days afterwards she was married to S. in her own name. They lived together as reputed husband & wife for many years, & on his death intestate she administered to his estate, receiving a moiety of it as his widow. Shortly after her death a certificate of the first marriage was discovered by pltfs., the next of kin of S., who thereupon filed a bill to have the moiety received by the reputed widow paid to them. Deft. did not deny the first marriage, but contended that S. was the person who solemnised both marriages, the first in the assumed name of "Masters," the second in his own:—*Held:* the two marriages were solemnised with the same person.

The Vice-Chancellor decided that the burden of proof lay with defts.; the Ct. of Appeal, on the contrary, held that it rested with pltfs., considering the cohabitation for eighteen years, the separation by deed as upon the footing that they were man & wife, & the twelve years of widowhood, during which no suspicion had arisen, as a case that could not be set aside without the strongest & most distinct evidence.—HAVILAND *v.* MORTIBOY (1859), 32 L. T. O. S. 343, L. C. & L. JJ.

As to validity of marriage.]—*See* Sect. 11, sub-sect. 1, *ante*.

SUB-SECT. 2.—MARRIAGES ABROAD.

A. Proof of Foreign and Colonial Law.

See EVIDENCE, Vol. XXII., p. 618, Nos. 6850 *et seq*

B. Foreign and Colonial Registers and Certificates.

See EVIDENCE, Vol. XXII., p. 339, Nos. 3405 *et seq.*

C. Channel Islands.

569. Celebrated according to rites of Church of England—Proof as English marriage—Expert evidence as to local law not necessary.]—A Jersey marriage can be proved as an English marriage, & need not be proved as a foreign one.—EDEN *v.* EDEN & BATTERICK (1908), 24 T. L. R. 602; 52 Sol. Jo. 483.

570. —— —— ——.]—As Jersey is in the diocese of Winchester, it is unnecessary to call a Jersey lawyer to prove a marriage celebrated in a church in Jersey.—PRITCHARD *v.* PRITCHARD (1920), 37 T. L. R. 104.

571. —— —— —— Certificate of marriage sufficient.]—Where a marriage had taken place in Jersey according to the rites & forms of the Church of England:—*Held:* it was sufficiently proved by the certificate of marriage without evidence of an expert witness.—BOUGHEY *v.* BOUGHEY & FOAN (1917), 86 L. J. P. 89; 117 L. T. 156.

572. Not celebrated according to rites of Church of England—Expert evidence of local law necessary.]—Where in the case of a marriage in the Channel Islands the marriage ceremony has been celebrated elsewhere & otherwise than in a church in accordance with the rites & ceremonies of the Established Church of England & Wales, evidence of the validity of the marriage according to the local law is still required.—WESTLAKE *v.* WESTLAKE (OTHERWISE WILLIAMS), [1910] P. 167; 79 L. J. P. 36; 102 L. T. 396; 26 T. L. R. 223; 54 Sol. Jo. 215.

D. Other Cases.

By production of special licence by Bishop of Sodor & Man—Evidence of marriage in Isle of Man.]—*See* EVIDENCE, Vol. XXII., p. 340, No.

Entry in original registry of College of Arms—Of marriage celebrated abroad—Inadmissible.]—*See* EVIDENCE, Vol. XXII., p. 317, No. 3100.

SUB-SECT. 3.—JEWS AND QUAKERS.

573. Jews—Jewish law must be complied with—Evidence of expert in Jewish law necessary.]—LINDO *v.* BELISARIO, No. 123, *ante*.

574. —— Necessity for production of written contract—Sufficiency of evidence of witness of ceremony.]—HORN *v.* NOEL, No. 436, *ante*.

575. —— —— ——.]—R. *v.* ALTHAUSEN, No. 437, *ante*.

576. —— —— ——.]—In order to prove a Jewish marriage celebrated abroad it is not sufficient to call a witness who was present at the ceremony. The contract between the parties must be produced & proved.—R. *v.* NASILLSKI (1897), 61 J. P. 520.

Annotation:—**Refd.** R. *v.* Hammer, [1923] 2 K. B. 786.

577. —— ——.]—R. *v.* HAMMER, No. 138, *ante*.

578. Certificate of marriage—Necessity for signature as secretary & registrar.]—Where the certificate of marriage in a Jewish synagogue had been signed by the secretary in that capacity alone, though he was also certified as registrar:—*Held:* he should have signed as secretary & registrar.—PRAGER *v.* PRAGER & GOODISON (1913), 108 L. T. 734; 29 T. L. R. 556.

579. Quakers—Marriage according to forms of society—Sufficiency of proof of.]—In an action for crim. con. at the suit of a Quaker, proof of a marriage according to the forms of that society is sufficient to sustain the action.—DEANE *v.* THOMAS (1829), Mood. & M. 361.

Annotation:—**Refd.** R. *v.* Millis (1843), 10 Cl. & Fin. 534.

Celebration of marriage.]—*See* Sect. 8, sub-sect. 2, B., *ante*.

SUB-SECT. 4.—IN MATRIMONIAL CAUSES.

In suits for restitution of conjugal rights.]—*See* Part XIII., Sect. 5, sub-sect. 1, C., *post*.

In other matrimonial causes.]—*See* Part XIII., Sect. 11, sub-sect. 2.

SECT. 5.—IN ACTION AGAINST HUSBAND FOR ANTE-NUPTIAL OBLIGATIONS OF WIFE.

See Part VII., Sect. 1, sub-sect. 3, *post*.

SECT. 13.—PROCEEDINGS TO ESTABLISH VALIDITY.

See, generally, BASTARDY, Vol. III., pp. 369, 370, Nos. 100–121; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 188.

See, now, Matrimonial Causes Rules, 1924, r. 96.

580. General rule.]—Apart from special statutory provision such as the Legitimacy Declaration Act, 1858 (c. 93), the ct. has no power to entertain a petition for or pronounce a declaration of the validity of a marriage. Such power, being absent in the Ecclesiastical Cts., is not supplied by the operation of Ord. 25, r. 5.—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), [1914] P. 53; 83 L. J. P. 40; 110 L. T. 121; 30 T. L. R. 329; 58 Sol. Jo. 341.

Annotation:—**Mentd.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135.

581. Under Legitimacy Declaration Act, 1858 (c. 93)—To declare marriage valid.]—Petitioners were married in 1874, but the wife having previously gone through a ceremony of marriage with a man whose wife was living at the time, petitioners prayed the ct. to declare their marriage had in 1874 valid:—*Held:* this was included within above Act, s. 1.—SHILSON *v.* A.-G. (1874), 22 W. R. 831.

582. —— ——.]—On Mar. 5, 1846, the mother & father of petitioner went through a ceremony of marriage at Gretna Green, the lady at that time being fifteen years of age. The certificate was signed by the contracting parties, & by two friends as witnesses to the marriage. The lady having signed her maiden name & made some erasure on the first certificate, a second was signed by the parties & witnesses, & was duly dated. This document was not forthcoming, & the first-mentioned certificate was tendered at the hearing, having been produced by one of the witnesses who attested it, & who had preserved it as a curiosity. After the ceremony at Gretna Green the parties

Sect. 13.—*Proceedings to establish validity. Sect. III. Sect.* 1: *Sub-sect.* 1.]

returned home, & were recognised as married by their respective parents & friends. Petitioner was born in Jan. 1847. This petition became necessary to enable him to establish his title to a reversionary interest under the will of a relative, which reversion he had mortgaged. Petitioner's father died in 1878, & the two witnesses were also dead. Petitioner's mother gave the only direct evidence in proof of her marriage:—*Held:* the marriage was valid by the law of Scotland, & accordingly a declaration of petitioner's legitimacy in terms of the prayer of the petition was made.—GARDNER *v.* A.-G. (1889), 60 L. T. 839.

583. —— ——.]—In a petition to establish the validity of a marriage under above Act, it appeared that petitioner, who was a British subject with an Irish domicil of origin, & temporarily resident in Japan, had married a Japanese woman in Japan, according to the forms required by the law of the country. Evidence having been adduced which showed that the marriage was valid according to the law of Japan & that by such a marriage petitioner was precluded from marrying any other woman during the subsistence of the marriage: *Held:* the marriage was valid in this country.—BRINKLEY *v.* A.-G. (1890), 15 P. D. 76; 59 L. J. P. 51; 62 L. T. 911; 6 T. L. R. 191.

Annotation:—**Refd.** R. *v.* Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634.

584. —— Parties to be cited—Attorney-General—Registrar's decision as to other parties.]—The practice in future in petitions under above Act & the Greek Marriages Act, 1884 (c. 20), will be that, after citing the A.-G., the parties on applying to have the case set down for trial must lay the state of the case, by affidavit or otherwise, before the registrar, who will direct whether any, & if so which, other parties shall be cited to see proceedings. The registrar's direction to be subject to appeal to the judge in the same manner as all other orders of the registrar.—BRINKLEY *v.* A.-G., SCARAMANGA *v.* A.-G. (1889), 14 P. D. 83; 58 L. J. P. 53; 60 L. T. 935; 53 J. P. 425; 37 W. R. 687; *subsequent proceedings* (1890), 15 P. D. 76.

—— ——.]—*See, further*, BASTARDY, Vol. III., p. 370, Nos. 110–114.

—— **Form of petition.**]—*See* BASTARDY, Vol. III., p. 369, Nos. 108, 109.

—— **Mode of trial.**]—*See* BASTARDY, Vol. III., p. 370, Nos. 115–117.

585. —— Admissibility of evidence—Post litem motam.]—(1) Asserted marriage between A. & B. in 1773. In 1800, C., their eldest son, claimed certain property, to which, if legitimate, he was entitled, but which was then in the possession of D., his maternal uncle. D. answered, saying that he should be ready to defend any action which C. might bring, & communicated the fact that the claim had been made to E., the paternal uncle of C. C. replied that his object was to establish his legitimacy, & did not follow up the claim to the property by any suit or action. In a proceeding under above Act to establish the fact of marriage between A. & B.:—*Held:* a "controversy" had arisen in 1800 between C. & D. upon the very question involved in the litigation, & declarations by members of his family subsequent to 1800 were inadmissible in evidence as made *post litem motam.*

(2) A deed, dated 1803, to which members of the family were parties, was tendered in evidence for the purpose of proving declarations by them, but was rejected on the ground that the declarations were made *post litem motam.* It was then tendered as original evidence or evidence of conduct:—*Held:* it was inadmissible for the purpose for which it was tendered.

(3) Evidence of declarations by members of the family subsequent to 1800 as to statements made by other members of the family concerning the marriage prior to the *lis mota* was also tendered & rejected as falling within the principle of declarations made *post litem motam.*

(4) A deed, dated 1826, made between D., certain members of D.'s family & other parties, was tendered & received in evidence, for the purpose of showing that the property claimed by C. had been dealt with adversely to his, A.'s, family subsequent to the controversy between C. & D.

(5) *Semble:* the ct. has no power under above Act to condemn in costs a party who is cited, & who is unsuccessful in his opposition to the declaration prayed for in the petition.—FREDERICK *v.* A.-G. (1874), L. R. 3 P. & D. 270; 44 L. J. P. & M. 1; 32 L. T. 39.

Annotation:—*As to* (5) **Consd.** Bain *v.* A.-G., [1892] P. 261.

586. —— Costs—Liability of party unsuccessfully opposing declaration.]—FREDERICK *v.* A.-G., No. 585, *ante.*

587. —— —— ——.]—In proceedings under the above Act, the ct. has jurisdiction to order a person who has been cited, & has appeared & opposed the petition, to pay the costs of petitioner.—BAIN *v.* A.-G., [1892] P. 261; 61 L. J. P. 135; 67 L. T. 447; 40 W. R. 505; 8 T. L. R. 466; 36 Sol. Jo. 397, C. A.

—— ——.]—*See, further*, BASTARDY, Vol. III., p. 370, Nos. 118–121.

588. Under Greek Marriages Act, 1884 (c. 20)—Parties.]—ZARAFI *v.* A.-G. (1885), 1 T. L. R. 683.

589. —— —— Attorney-General—Registrar's decision as to other party.]—BRINKLEY *v.* A.-G., SCARAMANGA *v.* A.-G., No. 584, *ante.*

SECT. 14.—OFFENCES IN RELATION TO MARRIAGE.

Marriages of wards of court.]—*See* INFANTS.

Criminal offences.]—*See* CRIMINAL LAW, Vol. XV., p. 735, Nos. 7950 *et seq.*

Part III.—Personal Rights and Obligations arising from Marriage.

SECT. 1.—OBLIGATION OF HUSBAND AND WIFE TO MAINTAIN ONE ANOTHER.

SUB-SECT. 1.—DUTY OF HUSBAND TO MAINTAIN WIFE.

590. General rule.]—By marriage a wife acquires the right to be maintained according to [illegible] estate & condition of her husband, of which [illegible] she cannot be divested, except by her own [illegible], therefore, [illegible] no defence to an [illegible]ht against a husband for necessaries [illegible] lied to his wife, that at the time they were so supplied, he was confined in an asylum as a dangerous lunatic. [illegible] (1851), 6 [illegible] Q. B. 299; 20 L. J. M. C. 129; 15 L. T. O. S. 118; 15 Jur. 1; 1 W. R. 1; 2 C. & K. 1; 6 Cox, C. C. 549, C. C. R.

591. [illegible], Prisoner was tried & convicted on an indictment under 16 & 17 Vict. c. 96, s. 9, charging that he, having the care & charge of his wife, a lunatic, did abuse & ill-treat her; & also containing a count for a common assault:—*Held:* prisoner was not a person having the care or charge of a lunatic within the statute, inasmuch as its provisions were not intended to apply to persons whose care or charge arises from natural duty, & so much of the conviction as related to the counts under the statute must be quashed.

(2) The law obliges a husband to take care of his wife independently of her being a lunatic; he does not take care of her because she is a lunatic, but because she is his wife (PARKE, B.).—R. *v.* RUNDLE (1855), Dears. C. C. 482; 3 C. L. R. 659; 24 L. J. M. C. 129; 25 L. T. O. S. 118; 19 J. P. 293; 1 Jur. N. S. 430; 3 W. R. 403; 6 Cox, C. C. 549, C. C. R.

Annotations:—As to (1) **Consd.** R. *v.* Porter (1864), 9 Cox, C. C. 449. **Dbtd.** Buchanan *v.* Hardy (1887), 18 Q. B. D. 486.

592. When living apart—Jurisdiction of Court of Chancery.]—LASBROOK *v.* TYLER (1630), 1 Rep. Ch. 44; 21 E. R. 502.

593. [illegible].]—ASHTON (LADY) *v.* ASHTON (1650), 1 Rep. Ch. 164; 21 E. R. 538.

594. [illegible] **Settlement made before marriage.**]—Where husband & wife lived separate by mutual consent, & no evidence of any cruelty on the part of the husband, & he had before marriage settled part of her property upon her, the ct. refused to decree maintenance.—DUNCAN *v.* DUNCAN (1815), Coop. G. 254; 19 Ves. 394; 35 E. R. 549.

595. [illegible] **To provide shelter—Stipulated allowance regularly paid.**]—Where husband & wife are separated by common consent, the husband granting the wife a stipulated allowance, which is regularly paid, he is not bound to supply her with shelter; but if he knows, or be informed that she is without shelter, & refuses to provide her with it, in consequence of which her death ensues, *semble*, he is guilty of manslaughter (even though the wife be labouring under disease which must ultimately prove fatal) if it can be shown that her death was accelerated for want of the shelter which he had denied.—R. *v.* PLUMMER (1844), 1 Car. & Kir. 600: 8 J. P. 615; 8 Jur. 921.

596. Covenant of indemnity against maintenance.]—D. having more than £3,000 *per annum*, married M. who had £10,000 portion, & settled £1,000 *per annum* upon her for her jointure, & the greatest part of D.'s estate was settled upon the first & every other son in tail male successively. D. run greatly in debt, & J., his eldest son, being of full age, D. upon a calculation of his debts, & the value of his estate for life, with impeachment of waste, agreed with J. to convey all his estate to him, & J. covenanted to pay all D.'s debts, & to allow him £500 *per annum* rentcharge for his life; & further (upon which the question arose) that J. should indemnify D. from all debts, charges & expenses for the maintenance of M., his mother, she being then separate from D. by consent. M. brought a bill against D. & J. the son to have an allowance for her maintenance:—*Held:* the son by his covenant had taken upon himself the charge of maintaining M. & stood in the place of the husband, who was bound to give his wife an allowance if he voluntarily separated from her; the son must be taken to be in nature of a trustee for the wife, so far as a reasonable allowance for her maintenance; though the son offered to take her to his house, yet she was not bound to accept that offer; for though he stood in the place of the husband as to her maintenance, & a husband is not bound to allow anything to his wife for maintenance if he offers to take her home, yet in this case here lay no such obligation upon the wife to live with the son; & though she refused, she ought to have a reasonable allowance.—DUTTON *v.* DUTTON (1715), 2 Eq. Cas. Abr. 150; 22 E. R. 128, L. C.

597. Execution of fraudulent deed of assignment.]—(1) Not maintaining his wife is a breach of the husband's recognisance to keep the peace towards her.

It is a breach of the peace in the husband not to maintain his wife, & if articles of the peace were exhibited by the wife against the husband, & he entered into a recognisance, to not maintain her would be a forfeiture of his recognisance, by which he binds himself *bene et honeste tractare* her (*per* CUR.).

(2) A husband voluntarily & causelessly deserted his wife & went to Maryland, having first made a fraudulent assignment of all his real & personal estate in trust, to pay his debts. The ct. decreed the wife a maintenance out of this estate, though by articles of intermarriage, she had the interest of £4,000 for pin-money.—COLMER *v.* COLMER (1729), Mos. 118; 25 E. R. 304, L. C.

Annotations:—As to (2) **Refd.** Sleech *v.* Thorington (1754), 2 Ves. Sen. 560; Wright *v.* Morley, Morley *v.* St. Alban (1805) 11 Ves. 12; Duncan *v.* Duncan (1815), 19 Ves. 394.

598. Commission of adultery by wife—Upon husband turning her away.]—A husband is

---

PART III. SECT. 1, SUB-SECT. 1.

[illegible] *rule.*]—There is no [illegible] to support her [illegible]—WAKSHINSKY [illegible] 2 W. W. R. 231.—**CAN.**

590 ii. [illegible].]—The obligation of a husband to support his wife & children is now made absolute in British Columbia, by statutory law.—BROWN *v.* BROWN, [1924] 3 W. W. R. 94.—**CAN.**

590 iii. [illegible].]—*Held:* under Married Women's Property (Scotland) Act, 1920, s. 4, the Lord Ordinary had a discretion to award *interim* aliment to a husband on a *primâ facie* case of necessity being set forth.—ADAIR *v.* ADAIR, [1924] S. C. 798.—**SCOT.**

Sect. 1.—*Obligation of husband and wife to maintain one another: Sub-sect.* 1.]

bound to receive or support his wife after she has committed adultery, though he has before committed adultery himself, & turned her out of doors, without any imputation on her conduct.—GOVIER *v.* HANCOCK (1796), 6 Term Rep. 603; 2 C. & P. 25, n.; 101 E. R. 726.

Annotations:—**Consd.** Cox *v.* Kitchin (1798), 1 Bos. & P. 338; Houliston *v.* Smyth (1825), 2 C. & P. 22; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Wilson *v.* Glossop (1887), 19 Q. B. D. 379; Stimpson *v.* Wood (1888), 57 L. J. Q. B. 484. **Refd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Cooper *v.* Lloyd (1859), 6 C. B. N. S. 519; Mitchell *v.* Torrington Union (1897), 76 L. T. 724; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80; Wickens *v.* Wickens (No. 2), [1918] P. 282, Durnford *v.* Baker, [1924] 2 K. B. 587.

599. — Loss of legal right of support.]—STIMPSON *v.* WOOD & SON (1888), 57 L. J. Q. B. 484; 59 L. T. 218; 52 J. P. 822; 36 W. R. 734; 4 T. L. R. 589, D. C.

Annotation:—**Mentd.** Barnett *v.* Cohen, [1921] 2 K. B. 461.

600. —— Not condoned by husband.]—In 1862, applt. married M. They lived together a few months & then the husband joined the marines. Nothing more was heard of him, & in 1889 M. married G. & lived with him as his wife. On hearing applt. was alive the wife still continued to live with G. M. became chargeable to the T. Union in 1896, & the guardians applied for an order against the husband, applt., which the magistrates made:—*Held:* the wife was guilty of adultery, & applt. could not be compelled to support M., his wife.—MITCHELL *v.* TORRINGTON UNION (1897), 76 L. T. 724; 61 J. P. 598, D. C.

Annotation:—**Refd.** Wickens *v.* Wickens (No. 2), [1918] P. 282.

601. ——.]—Where a wife leaves her husband without justification, his obligation to support her is, except where she has been guilty of adultery, not put an end to, but only suspended so long as she continues wilfully to absent herself, & if during her absence she becomes a lunatic then, as she is no longer capable of volition, her continued absence is not wilful, & her husband's liability to maintain her will revive.—JONES *v.* NEWTOWN & LLANIDLOES GUARDIANS, [1920] 3 K. B. 381; 89 L. J. K. B. 1161; 124 L. T. 23; 84 J. P. 237; 36 T. L. R. 758; 18 L. G. R. 481, D. C.

Annotations:—**Refd.** Llewellyn *v.* Turner (1922), 126 L. T. 532; Biggs *v.* Burridge (1924), 89 J. P. 75.

602. Whether she has money or not.]—A

602 i. *Whether she has money or not.*]—*Held:* a husband had no right to recoup himself out of his wife's estate in regard to payments for medical attendance, drugs, nursing & hospital accommodation during the wife's last illness. He was bound to provide for his wife during illness & she had power to bind him by contract to do so, even where she had separate estate.—*Re* MONTGOMERY, LUMBERS *v.* MONTGOMERY (1911), 17 W. L. R. 77; 20 Man. L. R. 444.—**CAN.**

a. *How enforced—Independent action for alimony.*]—Alimony may be decreed apart from divorce or judicial separation.—WOOD *v.* WOOD (1884), 1 Man. L. R. 317.—**CAN.**

b. ——.]—A wife has a right to the relief of alimony without its being necessarily incidental to divorce or judicial separation.—LEE *v.* LEE, [1920] 3 W. W. R. 530; 54 D. L. R. 608.—**CAN.**

c. ——.]—ROUSSEAU *v.* ROUSSEAU (1920), 1 W. W. R. 349.—**CAN.**

d. ——.]—HOLMES *v.* HOLMES, [1923] 1 W. W. R. 86; [1923] 1 D. L. R. 294; 16 Sask. L. R. 390.—**CAN.**

e. —— *Grounds of relief—Desertion.*]—A married woman voluntarily left her husband's house, alleging as a cause, unkind treatment by the husband, but subsequently offered to return, when he refused to receive her. Upon a bill filed for alimony the ct., in the circumstances, referred it to the master to fix an amount to be paid during such time as the parties continued to live separately.—ENGLISH *v.* ENGLISH (1858), 6 Gr. 580.—**CAN.**

f. ——.]—The right of a wife is to reside with her husband in his home, or in the joint home of both. Where, therefore, it appeared that the husband resided with his children by a former wife, & compelled his wife to live at lodgings, the ct., although no violence or other ill-treatment was shown, made a decree for alimony; & that although it was shown that during such time the husband had been in the habit of visiting & remaining with his wife.—WEIR *v.* WEIR (1864), 10 Gr. 565.—**CAN.**

g. ——.]—A wife having disobeyed her husband by visiting at the house of his brother-in-law, the husband, during her absence, put sundry chattels belonging to her outside the dwelling-house, & locked the door:—*Held:* the wife was entitled to a decree for alimony.—HOWEY *v.* HOWEY (1879), 27 Gr. 57.—**CAN.**

h. ——.]—Deft., an industrious, thrifty man, addicted to no bad habits, & with a yearly income of some $900, left home on account of the quarrelsome tendencies & lack of interest in his welfare by pltf. He refused to return:—*Held:* while pltf.'s conduct was not blameless, it was not such as to disentitle her to alimony, deft. refusing to live with her.—KARCH *v.* KARCH (1912), 23 O. W. R. 188; 4 O. W. N. 65; 6 D. L. R. 856; 4 D. L. R. 250.—**CAN.**

k. —— There was strong doubt whether deft. was the father of a child to which pltf. gave birth about a month & a half after marriage:—*Held:* even if the child were not deft.'s, pltf., having been deserted by deft., was entitled to alimony.—HOGG *v.* HOGG (1914), 28 W. L. R. 635; 20 D. L. R. 85; 6 W. W. R. 1201; 8 W. W. R. 111 **CAN.**

Where a few days after leaving her husband's house the wife was found with severe bruises & injuries upon her person, & the evidence raised a strong presumption that they were inflicted by him, the ct. decreed alimony.—JACKSON *v.* JACKSON (1860), 8 Gr. 499.—**CAN.**

m. ——.] deft. denied the cruelty charged against him, & it was not proved, but at the hearing deft. consented to a decree for alimony, the ct., on the ground of public policy, refused to interfere.—GRACEY *v.* GRACEY (1870), 17 Gr. 113.—**CAN.**

n. ——.]—The ct. will not, as a rule, for only one act of violence make a decree for alimony. But where a husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of *delirium tremens*, during which he became very violent, although this was the only instance in which he had, during eighteen years they had been married, ever struck her, the ct. made a decree for alimony, the wife swearing that she was apprehensive of further ill-treatment if she were to return to live with her husband.—RODMAN *v.* RODMAN (1873), 20 Gr. 428.—**CAN.**

the wife, brought an action for permanent alimony, & proved acts of cruelty by the husband, B. B. charged A. with acts of cruelty towards himself. It was admitted by B. that A. was an affectionate wife, & that her acts of cruelty were only committed at times when she was suffering from her menstrual periods:—*Held:* A. was entitled to alimony.—PATRICK *v.* PATRICK (1908), 1 Sask. L. R. 44.—**CAN.**

p. ——.]—In order to be entitled to alimony, pltf. must show that she was justified in leaving deft.; legal cruelty is justification.—MADAY *v.* MADAY (1911), 16 W. L. R. 701; 4 Sask. L. R. 18.—**CAN.**

q. ——.]—HOLMES *v.* HOLMES, [1923] 1 D. L. R. 294; 16 Sask. L. R. 390; [1923] 1 W. W. R. 86.—**CAN.**

r. —— *Not avoided by separation deed—Or otherwise.*]—Where a husband agrees with his wife to maintain her so long as they shall live together, & by his subsequent cruelty compels his wife to leave him, she may recover alimony against him in spite of such agreement.—TERELESKI *v.* TERELESKI, [1924] 1 D. L. R. 683.—**CAN.**

s. ——.]—Destitute Persons Act, 1894, imposes obligations & liabilities on a husband other than his obligations at common law. If "unlawfully," in sect. 16, governs the whole sect. the unlawfulness consists in the breach of obligations imposed by the Act. A husband cannot by a separation deed or otherwise contract himself out of such liabilities.—ELLMERS *v.* ELLMERS (1894), 13 N. Z. L. R. 242.—**N.Z.**

t. —— *Adultery.*]—Proof of grave misconduct, short of adultery by a wife will not disentitle her to alimony. A woman both in law & in morals is justified in leaving & in refusing to return to her husband who has committed adultery; but his act which breaks up the household does not relieve him from his duty to maintain her; & proof of that offence would be sufficient upon which to award alimony.—ALDRICH *v.* ALDRICH (1891), 21 O. R. 447.—**CAN.**

aa. ——.]—Where a separation agreement does not prevent a wife suing for increased alimony should the circumstances warrant her so doing, & the husband is subsequently guilty of adultery,

husband is bound to maintain his wife, whether she has money or not (PARKE, J.).—REED *v.* MOORE (1832), 5 C. & P. 200, N. P.

603. Wilful refusal of wife to live with husband —Effect of.]—JONES *v.* NEWTOWN & LLANIDLOES GUARDIANS, No. 601, *ante*.

that is a ground for granting alimony, & a judgment dismissing a former action for alimony, brought by the wife before such adultery, does not create an estoppel.—TUXFORD *v.* TUXFORD (1916), 34 W. L. R. 419 10 W. W. R. 598.—**CAN.**

b. —— —— —— *Unsubstantiated charge of unfaithfulness against wife.*]—A charge made publicly by a husband against his wife & unsubstantiated, & denied by her, that she was unfaithful & that two children borne by her were not his children, was held to afford her legal ground for alimony.—T. *v.* T., [1920] 3 W. W. R. 863.—**CAN.**

c. —— —— *Defences—Offer by husband to support wife separately.*]—An offer by a husband to support his wife separately is no bar to a suit for alimony, & an affidavit of the husband showing his willingness to support his wife separately cannot be received.—WEIR *v.* WEIR (1864), 1 Ch. Ch. 194.—**CAN.**

d. —— —— —— *Consent decree in former action.*]—A woman filed a bill for alimony on the ground of adultery & desertion, which suit was ultimately arranged by the husband agreeing to pay a sum of money, which pltf. accepted in payment of all past or future claims for alimony; & a decree was drawn up stating this arrangement, & that it was agreed to dismiss the bill; & that such dismissal should be treated as a dismissal on the merits:—*Held:* such decree furnished no defence to a bill afterwards filed by the wife for alimony on the ground of subsequent desertion & adultery.—HENDERSON *v.* HENDERSON (1872), 19 Gr. 464.—**CAN.**

e. —— —— —— *Cruelty or adultery on part of wife.*]—The only bar, under R. S. O., 1887, c. 44, s. 29, to an action for alimony against a husband who is living separately from his wife, is cruelty or adultery on the part of appet. A husband, who had been insane for years, at intervals, & during such periods of insanity had been confined in an asylum, afterwards declined to live with his wife, being under the suspicion that by doing so he might again be confined in an asylum:—*Held:* she was entitled to alimony, as he was living separate from her without sufficient cause.—NELLIGAN *v.* NELLIGAN (1894), 26 O. R. 8.—**CAN.**

f. —— —— —— ——.]—Suit by wife against husband for alimony on the grounds of cruelty, desertion & adultery. The parties were married in 1906, & pltf. left her husband on account of his conduct in Oct. 1906. Pltf. committed adultery in Dec. 1906:—*Held:* pltf.'s adultery was a bar to her right to recover.—LIEB *v.* LIEB (1908), 7 W. L. R. 824; 1 Sask. L. R. 363.—**CAN.**

g. —— —— —— ——.]—A magistrate cannot refuse to make an order against a husband for the maintenance of his wife on the ground that she has committed adultery, where it is proved that she is a destitute person within the meaning of Destitute Persons Act, 1894, & that he has deserted her or left her without maintenance.—SUTHERLAND *v.* SUTHERLAND (1896), 15 N. Z. L. R. 177.—**N.Z.**

h. —— —— *Payment of penalty on bond to secure alimony.*]—The liability of the obligor in a bond in a fixed penal sum conditioned for the payment of future maintenance is not limited to & is not satisfied by payment of the amount of the penalty, & the obligee has the right to sue for her support as it accrues from time to time.—BAKER *v.* TRUSTS & GUARANTEE CO. (1898), 29 O. R. 456.—**CAN.**

k. —— —— —— *Desertion by wife.*]—A wife is entitled to alimony even where she has deliberately deserted her husband & children, where she has been guilty of no other misconduct & offers to return but deft. refuses to receive her.—NEY *v.* NEY (1903), 24 O. W. R. 873; 4 O. W. N. 1536; 12 D. L. R. 248.—**CAN.**

l. —— —— —— *Husband's offer to receive wife.*]—Deft. in an action for alimony offered to "receive pltf. as his wife at any time when she is prepared to come & reside with & accept the home he is able to provide for her & conduct herself as a wife reasonably should":—*Held:* such offer was not honestly made, but solely for the purpose of avoiding a judgment for alimony, & was not sufficient to defeat pltf.'s claim. E. *v.* E. (1904), 15 Man. L. R. 352; 25 C. L. T. 19.—**CAN.**

m. —— —— —— *Wife living at home.*]—So long as a wife remains in her husband's house, though occupying a different bed, she is not entitled to alimony.—PRICE *v.* PRICE (1910), 16 O. W. R. 260; 21 O. L. R. 154; 1 O. W. N. 977.—**CAN.**

—— —— —— *Custody of children—Jurisdiction of court to grant.*]—MUNRO *v.* MU (1868), 15 Gr 431.—**CAN.**

o. —— —— —— *Access.*]—NEY *v.* NEY (1903), 24 O. W. R. 873; 4 O. W. N. 1536; 12 D. L. R. 248.—**CAN.**

KARCH *v.* KARCH (1912), 23 O. W. R. 188; 4 O. W. N. 65; 6 D. L. R. 856; 4 D. L. R. 250.—**CAN.**

q. —— —— —— ——.]—In an action for alimony pltf. was given custody of the children of the marriage, & provision was made for deft. to visit them at stated hours, upon notice.—FITCHETT *v.* FITCHETT (1913), 24 O. W. R. 109; 4 O. W. N. 844; 10 D. L. R. 367.—**CAN.**

r. —— —— —— RD *v.* TUXFORD (1916), 31 W. R. 419; 10 W. W. R. 598.—**CAN.**

s. —— —— —— ——.] T [1920] 3 W. W. R. 863.—**CAN.**

t. —— —— *Liability for costs—Settlement of action.*]—Application to compel deft. to pay the costs of pltf.'s solrs. in an action for alimony. The action was settled before trial, pltf. refusing to live with deft., & deft. agreeing to pay pltf.'s solrs.' costs:—*Held:* pltf. had not failed to obtain a decree for alimony, & deft. was therefore liable to pay costs.—MOORE *v.* MOORE (1884), 10 P. R. 284.—**CAN.**

a. —— —— —— ——.]—A reconciliation & return of the wife to the husband is not equivalent to a decree for alimony & does not entitle the wife's solrs. to full costs.—RINGROSE *v.* RINGROSE (1885), 4 C L. T. 497; 10 P. R. 299, 596.—**CAN.**

bb. —— —— —— *Wife unsuccessful.*]—If a wife brings an action for alimony against her husband & fails, she must pay the costs of the action if she possesses means of her own; but if she has none, the costs are payable by the husband except where the wife's solr. has improperly instituted litigation, or where he has misconducted himself in the action by being oppressive or by furnishing irrelevant or absurd evidence.—HARRIS *v.* HARRIS (1896), 3 Terr. L. R. 416.—**CAN.**

cc. —— —— —— ——.]—KEIZER *v.* KEIZER (1909), 12 W. L. R. 89.—**CAN.**

dd. ——.]—GILBERT *v.* GILBERT (1919), 50 D. L. R. 416.—**CAN.**

ee. —— —— —— ——.]—SEWELL *v.* SEWELL, [1920] 1 W. W. R. 10; 49 D. L. R. 594; 13 Sask. L. R. 44 **CAN.**

ff. —— —— —— ——.]—If a v brings her case for alimony to trial without applying for costs, & is successful, she is not entitled to costs.—PALIN *v.* PALIN, [1921] 3 W. W. R. 618; 62 D. L. R. 205; 14 Sask. L. R. 499.—**CAN.**

gg. —— —— *Assessment—Proportion of husband's income allotted.*]—Deft. owned real estate of the annual value of about £112 10*s.*, but subject to a debt of £100; he had also household furniture & farm stock, & he worked his farm. Pltf. with her eight children lived apart from him on account of his cruelty & with no means. On a reference to the master to fix permanent alimony, he allowed £37 10*s.*, which on appeal was increased to £80 *per annum*.—MCCULLOCH *v.* MCCULLOCH (1863), 10 Gr. 320.—**CAN.**

—— —— —— *Evidence as to wife's separate estate.*]—In the absence of evidence as to the separate estate of the wife it may be impossible to say what alimony should be assessed.—BATT *v.* BATT & HUGHES (1916), 33 W. L. R. 550; 9 W. W. R. 1040.—**CAN.**

kk. —— —— *Whether certificate of lis pendens issued.*]—A certificate of *lis pendens* should not be issued in a suit brought for alimony only.—WHITE *v.* WHITE (1874), 6 P. R. 208.—**CAN.**

—— *Collusive action against husband to defeat—Right of wife to defend.*]—Where a suit for alimony was pending, & it was alleged, that an action brought against the husband was so brought for the purpose of defeating the suit for alimony & depriving the wife of her dower, an order was made admitting the wife to defend the action.—FERRIS *v.* FERRIS (1883), 9 P. R. 443.—**CAN.**

mm. —— —— *Service out of jurisdiction.*]—ALLEN *v.* ALLEN (1893), 15 P. R. 458.—**CAN.**

nn. —— —— ——.]—WHEELER *v.* WHEELER (1895), 17 P. R. 45.—**CAN.**

oo. —— —— *Husband in default—Application to cancel judgment.*]—Where deft. in an alimony action, in default in his payments, applies for an order cancelling the judgment against him, he must make a full & frank disclosure of his affairs since the obtaining of the judgment, together with the reasons for his default.—MELLOR *v.* MELLOR (1910), 16 B. C. R. 1; 16 W. L. R. 143.—**CAN.**

pp. —— —— *Evidence—Wife's willingness to cohabit.*]—BATT *v.* BATT & HUGHES (1916), 33 W. L. R. 550; 9 W. W. R. 1040.—**CAN.**

qq. —— —— *Commencement of payments—Death of plaintiff before judgment.*]—In an action for alimony deft. did not appear or defend, & judgment for pltf. was pronounced, on motion therefor, allowing her alimony from the date of issue of the writ of summons, but not before that date. The motion for judgment was heard on Apr. 8; judgment was given on Apr. 12. Pltf. died on Apr. 11; the judge directed that the judgment should be entered as of Apr. 8.—MCFADDEN *v.* MCFADDEN (1918), 42 O. L. R. 599; 14 O. W. N. 116.—**CAN.**

rr. —— —— *Application under Act*

Sect. 1.—*Obligation of husband and wife to maintain one another: Sub-sects.* 1, 2, 3 & 4. *Sect.* 2: *Sub-sect.* 1, *A. & B. (a) & (b); sub-sect.* 2.]

Liability for necessaries supplied to wife.]—*See* Part VIII., Sect. 3, *post.*

SUB-SECT. 2.—LIABILITY UNDER POOR LAW ACTS.

See POOR LAW.

SUB-SECT. 3.—LIABILITY UNDER VAGRANCY ACTS.

See POOR LAW.

SUB-SECT. 4.—CRIMINAL LIABILITY FOR NEGLECT OF DUTY.

604. Amounting to breach of the peace—Forfeiture of recognisance.]—COLMER *v.* COLMER, No. 597, *ante.*

605. Death of wife—Through husband's refusal to provide shelter—Though parties separated by mutual consent—Manslaughter.]—R. *v.* PLUMMER, No. 595, *ante.*

606. Ill-treatment of lunatic wife.]—R. *v.* RUNDLE, No. 591, *ante.*

Under Vagrancy Acts.]—*See* POOR LAW.

SECT. 2.—RIGHT OF CONSORTIUM.

SUB-SECT. 1.—HUSBAND'S RIGHT TO WIFE'S CUSTODY.

A. In General.

607. Whether husband has right to custody of wife.]—A wife cannot, either by herself or her *prochein ami*, bring a *homine replegiando* against her husband, for he has by law a right to the custody of her & may, if he think fit, confine her (*per* CUR.).—ATWOOD *v.* ATWOOD (1718), Prec. Ch. 492; Gilb. Ch. 149; 24 E. R. 220.

Annotations:—**Refd.** *Re* Cochrane (1840), 8 Dowl. 630; *Ex p.* Jackson (1891), 7 T. L. R. 382.

608. —— Wife living apart under deed of separation improperly executed.]—If a husband, by a deed of separation executed by himself, but not executed by either of the trustees, give his wife licence to live where she pleases, he is not justified in entering the house of a third person to reclaim his wife, as being improperly harboured there; & the husband, before doing so, should at least have given distinct notice to the third person, that, as far as by law he could, he revoked the licence.—LEWIS *v.* PONSFORD (1838), 8 C. & P. 687, N. P.

609. ——.]—(1) Where there is a restraint of personal liberty of a *feme covert*, the ct., in *favorem libertatis*, will grant a *habeas corpus*, directed to the husband, to bring up the body of his wife.

(2) Where it appears, from the return made to the writ of *habeas corpus* by the husband, that the restraint on the wife's person arose from her own breach of duty, & that the object & declared purpose of the wife was to escape from her husband, & to live apart from him, as she had previously done for four years, the ct. will restore her to her husband, though there is no reason from her past conduct to apprehend that she will avail herself of her absence from his control to injure either his honour or his property.

The husband has, by the common law of England, a right to the custody & control of his wife: she is under his guardianship, & he is entitled to prevent her from indiscriminate intercourse with the world, by enforcing cohabitation & a

respecting Homesteads.]—The question whether a wife is or is not entitled to alimony should & could more properly be decided in the ordinary action with the usual procedure than in an issue raised by the husband on an application under Act respecting Homesteads, 1915, c. 29, for an order dispensing with her signature.—*Re* HOMESTEAD ACT, C.'S CASE, [1919] 3 W. W. R. 30.—**CAN**

s. *When living apart—Wife in public lunatic asylum.*]—There is no liability on the part of a husband for the support of his wife while confined in a public lunatic asylum where no order has been made under 1882 Act, s. 288, for payment by him towards her maintenance.—R. *v.* ROBINSON (1884), 2 N. Z. L. R. 314 (S. C.).—**N.Z.**

t. —.]—A husband brought an action in the Sheriff Ct., in which he offered his wife aliment, & craved an order on her to remove from the house in which they resided, & interdict against her returning thereto:—*Held:* he was entitled to the order but the ct. would not have pronounced the order if there had not been an offer of aliment made by the husband.—MACLURE *v.* MACLURE, [1911] S. C. 200.—**SCOT.**

a. *Only wife can sue—In respect of failure to maintain.*]—Deft. having seduced pltf.'s sister was induced to marry her by the solicitations of her father, who professed his willingness in such case to support her. Immediately after the marriage deft. left his wife, who, without notice to her husband, went to live with her brother, with the intention of charging her husband with her support:—*Held:* pltf. could not recover.—MANNING *v.* (1873), 9 N. S. R. 261.

CAN.

PART III. SECT. 1, SUB-SECT. 4.

b. *Question of fact.*]—*Held:* there was evidence upon which the judge could properly find against the accused; it is purely a question of fact whether the acts proved are of such a character that the health of the wife is likely, by reason of those acts, to be permanently injured.—R. *v.* BOWMAN (1898), 31 N. S. R. 403.—**CAN.**

c. *Where criminal proceedings commenced—Whether civil proceedings can be substituted—Without notice.*]—An order was made by two justices of the peace, purporting to act under Deserted Wives' Maintenance Act, R. S. O. 1897, c. 167, whereby defts. described as an Indian of the Six Nations, was directed to pay $1 a week for his wife's maintenance; but, it appearing that the information was laid under Criminal Code, s. 242, under which all proceedings were had, & that it was only at the last moment, when the justices were drawing up their minutes of the order, that they decided to proceed under the first named Act without any notice thereof to deft. the order was quashed.—*Re* WOODRUFF (1908), 16 O. L. R. 348; 11 O. W. R. 430.—**CAN.**

d. *What amounts to criminal neglect.*]—*Held:* By a plea of "guilty" deft. admitted that he neglected his wife, but he could not be convicted for that, & his plea could not be construed as an admission that he neglected to provide her with necessaries in circumstances which would render him liable to conviction, nor as an admission that he neglected his children as well as his wife; &, therefore, deft. must be discharged.—R. *v.* CHITNITA (1914), 27 W. L. R. 268; 16 D. L. R. 241.—**CAN.**

e. *Jurisdiction of court—How determined—Whether by domicil.*]—*Held:* upon an application for an order for payment under Deserted Wives Maintenance Act (R. S. O. 1914, Ch. 152), the jurisdiction of the ct. is determined by the place where desertion took place, & not by the husband's domicil.—*Re* HANLAN (1921), 64 D. L. R. 110; 50 O. L. R. 20.—**CAN.**

f. *Refusing to provide necessaries—Whether ground for prosecution.*]—The fact that a wife is maintained by the charity of others or gains her livelihood by her own means or exertions forms no ground for a prosecution under Criminal Code, s. 242 A, which was not intended as a means of enforcing the husband's civil responsibility for the wife's necessaries, either at her own instance or that of those who supply them.—R. *v.* BULLARD, [1924] 1 W. W. R. 326; 1 D. L. R. 956; 41 Can. Crim. Cas. 397 20 Alta. L. R. 107.—**CAN.**

— ——.]—R. MARIOTT (1924), 41 Can. Crim. Cas. 333 57 N. S. R. 44.—**CAN.**

h. —— *Admissibility of evidence.*]—Upon an indictment of the prisoner under Criminal Code, 1892, s. 210 (2), for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement, at the time of the marriage, between him & the person who became his wife, that they were to live at their respective homes & be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance.—R. *v.* ROBINSON (1897), 28 O. R. 407.—**CAN.**

common residence: therefore, where a wife appears at masked balls unprotected by the presence & without the permission of her husband he has a right to restrain her from the power to frequent such places.

A husband, in order to prevent his wife eloping, with a view to live apart from him against his will, may legally confine her in his own dwelling, & deprive her of her liberty for an indefinite time, using no hardship or unnecessary restraint.

Semble: such restraint would amount to imprisonment & be illegal, & the ct. would afford redress, unless the wife makes an undue use of her liberty by going into lewd company or squandering her husband's estate.

When a wife absents herself from her husband on account of no misconduct on his part & he afterwards by stratagem obtains possession of her person, & she declares her intention of leaving him again, whenever she can, he has a right to restrain her of her liberty, until she is willing to return to a performance of her conjugal duties.—*Re* COCHRANE (1840), 8 Dowl. 630; 4 Jur. 534.

Annotations:—*As to* (2) **Overd.** R. *v.* Jackson, [1891] 1 Q. B. 671. **Refd.** R. *v.* Leggatt (1852), 18 Q. B. 781.

610. ——.]—A husband being, until guilty of cruelty, or until judicial separation, entitled to the custody of his wife, & to detain her if she desires improperly to leave him, a *habeas corpus* obtained on her behalf against him, will be discharged in such a case.—*Re* PRICE (1860), 2 F. & F. 263.

611. ——.]—A husband has no right to the custody of his wife's person.

Where a wife had refused to obey a decree for the restitution of conjugal rights obtained by her husband:—*Held:* he had no right to seize her by force & confine her in order to compel her to render him conjugal rights.

The return to this writ [of *habeas corpus*] raises a question of law. Has or has not a husband the right to capture & confine his wife until she consent to render him conjugal rights? . . . The right set up does not exist by the law of England (FRY, L.J.).—R. *v.* JACKSON, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346; 64 L. T. 679; 39 W. R. 407; *sub nom. Re* JACKSON, 55 J. P. 246; *sub nom. Ex p.* JACKSON, 7 T. L. R. 382, C. A.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

B. Restraint of Wife's Liberty.

(a) By Husband.

612. Extends to confinement—But not imprisonment.]—ATWOOD *v.* ATWOOD, No. 607, *ante.*

613. —— ——.]—R. *v.* NEWTON (1728), 1 Barn. K. B. 64; 94 E. R. 44.

614. Wife making undue use of liberty—By squandering husband's estate—Or going into lewd company.]—Where the wife will make an undue use of her liberty either by squandering away the husband's estate or going into lewd company it is lawful for the husband in order to preserve his honour & estate to lay such a wife under restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty (*per* CUR.).—R. *v.* LISTER (1721), 1 Stra. 478; 93 E. R. 645; *sub nom.* LISTER'S CASE, 8 Mod. Rep. 22.

Annotations:—**Refd.** R. *v.* Vane (1747), 1 Wm. Bl. 18; *Re* Cochrane (1840), 8 Dowl. 630; R. *v.* Jackson, [1891] 1 Q. B. 671. **Mentd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; Jee *v.* Thurlow (1824), 4 Dow. & Ry. K. B. 11; Jones *v.* Waite (1839), 5 Bing. N. C. 341.

615. ——.]—*Re* COCHRANE, No. 609, *ante.*

616. —— **Taken in adulterous correspondence.**]—R. *v.* NEWTON (1728), 1 Barn. K. B. 64; 94 E. R. 44.

617. Until performance of conjugal duties—No misconduct by husband.]—*Re* COCHRANE, No. 609, *ante.*

618. ——.]—R. *v.* JACKSON, No. 611, *ante.*

619. To prevent elopement of wife.]—*Re* COCHRANE, No. 609, *ante.*

620. Wife desiring improperly to leave husband.]—*Re* PRICE, No. 610, *ante.*

(b) By Third Parties.

See Nos. 621–625, *post.*

SUB-SECT. 2.—REMEDY FOR UNLAWFUL DETENTION—HABEAS CORPUS.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 248 *et seq.*

621. Detention by third parties—Against wife's will—Must appear in affidavit.]—On a motion for a *habeas corpus* to a private person on the application of a husband, to bring up the body of his wife, the affidavit must state that she is detained against her will.—R. *v.* WISEMAN, *Ex p.* NEWTON (1805), 2 Smith, K. B. 617.

622. —— **Wife swearing peace against husband.**]—The ct. will not deliver up a wife to the husband where she swears the peace against him.—R. *v.* BROOKE & FLADGATE, GREGORY'S CASE (1766), 4 Burr. 1991; 98 E. R. 38.

Annotations:—**Refd.** *Re* Cochrane (1840), 8 Dowl. 630; R. *v.* Jackson (1891), 64 L. T. 679.

623. —— **Wife desiring to live apart—& being under no restraint.**]—Where, upon the return to a writ of *habeas corpus*, a wife voluntarily comes into ct., & declares that she is under no improper control, & desires to return to the house from which she came, the ct. will give her complete protection from any interference on the part of the husband.—*Re* WALMINGTON (1846), 6 L. T. O. S. 315.

624. —— —— ——.]—Where a wife is, by her own desire, living apart from her husband, & is under no restraint, the ct. will not grant a *habeas corpus* on the application of the husband, for the purpose of restoring her to his custody.—R. *v.* LEGGATT (1852), 18 Q. B. 781; 19 L. T. O. S. 201; 16 J. P. 472; 118 E. R. 295; *sub nom. Ex p.* SANDILANDS, 21 L. J. Q. B. 342; 17 Jur. 317.

Annotation:—**Refd.** R. *v.* Jackson, [1891] 1 Q. B. 671.

625. —— **In lunatic asylum.**]—(1) Trespass for assaulting, etc., & carrying away E. then & still being the wife of pltf., & detaining her against his will, etc., whereby pltf. lost her society, etc. Plea, under 8 & 9 Vict. c. 100, that deft. was a proprietor of a house duly licenced under that Act, & that he received an order in pursuance of that Act, for the reception of the said E. as a lunatic (the order, which was set out in the plea, described the patient as E., a person of insane mind); that the order was accompanied by two medical certificates, stating the said E. to be a person of unsound mind; that deft., then as such proprietor, took charge of & received into the house the said E. "then being the patient then named in the said order & certificate" & detained her until her escape from the asylum, & from the detention & custody of deft.; & that deft., within fourteen days after her escape, gently laid his hands upon her, & retook her, & carried her away to the

Sect. 2.—Right of consortium: Sub-sects. 2 & 3, A.

said house, & there detained her, as he lawfully might, which are the said trespasses, etc. :—*Held:* the order & certificate afforded a good justification to deft., although the person named in them was, in fact, not insane.

(2) *Semble:* in such case, where the wife is really not insane, the husband's remedy is by *habeas corpus*, or by application to the comrs.—NORRIS *v.* SEED (1819), 3 Exch. 782; 18 L. J. Ex. 300; 13 L. T. O. S. 122; 13 J. P. 586; 13 Jur. 830; 154 E. R. 1061.

See, further, LUNATICS.

626. Detention by husband—Restraint of wife's personal liberty.]—*Habeas corpus* granted on suggestion that a lady was confined & illtreated by her husband; & the husband bound to the peace & good behaviour.—LEE'S (LADY) CASE (1674), 1 Freem. K. B. 376; 89 E. R. 280; *sub nom.* LEIGH'S (LORD) CASE, 3 Keb. 433; *sub nom.* R. *v.* LEE (LORD), 2 Lev. 128; 3 Salk. 139.

627. —— ——.]—*Re* COCHRANE, No. 609, *ante*.

628. —— ——.]—R. *v.* JACKSON, No. 611, *ante*.

—— ——.]—*See* Sub-sect. 1, B. (*a*), *ante*.

629. —— **No restraint of wife's personal liberty.**]—The ct. will not grant a *habeas corpus* to bring up the body of a *feme covert*, on an affidavit that she is desirous of disposing of her separate property, & that her husband will not admit the necessary parties to see her, & that she is confined by illness, & not likely to live long; nor will the ct. in such circumstances grant a rule to show cause why the necessary parties should not be admitted to see her. If there is no restraint of personal liberty, the remedy, if there is one, is only in equity.—R. *v.* MIDDLETON (1819), 1 Chit. 654.

Annotation:—**Refd.** *Ex p.* McClellan (1831), 1 Dowl. 81.

630. —— **No allegation of cruelty.**]—*Re* PRICE, No. 610, *ante*.

SUB-SECT. 3.—ACTION FOR LOSS OF CONSORTIUM.

A. By Husband.

(a) For Assault on Wife.

631. Right to damages—Necessity for joining wife in action—Assault resulting in death.]—H. brought an action of trespass against B. for assaulting & beating the wife of pltf. whereof she died:—*Held:* the action would not lie, for the King only is to punish felony, except the party brings an appeal, & it would not lie as the wife was dead & she ought to be joined.—HIGGIN'S CASE (1606), Noy, 18; 74 E. R. 989; *sub nom.* HIGGINS *v.* BUTCHER, Yelv. 89; *sub nom.* HUGGINS *v.* BUTCHER, 1 Brownl. 205.

Annotations:—**Consd.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Jackson *v.* Watson, [1909] 2 K. B. 193. **Expld. & Apld.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Dawkes *v.* Coveneigh (1652), Sty. 346; Cooper *v.* Witham (1668), 1 Sid. 375; Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554.

632. —— ——.]—A husband may bring an action of trespass for a battery of the wife *per quod consortium amisit* in his own name.—GUY *v.* LIVESEY (1618), Cro. Jac. 501; 79 E. R. 428.

Annotations:—**Consd.** Woodward *v.* Walton (1807), 2 Bos. & P. N. R. 476. **Refd.** Ditcham *v.* Bond (1814), 2 M. & S. 436; Lynch *v.* Knight (1861), 5 L. T. 291; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

633. —— ——.]—In trespass for beating a wife, both the husband & wife must join in the action; but if it be with a *per quod consortium amisit*, the husband may sue alone; & if any asportation be charged, either the words *cepit et abduxit* or *rapuit* may be used.—HYDE *v.* SCYSSOR (1619), Cro. Jac. 538; 79 E. R. 462.

Annotations:—**Apld.** Young *v.* Pridd (1627), Cro. Car. 89. **Refd.** Lynch *v.* Knight (1861), 5 L. T. 291.

634. —— ——.]—A judgment recovered by a husband alone, for the forcible abduction of the wife, will not bar an action by husband & wife, or by the wife alone after her husband's death, to recover damages for the battery.—YOUNG *v.* PRIDD (1627), Cro. Car. 89; 79 E. R. 679.

635. —— ——.]—A husband may sue alone for an assault upon his wife for damage for loss of her consorting with him.—ANON. (1639), W. Jo. 440; 82 E. R. 231.

636. —— ——.]—Baron may bring trespass for entering his house & beating his wife.—DIX *v.* BROOKES (1717), 1 Stra. 61; 93 E. R. 385.

Annotation:—**Refd.** Hansworth *v.* Fowkes (1833), 2 L. J. K. B. 72.

637. —— **Assault & seduction of wife.**]—Where pltf. complained of a plea of trespass for that deft. with force & arms assaulted & seduced pltf.'s wife whereby he lost the comfort of her society, etc., against the peace, etc., to his damage, etc., whether this be trespass or case (& former authorities have considered it to be case) at any rate a plea of not guilty *infra sex annos* is good on general demurrer.—MACFADZEN *v.* OLIVANT (1805), 6 East, 387; 2 Smith, K. B. 486; 102 E. R. 1335.

638. —— **Summary conviction for assault a bar to action.**]—Deft. assaulted the female pltf., & for such assault was fined by the justices under Offences against the Person Act, 1861 (c. 100), & paid the fine:—*Held:* an action by the husband in respect of the consequential damage to himself by reason of the assault on his wife was barred under sect. 45 of the Act.—MASPER *v.* BROWN (1876), 1 C. P. D. 97; 45 L. J. Q. B. 203; 34 L. T. 254; 40 J. P. 265; 24 W. R. 369.

Annotation:—**Apld.** Holden *v.* King (1876), 47 L. J. Q. B. 75.

639. —— ——.]—A man & his wife, having each been struck by deft., summoned him before justices for the assaults. The justices, after hearing the case, fined deft. for the assault on the man, & committed him to prison for fourteen days in respect of the assault on the woman, who was much hurt. Deft. paid the fine & suffered the imprisonment. An action having been afterwards brought against him for the injuries to the wife, he set up this conviction & imprisonment as a release, under Offences against the Person Act, 1861 (c. 100), s. 45. Pltfs. contended that he had been punished only for a common assault, & not for the distinct offence of an "aggravated" assault & that, therefore, the action in respect of the more serious injury was not "for the same cause" within the sect.:—*Held:* the whole case being before the justices, they had power to deal with it as an "aggravated" assault, & had so

PART III. SECT. 2, SUB-SECT. 3.—A. (a).

632 i. *Right to damages—Necessity for joining wife in action.*]—The husband may sue alone for consequential damage & inconvenience resulting from an assault & battery on his wife.—GEEVES *v.* MARKS (1810), Arm. M. & O. 50.—**IR.**

632 ii. —— ——.]—Pursuer averred that defender had obtained connection with his wife by forcibly overcoming her resistance, & claimed *solatium* in respect thereof. The wife was not a party to the action:—*Held:* the rape was a wrong done to her husband for which he had an independent right to sue.—BLACK *v.* DUNCAN, [1924] S. C. 738.—**SCOT.**

treated it, & deft. was, by sect. 45, released from the action.—HOLDEN *v.* KING (1876), 46 L. J. Q. B. 75; 35 L. T. 479; 41 J. P. 25; 25 W. R. 62.

Annotations :—**Refd.** Crocker *v.* Raymond (1886), 3 T. L. R. 181; Dyer *v.* Munday (1895), 72 L. T. 448.

(*b*) *For enticing away or harbouring Wife.*

640. Right to damages—Admissibility of wife's evidence.]—(1) Verdict not set aside for excessive damages, in action for enticing away pltf.'s wife.

(2) In such action the declaration of the wife not admissible in evidence.

(3) In an action on the case for inducing pltf.'s wife to continue absent it is sufficient to state that "deft. unlawfully & unjustly persuaded, procured & enticed the wife to continue absent, etc., by means of which persuasion, etc., she did continue absent, etc.; whereby pltf. lost the comfort & society of his wife;" without setting forth the means, etc., used by deft.—WINSMORE *v.* GREENBANK (1745), Willes, 577; 125 E. R. 1330.

Annotations :—*As to* (1) **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. *As to* (1) **Refd.** Lynch *v.* Knight (1861), 5 L. T. 291. *As to* (3) **Refd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615. *Generally*, **Mentd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Mogul S.S. Co. *v.* McGregor, Gow (1888), 21 Q. B. D. 544; Allen *v.* Flood, [1898] A. C. 1; Manton *v.* Brocklebank, [1923] 1 K. B. 406.

641. Wife sheltered from ill-treatment of husband.]—No action lies for harbouring pltf.'s wife where she is kept by deft. from a principle of humanity, to secure her from the ill-treatment of her husband.

PART III. SECT. 2, SUB-SECT. 3.—A. (b).

641 i. *Right to damages—Wife sheltered from ill-treatment of husband.*]—Deft. is not liable in damages for having given shelter to the wife, if it be shown that he has acted without *mala fides;* or if the husband's misconduct has justified the wife in leaving him.—MAJOR *v.* MAKETTRA (1880), 1 E. D. C. 47.—**S. AF.**

k. ——.]—An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife from the house of her husband against his will, she continuing absent, whereby he has lost the comfort & help of her society; & substantial damages may be awarded in such a case.—METCALF *v.* ROBERTS (1893), 23 O. R. 130.—**CAN.**

l. —— *Husband & wife living apart.*]—Deft. was liable in damages for having, without good cause, received & harboured pltf.'s wife while living apart from her husband without his consent.—MCKILLOP *v.* KENNEDY, [1919] 1 W. W. R. 186.—**CAN.**

m. —— *Husband & wife living together.*]—Deft. was sued for (1) enticing away & (2) alienating the affections of pltf.'s wife, & the jury assessed damages upon each claim separately:—*Held:* the action was maintainable notwithstanding that his wife was still living with pltf. & that the jury had not found that adultery had been committed; but pltf. had suffered no damages beyond the loss of his wife's affections, love, services, & society, & should be confined to the damages assessed by the jury upon the claim for alienation.—BANNISTER *v.* THOMPSON (1914), 32 O. L. R. 34; 20 D. L. R. 513; 7 O. W. N. 46.—**CAN.**

n. —— ——.]—Pltf.'s wife had been, during his absence overseas, guilty of adultery with deft. Shortly after pltf.'s return, the wife confessed her misconduct, notwithstanding which they remained together in their own house, & were so living when action was brought. The cause of action alleged was alienation of affection, causing loss of *consortium:*—*Held:* while this action was competent, although the husband & wife were living together, no damages for the loss of *consortium*, which was the gist of the action, could properly be awarded upon the evidence adduced, for it was not shown that the husband had lost the affection of his wife or had been deprived of her love, services, & society; & the action was rightly withdrawn from the jury.—BALLARD *v.* MONEY (1920), 47 O. L. R. 132; 52 D. L. R. 371; 17 O. W. N. 472.—**CAN.**

o. —— ——.]—*Held:* the fact that the husband & wife continued to live together did not affect the husband's right to recover if the result of the conduct of which he complained had been to deprive him to a greater or less degree of the comfort, society & services, of his wife, as well as to alienate her affections from him.—MARANGOS *v.* HAROLD (1922), 52 O. L. R. 395; [1923] 4 D. L. R. 520.—**CAN.**

p. —— —— *No proof of adultery.*]—A husband has a right of action for the alienation of the affections of his wife, although he cannot prove adultery & although the wife continues to live with him.—S. *v.* D., [1922] 1 W. W. R. 1275; 65 D. L. R. 253; 15 O. L. R. 366.—**CAN.**

q. —— *After wife's death.*]—Damages were awarded to a surviving husband for improper overtures to his deceased wife, which were discovered, after her death, to have been made, from letters found among her papers.—BANKES *v.* AYRES (1888), 9 N. L. R. 3, 31.—**S. AF.**

r. —— *Assessment of damages.*]—MAGUIRE *v.* MAGUIRE (1921), 64 D. L. R. 564; 50 O. L. R. 579.—**CAN.**

s. *Sufficiency of evidence.*]—Pltf. sought to recover damages against deft for persuading & enticing pltf.'s wife to leave him. The evidence for pltf., afforded in the most extreme view that could be taken, nothing more than ground for suspicion against deft., & was as fully consistent with

It is of no consequence whether the wife's representation was true or false (LORD KENYON).—PHILP *v.* SQUIRE (1791), Peake, 114, N. P.

Annotation :—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

642. —— ——.]—If a wife by ill-treatment & fear of bodily injury is forced to quit her husband's house, any person may safely receive her, & not be subject to an action at the husband's suit.—BERTHON *v.* CARTWRIGHT (1796), 2 Esp. 480, N. P.

Annotation :—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

643. —— **Advice given at request of wife.**]—The question which they [the jury] have to decide is under what circumstances S. left her husband, or stayed away after she had left him? If S. asked defts. for their advice, & they merely approved of her leaving, defts. would not be liable if they gave that advice in good faith. If the advice was gratuitous it might be different. If defts. persuaded her to leave or procured her leaving, then they would be liable. Would S. have left if defts. had not interfered? The evidence goes to show that she would not. In fact the admission of deft. indicates that he did all he could to get her to go. If the jury think that defts. induced, or incited the wife to leave her husband, & in consequence she did leave, they must give such damages as would be reasonable in the circumstances, having regard to some extent to pltf.'s position in the world & what he has lost by deft.'s only doing his duty as a kind friend, as with his having advised the wife to leave her husband:—*Held:* the trial judge should have withdrawn the case from the jury for lack of evidence, & granted a nonsuit.—BRIZARD *v.* HEYNE (1914), 27 W. L. R. 308; 16 D. L. R. 859; 24 Man. L. R. 127.—**CAN.**

t. ——.]—It is sufficient evidence of unlawful harbouring to show a refusal by the owner of the place where the wife is staying, to allow a husband whose wife has left him without sufficient cause to enter such place.—HOMEWOOD *v.* BEATON, [1917] 1 W. W. R. 1309.—**CAN.**

a. —— *Wife's parents defendants.*]—OSBORNE *v.* CLARK (1919), 45 O. L. R. 594; 48 D. L. R. 588; 16 O. W. N. 257.—**CAN.**

b. —— *Inference of enticing.*]—In an action for alienation of affections & enticing:—*Held:* the evidence of what took place between deft. & pltf.'s wife did not, in the circumstances, justify the inference that they had committed adultery, & the fact of adultery, assuming adultery, to have been proved, was insufficient to justify the inference of enticing.—WINFREY *v.* CLUTE, [1922] 2 W. W. R. 733; 66 D. L. R. 140.—**CAN.**

c. —— *Proof of marriage.*]—Strict proof of marriage is not required in an action for alienation of affections & enticing.—WINFREY *v.* CLUTE, [1922] 2 W. W. R. 733; 66 D. L. R. 140.—**CAN.**

d. —— ——.]—The fact & the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman & must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way.—R. *v.* NAZIR KHAN (1913), I. L. R. 36 All. 1.—**IND.**

e. *Whether plaintiff competent witness.*]—Pltf. allowed to be examined as a witness, as the declaration was for harbouring the wife as well as for crim. con.—SMEATH *v.* NESBITT, Mac. 151.—**N.Z.**

Sect. 2.—*Right of consortium: Sub-sect.* 3, *A.* (*b*), (*c*) & (*d*), *B.; sub-sect.* 4. *Sect* 3: *Sub-sect.* 1, *A.* & *B.; sub-sect.* 2. *Part IV. Sect.* 1.]

being deprived of the society of his wife (WRIGHT, J.).—SMITH *v.* KAYE (1904), 20 T. L. R. 261.

Annotation :—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrision, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Lodgard, [1920] P. 126.

Woman enticing away husband, *see* No. 645, *post.*

(*c*) *Slander of Wife.*

See LIBEL & SLANDER.

(*d*) *Negligence causing Injury to Wife.*

See NEGLIGENCE.

B. By Wife.

644. Right to damages — Slander of wife by imputing unchastity—Sufficiency of special damage.]—(1) *Qu.:* whether a wife can maintain an action against a third person for words occasioning to her the loss of the *consortium* of the husband?

(2) If she can, the words must be such that from them the loss of the *consortium* follows as a natural & reasonable consequence.

Where therefore a wife (her husband being joined for conformity as a pltf.) brought an action to recover damages from A. for slander uttered by him to her husband, imputing to her that she had been almost seduced by B. before her marriage, & that her husband ought not to let B. visit at his house, & the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house & return to her father, whereby she lost the *consortium* of her husband:—*Held:* the cause of complaint thus set forth would not sustain the action, for the alleged ground of special damage did not show (in the conduct of the husband) a natural & reasonable consequence of the slander.

(3) The loss by the wife of her maintenance by the husband, occasioned by slander uttered by a third person, may be made the subject of a claim for damages, but such loss cannot be presumed to have so arisen: it must be distinctly averred.—LYNCH *v.* KNIGHT (1861), 9 H. L. Cas. 577; 5 L. T. 291; 8 Jur. N. S. 724; 11 E. R. 854, H. L.

Annotations :—*As to* (1) **Consd.** Davies *v.* Solomon (1871), L. R. 7 Q. B. 112; Gray *v.* Gee (1923), 39 T. L. R. 429. **Refd.** Parkins *v.* Scott (1862), 1 H. & C. 153, Roberts *v.* Roberts (1864), 5 B. & S. 384; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. *Generally*, **Mentd.** Miller *v.* David (1874), L. R. 9 C. P. 118; Riding *v.* Smith (1876), 45 L. J. Q. B. 281; Bowen *v.* Hall (1881), 6 Q. B. D. 333; Chamberlain *v.* Boyd (1883), 11 Q. B. D. 407; Ecklin *v.* Little (1890), 6 T. L. R. 366; Whitney *v.* Moignard (1890), 24 Q. B. D. 630; Wilkinson *v.* Downton, [1897] 2 Q. B. 57; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Hambrook *v.* Stokes, [1925] 1 K. B. 141.

See, now, Slander of Women Act, 1891 (c. 51); LIBEL & SLANDER.

645. —— Woman enticing away husband.]—An action will lie by a married woman against another woman for enticing away pltf.'s husband.—GRAY *v.* GEE (1923), 39 T. L. R. 429.

Enticing away wife, *see* Sub-sect. 3, A. (*b*), *ante.*

SUB-SECT. 4.—CONDITIONAL GIFT INDUCING SEPARATION.

646. Condition attached to legacy — Providing fixed residence for wife.]—Testatrix by her will, in 1867, gave the residue of her property to her niece, the wife of W. (who was carrying on a large business as a corn miller at S.) for life, with gifts over; & by a codicil, in 1869, she directed that all interest given by her will to her niece should go over, should she not cease to reside in S., within eighteen months of testatrix's death:—*Held:* as this was a condition which would require the niece to omit the doing of something that was a duty, it was void.

Testatrix knew that pltf. was married, & that her ceasing to reside at S. could not depend upon herself, but upon her husband. It is a condition imposed upon a person who is not the person that must really perform it. Pltf., a married woman, considering that it was her duty to perform the condition so that there should be no forfeiture of the property, has been obliged to neglect another & more important duty in quitting her husband's house, & going to reside elsewhere (SIR JOHN STUART, V.-C.).—WILKINSON *v.* WILKINSON (1871), L. R. 12 Eq. 604; 40 L. J. Ch. 242; 24 L. T. 314; 19 W. R. 558.

Annotations :—**Mentd.** *Re* Tyler, Tyler *v.* Tyler, [1891] 3 Ch. 252; Neville *v.* Dominion of Canada News Co., [1915] 3 K. B. 556; *Re* Borwick's Settlmt., Woodman *v.* Borwick, *Re* Woodman, [1916] 2 Ch. 304.

647. —— Gift payable while living apart from husband.]—Testator directed his trustee to pay to his sister M. "during such time as she may live apart from her husband, before my son attains the age of twenty-one years, the sum of £2 10*s.* per week for her maintenance whilst so living apart from her husband." M. & her husband were married some years before the date of the will, & never lived apart till some time after the death of testator. Testator's son was living & an infant:—*Held:* the bequest to M. was not to be construed as a gift to her during the joint lives of herself, & her husband until the son attained twenty-one, upon a condition, which might have been rejected as against the policy of the law, that she & her husband should not live together, but as a limited gift of weekly payments to be made during a period the commencement & duration of which were fixed in a way which the law does not allow, & the gift was void.—*Re* MOORE, TRAFFORD *v.* MACONOCHIE (1888), 39 Ch. D. 116; 57 L. J. Ch. 936; 59 L. T. 681; 37 W. R. 83; 4 T. L. R. 591, C. A.

Annotations :—**Consd.** *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470. **Distd.** *Re* Charleton, Bracey *v.* Sherwin (1911), 55 Sol. Jo. 330; *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122. **Mentd.** Corbett *v.* Corbett (1888), 14 P. D. 7; *Re* Wagstaff, Wagstaff *v.* Jalland, [1907] 2 Ch. 35.

648. —— —— Desertion of husband prior to death of testator.]—A gift to a married woman, during such time as her husband should be living apart from her, with a limitation over away from her in the event of their living together again, is not necessarily invalid, as being against public policy, if she was at the date of testator's will already deserted by her husband.—*Re* CHARLETON, BRACEY *v.* SHERWIN (1911), 55 Sol. Jo. 330.

Annotation :—**Folld.** *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122.

PART III. SECT. 2, SUB-SECT. 3.—B.

645 i. *Right to damages—Woman enticing away husband.*]—Where a husband leaves his wife to live in adultery with another woman by her procurement, & lives & continues to live in adultery with her, whereby his affections are alienated from his wife & she is deprived of her means of support, an action lies at common law by the wife against such woman.—QUICK *v.* CHURCH (1893), 23 O. R. 262.—**CAN.**

f. ——.]—*Held:* no action lies by a married woman for loss of *consortium* of her husband. But the right to support from him in such an event is not taken away.—NEY *v.* NEY (No. 1) (1912), 21 O. W. R. 523; 3 O. W. N. 896.—**CAN.**

649. —— —— ——.] — Testator who was living apart from his wife, & was living with S., a married woman who had been deserted by her husband, bequeathed to S. provided she was living with him, testator, at the time of his death an annuity of £750 " provided & so long as she shall not return to live with her husband & provided & so long as she shall not re-marry & subject to her leading a clean moral & respectable life in the opinion of my exors. & trustees " : in the event of S. remarrying or returning to live with her husband testator reduced her annuity to £250 *per annum* :—*Held :* (1) the bequest was a limitation & not upon a condition, & was therefore valid ; (2) the bequest was not void as being contrary to the policy of the law, for its object was not to induce S. to continue to live apart from her husband & not to remarry but to maintain her until she returned to her husband or remarried.—LOVELL, SPARKS *v.* SOUTHALL, [1920] 1 Ch. 122 ; 88 L. J. Ch. 540 ; 122 L. T. 26 ; 35 T. L. R. 715 ; 64 Sol. Jo. 35.

Order for removal under Poor Law Acts.]—*See* POOR LAW.

SECT. 3.—FUNERAL EXPENSES.

SUB-SECT. 1.—LIABILITY OF HUSBAND.

A. In General.

650. Wife living apart — With separate maintenance.]—The estate of a husband in the possession of his devisee is liable to the funeral expenses of testator's wife, although she lived apart from him on a separate maintenance.—BERTIE *v.* CHESTERFIELD (LORD) (1723), 9 Mod. Rep. 31 ; 2 Eq. Cas. Abr. 152, 483 ; 88 E. R. 296.

Annotation :—**Refd.** *In the Goods of* Spitty (1852), 16 Jur. 92.

See, also, BURIALS, Vol. VII., p. 524, Nos. 38–41.

Liability of deceased's estate.]—*See* BURIALS, Vol. VII., p. 523, Nos. 20 *et seq.*

B. Where Wife leaves Separate Property.

651. Right of husband — To resort to wife's separate estate.]—*Qu. :* whether husband has a right to throw wife's funeral expenses upon her separate estate.—GREGORY *v.* LOCKYER (1821), 6 Madd. 90 ; 56 E. R. 1024.

Annotations :—**Refd.** *In the Goods of* Spitty (1852), 18 L. T. O. S. 351 ; Shattock *v.* Shattock (1866), L. R. 2 Eq. 182.

——— ———.]—*See, also,* BURIALS, Vol. VII., p. 523, Nos. 22–24.

SUB-SECT. 2.—LIABILITY OF WIFE.

652. Express contract to pay — Infant widow liable.]—An infant widow is bound by her contract for the furnishing of the funeral of her husband, who has left no property to be administered.—CHAPPLE *v.* COOPER (1844), 13 M. & W. 252 ; 13 L. J. Ex. 286 ; 3 L. T. O. S. 340 ; 153 E. R. 105.

Annotations :—**Refd.** Bradshaw *v.* Beard (1862), 12 C. B. N. S. 344. **Mentd.** Ryder *v.* Wombwell (1868), L. R. 3 [illegible]. 90.

Part IV. Effect of Marriage with Regard to Wife's Property.

NOTE.—*The Married Women's Property Acts have completely changed several branches of the law relating to Husband & Wife & have rendered practically obsolete many of the Common Law & Equity cases decided before those Acts came into force. It has been thought advisable to omit these cases, the Acts having been in force for a considerable time. The Married Women's Property Act*, 1870 (*now repealed*) *came into force on the 9th August*, 1870. *The Married Women's Property Acts*, 1882, 1893, 1907, *now govern the law* (*inter alia*) *as to property acquired by a woman married on or after the 1st January*, 1883.

SECT. 1.—IN GENERAL.

See Married Women's Reversionary Interests Act, 1857 (c. 57).

See Married Women's Property Act, 1882 (c. 75) ; Married Women's Property Act, 1893 (c. 63) ; Married Women's Property Act, 1907 (c. 18) ; Administration of Estates Act, 1925 (c. 23).

653. Property does not pass to husband.]—

653 iii. ——.]—A husband agreed to purchase certain land, & his wife, who was married to him in 1866 without any marriage settlement, & had acquired real estate in 1870 under a deed to her, her heirs & assigns, " to & for her & their sole & only use forever," joined in the agreement for the purpose of securing its being carried out & charged her land with a portion of the purchase money :—*Held :* the wife's land was separate estate & was properly charged.—DAME *v.* SLATER (1891), 21 O. R. 375.—**CAN.**

653 iv. —.]—CONGER *v.* KENNEDY (1896), 26 S. C. R. 397.—**CAN.**

653 v. ——.]—Marriage does not disturb the right or interest in her estate, neither can her husband become seised or entitled jointly with his wife, & acquire some of her rights, simply because they live together on land, any more than he can acquire her estate in other lands owned by her at the time of the marriage.—MYERS

PART III. SECT. 3, SUB-SECT. 1.—A.

g. *General rule.*]—A husband is liable for the funeral expenses of his wife.—*Re* SEA (1905), 11 B. C. R. 324 ; 1 W. L. R. 460.—**CAN.**

PART III. SECT. 3, SUB-SECT. 1.—B.

651 i. *Right of husband—To resort to wife's separate estate.*]—A husband cannot claim to be indemnified therefor out of her separate estate.—*Re* SEA (1905), 11 B. C. R. 324 ; 1 W. L. R. 460.—**CAN.**

651 ii. —— ——.]—A husband cannot recover from his wife's estate money disbursed for the expenses of her funeral unless she has charged them by will upon her estate, or unless there is some statute making such expenses a charge upon her separate estate.—*Re* MONTGOMERY, LUMBERS *v.* MONTGOMERY (1911), 20 Man. L. R. 444.—**CAN.**

h. *Wife's estate liable.*]—The separate estate of a married woman is liable for her funeral expenses.—*Re* GIBBONS (1899), 31 O. R. 252.—**CAN.**

PART IV. SECT. 1.

653 i. *Property does not pass to husband.*]—After the death of a man & his wife, a sum of money was found deposited in a bank at the credit of the wife, which had been so deposited in the lifetime of the husband, but it did not appear by whom. The wife survived the husband ; & after her death, a question being made to whose estate the fund belonged :—*Held :* it belonged to the estate of the wife.—FERRIS *v.* HAMILTON (1862), 9 Gr. 362.—**CAN.**

653 ii. ——.]—A grant to a married woman of a life estate in land does not require the assent of her husband to pass the title to her ; & unless he repudiate it in some way, both will be seised in her right.—NOLAN *v.* FOX (1865), 15 C. P. 565.—**CAN.**

Sect 1.—*In general. Sect.* 2.]

Re PARSONS, STOCKLEY *v.* PARSONS, No. 669, *post.*

654. ——.]—Before Married Women's Property Act a married woman could at law have no personal property, but, in order to secure to her the equitable interest in property, it was vested in trustees for her, & then at law the property was not hers but that of the trustees. If money was bequeathed to a married woman without the intervention of trustees it went to her husband. Married Women's Property Act was passed to alter this state of the law, & now by virtue of that Act money & other personal property of a married woman does not pass to her husband. For this purpose a married woman & her husband are no longer in law one person; they are two persons, just as if they were two men (LORD ESHER, M.R.).—RAMSAY *v.* MARGRETT, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 407, C. A.

Annotations:—**Refd.** *Re* Satterthwaite, *Ex p.* Trustee (1895), 2 Mans. 52; Withers *v.* Berry (1895), 39 Sol. Jo. 559; *Re* Reis, *Ex p.* Clough, [1904] 1 K. B. 451; *Re* Magnus, *Ex p.* Salaman (1910), 80 L. J. K. B. 71; French *v.* Gething, [1922] 1 K. B. 236. **Mentd.** Clapham *v.* Ives (1904), 91 L. T. 69; Rogers, Eungblut *v.* Martin (1910), 103 L. T. 527; *Re* Lavey *Ex p.* Trustee, [1918–19] B. & C. R. 116; Canvey Island Comrs. *v.* Preedy, [1922] 1 Ch. 179.

655. Husband & wife separate persons in law.]—RAMSAY *v.* MARGRETT, No. 654, *ante.*

656. Rights of husband surviving wife intestate—Personalty.]—Married Women's Property Act, 1882 (c. 75), has not altered the devolution of the undisposed of separate personalty of a married woman. Accordingly, on the death of a married woman without disposing of her separate personalty, the quality of separate property ceases, & the right of the husband to such undisposed of personalty accrues as if the separate use had never existed. A married woman who has a power of appointment over certain trust funds, & was also possessed of separate estate, her title to which had accrued before Married Women's Property Act, 1882 (c. 75), died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund & appointed exors., but made no disposition of her separate property. Probate of the will was granted to the exors. according to the altered practice introduced by the Probate Rules of 1887, *i.e.* in the ordinary form without any exception or limitation:—*Held:* (1) on the death of testatrix the title of her husband to her undisposed of separate estate accrued, & the exors. of her will became trustees of it for him, & not for the next of kin of testatrix; (2) the expenses of proving the will, including the probate duty, must be apportioned ratably between the appointed & undisposed of property in the same manner in which they would have been apportioned under a grant *cæterorum* before the change in the form of the grant: but the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband & the next of kin.—*Re* LAMBERT'S ESTATE, STANTON *v.* LAMBERT (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

Annotation:—*As to* (1) **Refd.** Surman *v.* Wharton, [1891] 1 Q. B. 491.

657. —— ——.]—(1) Since the coming into operation of the amended rules 15 & 18 of the Probate Rules (Non-Contentious), which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.

(2) Upon the true construction of the will the property in dispute was not included in the bequest, &, therefore, the question of assent did not arise.—*Re* ATKINSON, WALLER *v.* ATKINSON, [1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505; 47 W. R. 469; 43 Sol. Jo. 455, C. A.

Annotations:—*As to* (1) **Refd.** Elliot *v.* North, [1901] 1 Ch. 424; *Re* Natham, Herring *v.* Spyer (1907), 51 Sol. Jo. 428.

658. Tenancy by the curtesy.]—Notwithstanding Married Women's Property Act, 1882 (c. 75), ss. 1 (1), 5, a husband is still entitled, on the death of his wife, to an estate by the curtesy in her undisposed of real estate.—HOPE *v.* HOPE, [1892] 2 Ch. 336; 61 L. J. Ch. 441; 66 L. T. 522; 40 W. R. 522; 8 T. L. R. 504; 36 Sol. Jo. 428.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 33, 45–47.

659. Release of general power of appointment—By wife.]—Testator, who died before 1882, by his will gave property to trustees upon trust to pay the income equally to two daughters for their respective lives for their separate use, & as to the capital declared that the same, being equally divided, should be subject to their respective appointments by will, & assigned & paid over accordingly, & in default of appointment, to their exors., administrators, or assigns respectively. The trustees had some prior payments to make out of the capital. The two daughters married after 1882:—*Held:* on releasing their powers of appointment they were entitled to a declaration that they were entitled to their shares as absolute owners.

The direction to pay to the exors., administrators, or assigns of the life-tenant is, in such a connection, equivalent to a gift of the reversionary interest to the life-tenant herself: & by virtue of the Married Women's Property Act, 1882 (c. 75), the reversionary interest in such a case now coalesces with the life interest, while the testamentary power can be released. There is, however, no occasion for an express release of the power where the capital is actually paid over to the married woman, a sufficient release being implied from the circumstance.—*Re* DAVENPORT, TURNER *v.* KING,

v. RUPORT (1904), 4 O. W. R. 365; 25 C. L. T. 8; 8 O. L. R. 668.—**CAN.**

653 vi. ——.]—ADAMS *v.* ADAMS' TRUSTEES (1894), 21 R. (Ct. of Sess.) 676; 31 Sc. L. R. 572; 1 S. L. T. 597.—**SCOT.**

k. —— *Husband has interest during coverture.*]—EMRICK *v.* SULLIVAN (1865), 25 U. C. R. 105.—**CAN.**

l. *Real estate owned before* 1872.]—Sect. 1 of 35 Vict. c. 16, so far as regards "the real estate of any married woman which is owned by her at the time of her marriage," applies only to marriages which take place after the passing of the Act.—DINGMAN *v.* AUSTIN (1873), 33 U. C. R. 190.—**CAN.**

m. *Real estate acquired after* 1872.]—Where real estate is acquired by a married woman after the passing of Married Woman's Property Act of 1872, such property is liable for her contracts to the same extent as if she were a *feme sole;* but the ct. will not make any personal order against her, as would be done in the case of a man or a *feme sole.*—KERR *v.* STRIPP (1876), 24 Gr. 198.—**CAN.**

n. *Wife's goods—Used on husband's farm—Belong to husband.*]—Certain moneys were settled to the separate use of a married woman, subject to her power of appointment. She appointed to her own use, received the moneys & with them purchased certain cattle & farm stock which, with her assent, were used by her husband upon a farm. In an interpleader issue between the married woman & the execution creditors of the husband:—*Held:* the goods belonged to the husband by virtue of the marriage, notwithstanding 43 Vic. (D.), c. 25, ss. 57 to 62.—BRITTLEBANK *v.* GRAY-JONES, GRAY-JONES, CLAIMANT (1888), 5 Man. L. R. 33.—**CAN.**

[1895] 1 Ch. 361 ; 64 L. J. Ch. 252 ; 71 L. T. 875 ; 43 W. R. 217 ; 13 R. 167.

Administration bond by married women.]—*See* EXECUTORS, Vol. XXIII., p. 218, No. 2613.

Actions by & against.]—*See* Part XII., *post.*

SECT. 2.—INTERESTS CONTINGENT, REVERSIONARY AND IN REMAINDER.

See Married Women's Property Act, 1882 (c. 75), s. 5.

660. Interest vested prior to 1882 — Possession after 1882—Whether separate property of wife.]—Property to which a married woman was, at the commencement of Married Women's Property Act, 1882 (c. 75), entitled in reversion or remainder, & which since the Act has fallen into possession, is within Married Women's Property Act, 1882 (c. 75), s. 5, & may be transferred & paid to her upon her separate receipt.—BAYNTON *v.* COLLINS (1884), 27 Ch. D. 604 ; 53 L. J. Ch. 1112 ; 51 L. T. 681 ; 33 W. R. 41.

Annotations :—**N.F.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300. **Folld.** *Re* Hughes' Trust, [1885] W. N. 62 ; *Re* Thompson & Curzon (1885), 29 Ch. D. 177. **Consd.** *Re* Adames' Trusts (1885), 54 L. J. Ch. 878 ; *Re* Tucker, Emanuel *v.* Parfitt (1885), 54 L. J. Ch. 874. **Overd.** Reid *v.* Reid (1886), 31 Ch. D.

661. —Married Women's Property Act, 1882 (c. 75), s. 5, applies only to property of a married woman, her title to which accrues for the first time after the commencement of the Act ; it does not, therefore, include an interest to which she was contingently entitled before, but which falls into possession after, the Act.—*Re* ADAMES' TRUSTS (1885), 54 L. J. Ch. 878 ; 53 L. T. O. S. 198 ; 33 W. R. 834.

Annotation :—**Folld.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300.

662. —— —— ——.]—Testator, who died in 1875, devised his real estate to his wife for life with remainder to his children. One daughter married in 1878 & the tenant for life died in 1884 :—*Held :* under the operation of Married Women's Property Act, 1882 (c. 75), s. 5, the married woman's share in the estate was her separate property & could be disposed of by her without the concurrence of her husband.—*Re* THOMPSON & CURZON (1885), 29 Ch. D. 177 ; 54 L. J. Ch. 610 ; 52 L. T. 498 ; 33 W. R. 688.

Annotations :—**Folld.** *Re* Hughes' Trusts, [1885] W. N. 62. **Refd.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300 ; *Re* Tucker, Emanuel *v.* Parfitt (1885), 54 L. J. Ch. 874.

663. —— —— ——.]—Property to which a married woman was, at the commencement of Married Women's Property Act, 1882 (c. 75), entitled for a vested interest in remainder, & which afterwards became an interest in possession, is not property "her title to which has accrued after the commencement of the Act" within sect. 5.—*Re* TUCKER, EMANUEL *v.* PARFITT (1885), 54 L. J. Ch. 874 ; 52 L. T. 923 ; 33 W. R. 932 ; 1 T. L. R. 597.

Annotations :—**Folld.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300 ; Reid *v.* Reid (1886), 31 Ch. D. 402. **Refd.** *Re* Adames' Trusts (1885), 54 L. J. Ch. 878.

664. —.]—*Re* HUGHES' TRUSTS, [1885] W. N. 62.

Annotations :—**Refd.** *Re* Hobson's Settlmt., Webster *v.* Rickards (1885), 55 L. J. Ch. 300 ; *Re* Tucker, Emanuel *v.* Parfitt (1885), 54 L. J. Ch. 874 ; Reid *v.* Reid (1886), 31 Ch. D. 402.

665. —— —— ——.]—Property to which a married woman was, at the commencement of Married Women's Property Act, 1882 (c. 75), entitled for a vested interest in remainder, & which on Oct. 4, 1884, became an interest in possession, is not property "her title to which has accrued after the commencement of the Act" within sect. 5.—*Re* HOBSON'S SETTLEMENT, WEBSTER *v.* RICKARDS (1885), 55 L. J. Ch. 300 ; 34 W. R. 195 ; 2 T. L. R. 187.

666. ——————.]—Property to which at the time of the commencement of Married Women's Property Act, 1882 (c. 75), a woman married before the Act was entitled subject to a life estate, but not for her separate use :—*Held :* not to become her separate estate by falling into possession after the commencement of the Act. If a woman married before the commencement of Married Women's Property Act, 1882 (c. 75), has before the commencement of the Act acquired a title, whether vested or contingent, & whether in reversion or remainder, to any property, such property is not made her separate estate by sect. 5 of the Act, though it falls into possession after the Act. *Baynton* v. *Collins*, No. 660, *ante*, overd.—REID *v.* REID (1886), 31 Ch. D. 402 ; 55 L. J. Ch. 294 ; 54 L. T. 100 ; 34 W. R. 332 ; 2 T. L. R. 254, C. A.

Annotations :—**Consd.** *Re* Cuno, Mansfield *v.* Mansfield (1889), 43 Ch. D. 12. **Refd.** *Re* Armstrong (1886), 2 T. L. R. 389 ; *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148 ; *Re* Parsons, Stockley *v.* Parsons (1890), 45 Ch. D. 51. **Mentd.** The Ydun, [1899] P. 236.

667. —— —— **Property converted before possession.**]—If a woman married before the commencement of Married Women's Property Act, 1882 (c. 75), has before the commencement of the Act acquired a title in reversion to land, & the land is converted into money after the commencement of the Act but before the property falls into possession, the conversion gives no new title to the married woman & the property is not made her separate estate by Married Women's Property Act, 1882 (c. 75), s. 5 (1).—*Re* BACON, TOOVEY *v.* TURNER, [1907] 1 Ch. 475 ; 76 L. J. Ch. 213 ; 96 L. T. 690.

668. —— —— **Effect of marriage settlement prior to possession.**]—By a marriage settlement executed by husband & wife in 1896, after a recital that provision should be made for the settlement of the future acquired property of the wife, it was agreed that if the wife during the coverture or the husband in her right should become by any means, except purchase for valuable consideration, seised, possessed, or entitled of or to any real or personal property or any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except certain property which did not include the property in question, such property should be assured by the wife & all other necessary parties to the trustees upon trust that they should, but as to reversionary property not until it fell into possession unless it should appear to the trustees that an earlier title would be beneficial, sell & convert the same & should hold the proceeds upon trusts therein declared in favour of the wife & husband & their children.

PART IV. SECT. 2.

660 i. *Interest vested prior to* 1882—*Possession after* 1882—*Whether separate property of wife.*]—Property, to which a woman married before the passing of Married Women's Property Act, 1882, has acquired a contingent title before the Act does not become her separate property by its falling into possession after the Act.—*Re* TENCH'S TRUSTS, *Ex p.* M'CORMACK (1885), 15 L. R. Ir. 406.—**IR.**

660 ii. —— —— ——.]—*Re* BEAUPRE'S TRUSTS (1888), 21 L. R. Ir. 397, 404.—**IR.**

660 iii. —— —— ——.]—HURLEY *v.* HURLEY, [1910] 1 I. R. 86. **IR.**

Sect. 2.—*Interests contingent, reversionary and in remainder. Sect.* 3.]

At the date of the marriage the wife was entitled in reversion under her parents' marriage settlement to certain policy moneys & the proceeds of sale of certain furniture, subject to the life interests of her parents therein. By the deaths of her parents during her coverture the wife became entitled in possession to the property to which at the date of her marriage she was so entitled in reversion :—*Held :* (1) upon the assumption that the property was the property of the wife & therefore capable of being bound by her covenant, that upon the true construction of the settlement, notwithstanding that at the date of her marriage she was entitled to the property in reversion, yet, as she became entitled thereto in possession during the coverture, the property was, within the meaning of the covenant, property to which during the coverture the wife might become entitled in possession, & was therefore caught by the settlement ; (2) if the property were not bound by the covenant of the wife, then, as the effect of sect. 19 of the Married Women's Property Act, 1882 (c. 75), is to render sect. 2 of that Act as if it were non-existent in the case of a settlement which would have bound the property but for that Act, the property on falling into possession belonged to the husband in right of his wife & he became bound by his covenant to settle the same.—*Re* CROOK'S SETTLEMENT, *Re* GLASIER'S SETTLEMENT, CROOK *v.* PRESTON, [1923] 2 Ch. 339 ; 92 L. J. Ch. 495 ; 129 L. T. 284.

669. Spes successionis — Not a contingent interest.]—A *spes successionis* is not a title to property by English law. A woman, married before Married Women's Property Act, 1882 (c. 75), who has a mere *spes successionis* to property, as one of a class of possible next of kin, has not a "contigent title" within the meaning of sect. 5 of that Act. A testator, who died in 1879, bequeathed a sum of money to trustees, upon certain trusts, & subject thereto in trust for "such person or persons as at the time of the failure of the preceding trusts would be my next of kin, & entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, if I had then died intestate." The preceding trusts failed on May 21, 1886. A woman, married in 1857, was one of the persons who would have been next of kin of testator if he had died on May 21, 1886. She made a will, dated in 1889, & died in the same year, leaving her husband surviving :—*Held :* the property of the married woman under the gift in favour of testator's next of kin first accrued to her in title & interest on May 21, 1886, &, therefore, under Married Women's Property Act, 1882 (c. 75), s. 5, she was entitled to it for her separate use, & it passed under her will.—*Re* PARSONS, STOCKLEY *v.* PARSONS (1890), 45 Ch. D. 51 ; 59 L. J. Ch. 666 ; 62 L. T. 929 ; 38 W. R. 712.

Annotations :—**Refd.** *Re* Johnson, Moore *v.* Johnson, [1891] 3 Ch. 48 ; Allcard *v.* Walker, [1896] 2 Ch. 369 ; *Re* Ellenborough, Towry Law *v.* Burne, [1903] 1 Ch. 697 ; *Re* Green, Green *v.* Meinall, [1911] 2 Ch. 275 ; *Re* Mudge, [1914] 1 Ch. 115. **Mentd.** Molyneux *v.* Fletcher, [1898] 1 Q. B. 648.

670. —— ——.]—Testatrix by her will, dated in 1862, gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she should die without issue, which event happened, "her share to go to her next of kin as if she had not been married." In 1866 J., another daughter of testatrix, married, & by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W. died in 1912 without issue, & leaving J. her sole next of kin :—*Held :* (1) the interest which J. had at the date of the settlement in the settled share of W. was either a mere *spes successionis*, or, having regard to the authorities, including *Re Parsons, Stockley* v. *Parsons*, No. 669, *ante*, must be treated as such, & therefore was not assignable at law ; (2) inasmuch as the covenant did not relate to any defined *spes successionis* it was too vague to be enforceable in equity ; & consequently the property to which J. became entitled as next of kin of her sister was not comprised in the settlement.—*Re* MUDGE, [1914] 1 Ch. 115 ; 83 L. J. Ch. 243 ; 109 L. T. 781 ; 58 Sol. Jo. 117, C. A.

Annotation :—*As to* (1) **Refd.** *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345.

SECT. 3.—EFFECT OF STATUTE ON PRIOR SETTLEMENTS OR DISPOSITIONS.

See Married Women's Property Act, 1882 (c. 75), ss. 2, 5, 19 ; Married Women's Property Act, 1907 (c. 18), s. 2.

671. Settlements exempted from statute—Covenant to settle after acquired property.]—A marriage settlement made in 1862 contained an agreement for the settlement of any future acquired property of the wife to a specified amount, except interests settled & limited to her separate use. The wife after the commencement of Married Women's Property Act, 1882 (c. 75), became entitled absolutely to a bequest above the specified amount, without any limitation as to separate use :—*Held :* by Married Women's Property Act, 1882 (c. 75), s. 19, the marriage settlement was exempted from sect. 5 & other sects. ; & the bequest to the wife came within the covenant to settle future acquired property & must be dealt with as if the Act had never been passed.—*Re* STONOR'S TRUSTS (1883), 24 Ch. D. 195 ; 52 L. J. Ch. 776 ; 48 L. T. 963 ; 32 W. R. 413.

Annotations :—**Distd.** *Re* Qucade's Trusts (1885), 54 L. J. Ch. 786. **Apprvd.** *Re* Whitaker, Christian *v.* Whitaker (1887), 34 Ch. D. 227. **Consd.** Hancock *v.* Hancock (1888), 38 Ch. D. 78. **Refd.** *Re* Armstrong (1886), 2 T. L. R. 389.

672. —— ——.]—By a post-nuptial settlement made in 1847, it was agreed & declared by & between the husband, wife & trustees, & the husband covenanted, that all property to which the wife, or her husband in her right, was then or should during the coverture become possessed of or entitled to should be assured upon trust for the wife for life to her separate use without power of anticipation, & after her death upon trusts in favour of the husband & issue of the marriage. During the coverture, property of the wife was reduced into possession by the husband, & settled upon the trusts of the settlement. In 1883 the wife became entitled, as one of the next of kin of a deceased testator, to a share of undisposed of personalty :—*Held :* the operation of Married Women's Property Act, 1882 (c. 75), s. 5, conferring on women married before Jan. 1, 1883, the right to hold & dispose of as their separate property all real & personal property accruing after that date, was not displaced by sect. 19 of the Act, which saves "any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman" ; but that sect. 19 referred only to settlements made by & binding upon married women ; &, therefore, that the settle-

ment, so far as it purported to be made by the wife was entitled to the undisposed of personalty as her separate property.—*Re* QUEADE'S TRUSTS (1885), 54 L. J. Ch. 786; 53 L. T. 74; 33 W. R. 816; 1 T. L. R. 448; 29 Sol. Jo. 99.

Annotations:—**Distd.** *Re* Whitaker, Christian *v.* Whitaker (1887), 34 Ch. D. 227. **N.F.** Hancock *v.* Hancock (1888), 38 Ch. D. 78. **Consd.** Buckland *v.* Buckland, [1900] 2 Ch. 534. **Reld.** Stevens *v.* Trevor-Garrick (1893), 62 L. J. Ch. 660. **Mentd.** Bateman *v.* Faber (1897), 77 L. T. 576.

673. —— ——.]—By ante-nuptial settlement of 1873 the husband & wife covenanted to settle after acquired property of the wife other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case the value of £1,000, "or any property belonging, or which may be given or bequeathed to or settled upon her for her separate use, all which excepted articles & property shall belong to the wife & shall or may be used, enjoyed, & disposed of by her accordingly as if she were not under coverture." Under the will, made in 1884, of her father, who died in the same year, the wife became entitled to a share of personalty exceeding £1,000, & not limited to her separate use:—*Held:* having regard to Married Women's Property Act, 1882 (c. 75), s. 10, the effect of which is to limit the operation of sect. 5 by preventing the provisions of marriage settlements from being interfered with or affected by withdrawing therefrom property, which independently of the Act must have been brought into settlement, the share of the wife under her father's will had not been made separate estate so as to fall within the exception, but was bound by the covenant to settle after acquired, other than separate, property.

Semble: upon the construction of the covenant, independently of sect. 19, the property in question was not within the exception.—*Re* WHITAKER, CHRISTIAN *v.* WHITAKER (1887), 34 Ch. D. 227; 56 L. J. Ch. 251; 56 L. T. 34; 35 W. R. 217; 3 T. L. R. 284, C. A.

Annotations:—**Folld.** Hancock *v.* Hancock (1888), 38 Ch. D. 78. **Mentd.** *Re* Smith, Clements *v.* Ward (1887), 56 L. T. 850.

674. —— ——.]—The effect of Married Women's Property Act, 1882 (c. 75), s. 19, is so to modify the operation of Married Women's Property Act, 1882 (c. 75), s. 5, that the persons interested under a settlement of the property of a married woman are not by sect. 5 deprived of any benefit to which they would have been entitled under the settlement in case sect. 5 had not been enacted. An ante-nuptial settlement executed in 1870, contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, on the death of the wife's mother, the wife became entitled under her will to a share of the mother's personal estate, which was not limited by the will to the separate use of the wife:—*Held:* this share was, notwithstanding the Act of 1882, bound by the covenant in the settlement.—HANCOCK *v.* HANCOCK (1888), 38 Ch. D. 78; 57 L. J. Ch. 396; 58 L. T. 906; 36 W. R. 417; 4 T. L. R. 373, C. A.

Annotations:—**Apld.** *Re* Shelton, Chancellor *v.* Brown (1891), 7 T. L. R. 638; Stevens *v.* Trevor-Garrick, [1893] 2 Ch. 307; Buckland *v.* Buckland, [1900] 2 Ch. 534.

675. —— **Settlement by infant wife.**]—A female infant entitled under a will to a share of residuary personalty contingently on her attaining twenty-one, married before but came of age after the commencement of Married Women's Property Act, 1882 (c. 75). On her marriage a settlement of her property not sanctioned under Infants Settlements Act, 1845 (c. 43), was made under which she took the first life estate with a restraint on anticipation. On her coming of age the fund was paid to her under an order of the ct. The Ct. of Appeal reversed this order, & declared her liable to refund on the ground that the fund was subject to the settlement. She refunded part but was unable to refund the remainder which she had spent. After this the exors. of the will paid to the trustees of the settlement an arrear of income which they had in hand:—*Held:* so much of this income as accrued between the married woman's attaining twenty-one & the order declaring her ability to refund must be retained in part satisfaction of her liability to refund.—*Re* DIXON, DIXON *v.* SMITH (1887), 35 Ch. D. 4; 56 L. J. Ch. 773; 57 L. T. 94; 35 W. R. 742, C. A.; *previous proceedings* (1886), 21 L. J. N. C. 42, C. A.

Annotation:—**Reld.** *Re* Lumley, Hood-Barrs *v.* Cathcart (1894), 70 L. T. 622.

676. —— ——.]—Covenant by husband & infant wife in marriage settlement to settle her after acquired property. Married took place in 1880 & a legacy bequeathed in 1890. Argued that the legacy, by virtue of Married Women's Property Act, 1882 (c. 75), s. 5, was the wife's separate property: & that wife could disaffirm the settlement:—*Held:* on the authority of *Hancock* v. *Hancock*, No. 674, *ante*, the legacy was bound by the settlement.—*Re* SHELTON, CHANCELLOR *v.* BROWN (1891), 7 T. L. R. 638.

677. —— —— **Repudiation on attaining full age.**]—An infant, being entitled on her marriage to a sum of £1,000, by her settlement, in Apr. 1890, joined with her intended husband in assigning the same to trustees, to be held by them upon the usual trusts for the benefit of herself, her husband, & children. In Oct. 1891, the lady attained twenty-one, when she disaffirmed the settlement, & then claimed to be absolutely entitled to this sum of £1,000:—*Held:* the reasons given in *Hancock* v. *Hancock*, No. 674, *ante*, as to the effect of Married Women's Property Act, 1882 (c. 75), s. 19, on the operation of sect. 5 of that Act, were equally applicable to modify the operation of sect. 2, &, consequently, the sum of £1,000 was effectually included in the settlement by the husband's assignment, & could not be dealt with by the wife, notwithstanding her repudiation of the settlement when she attained twenty-one.—STEVENS *v.* TREVOR-GARRICK, [1893] 2 Ch. 307; 62 L. J. Ch. 660; 69 L. T. 11; 41 W. R. 412; 3 R. 468.

Annotations:—**Folld.** Buckland *v.* Buckland, [1900] 2 Ch. 534. **Apld.** *Re* Crook's Settlmt., *Re* Glasier's Settlmt., Crook *v.* Preston, [1923] 2 Ch. 339.

678. —— —— ——.]—The principle stated in *Hancock* v. *Hancock*, No. 674, *ante*, namely, that Married Women's Property Act, 1882 (c. 75), s. 19, prevents sect. 5 of that Act from interfering with any settlement which would have bound the property if the Act had not been passed, applies also to sect. 2 & to settlements by which the wife is not bound; An ante-nuptial settlement made between the intended husband, the intended wife, an infant, & trustees recited an agreement that property belonging to the wife & then in the hands of the trustees should be settled. By the *testatum* the wife, in pursuance of the agreement, declared that the trustees should hold the property on certain trusts. There was no declaration or covenant by the husband. On attaining twenty-

Sect. 3.—*Effect of statute on prior settlements or dispositions. Sects.* 4, 5 & 6: *Sub-sects.* 1 & 2

one the wife repudiated the settlement :—*Held :* there was an agreement between the husband & the trustees, & the recital of that agreement was operative as between the parties to it, although unaccompanied by any obligation binding on the infant wife. The husband's marital right was affected by the agreement ; there was, therefore, a settlement which would have bound the property if Married Women's Property Act, 1882 (c. 75), had not been passed, & the wife was not entitled to have the trust funds transferred to her as her separate estate.—BUCKLAND *v.* BUCKLAND, [1900] 2 Ch. 534 ; 69 L. J. Ch. 648 ; 82 L. T. 759 ; 48 W. R. 637 ; 16 T. L. R. 487 ; 44 Sol. Jo. 593.

Annotation :—**Apld.** *Re* Crook's Settlmt., *Re* Glasier's Settlmt., Crook *v.* Preston, [1923] 2 Ch. 339.

See, now, Married Women's Property Act, 1907 (c. 18), s. 2.

679. Contingent interest to wife—Separate use added by statute.]—By a marriage settlement made in 1878 a fund was settled upon trust to pay the income to the wife for life, & during her then intended coverture such income was to be for her separate use, & after her death the fund was to be held in default of children in trust for such persons as the wife should during coverture by will, & when discovert by deed or will appoint, & in default, if the wife should survive the husband, in trust for her, her exors., administrators, & assigns. The husband died in 1880. There was no issue of the marriage. The lady married again, after Married Women's Property Act, 1882 (c. 75), & no settlement was made on that marriage. Upon a summons taken out by her & her second husband to have it determined whether she could release the power of appointment by will given to her by the settlement, & call for a transfer of the settled property :—*Held :* if the lady had come to the ct. immediately before her second marriage she would have been entitled to have the settled property transferred to her, & Married Women's Property Act, 1882 (c. 75), had added the incident of separate use to her interest in such property, so that the lady & her husband were now entitled to have that property made over to them without any release by her of the power.—*Re* ONSLOW, PLOWDEN *v.* GAYFORD (1888), 39 Ch. D. 622 ; 57 L. J. Ch. 940 ; 59 L. T. 308 ; 36 W. R. 883.

Annotation :—**Consd.** *Re* Davenport, Turner *v.* King (1891), 64 L. J. Ch. 252.

680. —— ——.]—*Re* DAVENPORT, TURNER *v.* KING, No. 659, *ante.*

681. —— ——.]—By a marriage settlement made prior to Married Women's Property Act, 1882 (c. 75), a fund was settled upon a lady for life to her separate use without power of anticipation, & after her decease, in the event of her surviving her husband, for herself, her exors., administrators, & assigns, but in the event of the husband surviving her, as she should appoint, & in default of appointment to her next of kin. By his will made subsequently to the Act her father bequeathed a third of his residuary estate to the trustees of the settlement to be held upon the trusts therein expressed & declared. On a summons taken out by the lady asking for a declaration that her contingent interest under the will was held by her to her separate use :—*Held :* the incident of separate use was added by the statute, & her contingent interest under the will was therefore disposable by her.—*Re* WILLIAMS, WILLIAMS *v.* GRANT (1897), 76 L. T. 150.

SECT. 4.—PROPERTY ACQUIRED BETWEEN 1870 AND 1883.

See Married Women's Property Act, 1870 (c. 93), ss. 1-9 ; Married Women's Property Act, 1882 (c. 75), s. 22.

682. Fund in court—Payment out.]—A fund which had been paid into ct. under Lands Clauses Act, 1845 (c. 18), was subject, during the life of a married woman, to the trusts of her settlement, & belonged in remainder to her daughter, who was a widow. *Under the settlement, the married woman had a general power of appointing her interest in the fund. On a petition presented by the mother, the daughter, & the husband of the mother, & praying that the fund might be paid out of ct. & transferred into the name of the mother under Married Women's Property Act, 1870 (c. 93), s. 3, an order was made in accordance with the prayer.*—*Re* BARTHOLOMEW'S ESTATE (1870), 23 L. T. 433 ; 19 W. R. 95.

683. —— ——.]—On a petition presented under Married Women's Property Act, 1870 (c. 93), by a husband & wife, the ct. ordered a fund in ct., to which the wife was entitled, to be transferred to her separate use, in the books of the Bank of England.—*Re* BUTLIN'S TRUST (1870), 23 L. T. 523 ; 19 W. R. 241.

684. Company stock—Transfer to own name—Investigation of title by company.]—Under Married Women's Property Act, 1870 (c. 93), s. 4, on application by a married woman to a joint-stock or incorporated company to register stock in her name as a "married woman entitled to her separate use," the co. must investigate the title ; & if they refuse to register, the ct., unless a flaw in the title be shown, will compel them by *mandamus* to register.—R. *v.* CARNATIC RY. CO. (1873), L. R. 8 Q. B. 299 ; 42 L. J. Q. B. 169 ; 28 L. T. 413 ; 21 W. R. 621.

Annotation :—**Mentd.** R. *v.* Charnwood Forest Ry. (1884), Cab. & El. 419.

685. —— —— **Sum under £200.**]—Married Women's Property Act, 1870 (c. 93), does not empower a married woman, entitled under sect. 7 to a sum of stock for her separate use, to transfer such stock without the concurrence of her husband, unless & until the stock has been placed, under sect. 3, in her name as a married woman entitled for her separate use. A sum of consols was standing in the name of three persons, one of whom was a married woman, who had been deserted by her husband, & was entitled beneficially to the stock under Married Women's Property Act, 1870 (c. 93), s. 7. Those persons applied to the Bank of England to be permitted to transfer the stock without the concurrence of the husband of the married woman ; & the bank having refused :—*Held :* the bank could not be compelled to permit such a transfer.

It does appear to me that the present Act gives no power to contract to a married woman which she did not possess before (JESSEL, M.R.).—HOWARD *v.* BANK OF ENGLAND (1875), L. R. 19 Eq.

PART IV. SECT. 4.

o. *Chattels purchased by wife—Wife's separate property.*]—The pltf. & her husband were married before 1859. In 1870 he, being free from debt, purchased land & had it conveyed to his wife, pltf. ; who with the rents & profits thereof, she & her husband not living on the land, with money raised by mtge. thereof, & with money borrowed from her sons, purchased the chattels in question herein, which were seized under execution against the husband :—*Held :* the chattels were her separate property within the meaning of R. S. O. 1877, c. 125, s. 1, & free from the debts of her husband.—TROTTER *v.* CHAMBERS (1883), 2 O. R. 515.—**CAN.**

295 ; 44 L. J. Ch. 329 ; 31 L. T. 871 ; 23 W. R. 303.

Annotation :—**Mentd.** *Re* Brooke & Fremlin's Contract (1898), 78 L. T. 416.

—— ——.]—*See, generally*, BANKERS, Vol. III., p. 127, Nos. 31–33 ; COMPANIES, Vol. IX., p. 402, Nos. 2573–2576.

686. Sum of money under £200—Payment to husband with wife's consent—Liability for husband's debt.]—After the passing of Married Women's Property Act, 1870 (c. 93), A., a *feme sole*, being then entitled, under a will, to a sum of money under £200, expectant on the death of C., who had a life interest therein, married deft., without any settlement. On the death of C., during the coverture, A. became entitled in possession to the money, & joined her husband, deft., in a petition to the Ct. of Ch. for payment of it to the husband, "*in right of his wife*" : & the ct. having made an order directing the money to be so paid, it was, in pursuance of such order, paid to the garnishee under a power of attorney from the husband alone, of which, however, the wife was fully cognisant :—*Held :* this was clearly money to which the wife "became entitled," within the meaning & operation of Married Women's Property Act, 1870 (c. 93), s. 7, but that she had, by joining in the petition to the Ct. of Ch. divested herself of the separate property in the money, & that it thereby became the property of the husband, & as such was liable to attachment at the suit of his creditor, pltf. in the hands of the garnishee, & they accordingly made absolute a rule to enter a verdict for pltf.

If A. could satisfy the Ct. of Ch. that she had not intended to part with her property in & control over the money, & to give it to her husband unconditionally, & was not aware at the time that she had done so, & it were found that the ct. had not been made aware of the true nature of the transaction when the petition was presented, it would even now order the return of the money (AMPHLETT, *B.*).—LANE *v.* OAKES (1874), 30 L. T. 726 ; 22 W. R. 709.

687. —— Payable under deed or will.]—The limit of £200 fixed by Married Women's Property Act, 1870 (c. 93), s. 7, applies only to money coming to the married woman by "deed or will," & not to personal estate to which she may have become entitled as next of kin of an intestate ; consequently such personal estate, whatever may be its amount or value, belongs, when unaffected by any settlement, to her for her separate use, & may be transferred or paid to her upon her separate receipt, without the necessity of any examination. *Qu. :* whether sect. 8 does not apply to corpus, as the "rents & profits" therein mentioned are not limited to those arising during the life of the married woman.—*Re* VOSS, KING *v.* VOSS (1880), 13 Ch. D. 504 ; 42 L. T. 78 ; 28 W. R. 565.

Annotation :—**Consd.** Johnson *v.* Johnson (1887), 35 Ch. D. 345.

688. —— Payable under intestacy—To married woman as next of kin.]—*Re* VOSS, KING *v.* VOSS, No. 687, *ante*.

689. —— Separate sums under different titles—Aggregation of sums.]—A wife married in 1877 became, under the will of a testator who died in 1880, entitled to a sum of £180 & also to an unascertained share of residue assumed to somewhat exceed the sum of £20 :—*Held :* as between the husband & wife, that, although the wife took the £180 & share of residue under the same instrument, she did so under different titles, & therefore Married Women's Property Act, 1870 (c. 93), s. 7, must be applied to each sum separately & not to both in the aggregate, so that the £180, being by itself "a sum of money not exceeding £200," belonged to the wife "for her separate use." —*Re* DAVIES, HARRISON *v.* DAVIS, [1897] 2 Ch. 204 ; 66 L. J. Ch. 512.

—— Transfer of stock.]—*See* No. 685, *ante*.

690. Earnings—Wife deserted by husband.]—Testatrix was a married woman who had been deserted by her husband in 1866. The property which she disposed of by her will consisted of her earnings since 1866, which had all been invested since 1870. The ct. limited the probate to property acquired since 1870, the date of the Married Women's Property Act, 1870 (c. 93).—*In the Goods of* PEPPER (1874), 31 L. T. 274 ; 38 J. P. 712 ; 22 W. R. 832.

—— Separate trading.]—*See* Sect. 6, *post*.

691. Realty acquired as heiress—Whether fee simple passes—In addition to rents & profits.]—*Re* VOSS, KING *v.* VOSS, No. 687, *ante*.

692. —— ——.]—Married Women's Property Act, 1870 (c. 93), s. 8, does not enable a woman married after the passing of the Act to pass by an unacknowledged deed the fee simple of real estate, descended upon her.—JOHNSON *v.* JOHNSON (1887), 35 Ch. D. 345 ; 56 L. J. Ch. 326 ; 56 L. T. 163 ; 35 W. R. 329 ; 3 T. L. R. 332.

SECT. 5.—DISPOSITION OF PROPERTY.

See Part VI., Sect. 3, *post*.

SECT. 6.—SEPARATE TRADING.

SUB-SECT. 1.—IN GENERAL.

See Married Women's Property Act, 1870 (c. 93), s. 1 ; Married Women's Property Act, 1882 (c. 75), ss. 1, 2, 5.

693. Wife solely entitled.]—*Re* DEARMER, JAMES *v.* DEARMER, No. 705, *post*.

694. Wife deserted by husband.]—*In the Goods of* PEPPER, No. 690, *ante*.

695. Wife may maintain ejectment—Protection of property.]—A married woman living apart from her husband can maintain ejectment for the recovery of property purchased with her own earnings. Pltf., a married woman living apart from her husband, purchased with her own earnings the goodwill & stock-in-trade of a beerhouse. From this beerhouse she was, as decided by the present action, wrongfully expelled by the lessor. She brought an action to recover damages for the expulsion :—*Held :* by virtue of Married Women's Property Act, 1870 (c. 93), pltf. could maintain this action, as she could have brought an action for ejectment, that being a remedy for the protection of her property within the provisions of the Act.—MOORE *v.* ROBINSON (1878), 48 L. J. Q. B. 156 ; 40 L. T. 99 ; 43 J. P. 334 ; 27 W. R. 312.

Actions by & against married women generally.]—*See* Part XII., *post*.

Rights & liabilities in bankruptcy proceedings.]—*See* Part XII., Sect. 3, *post*.

SUB-SECT. 2.—WHAT IS SEPARATE TRADE.

696. Question of fact.]—A woman may before marriage, with the consent of her intended

PART IV. SECT. 6, SUB-SECT. 2.

696 i. *Question of fact.*]—LETT *v.* COMMERCIAL BANK (1865), 24 U. C. R. 552.—**CAN.**

696 ii. ——.]—HARRISON *v.* DOUGLAS (1877), 40 U. C. R. 410.—**CAN.**

Sect. 6.—*Separate trading: Sub-sect.* 2. *Sect.* 7: *Sub-sect.* 1.]

husband, convey all her stock in trade & furniture to trustees, to enable her to carry on her business separately: & if the husband do not intermeddle with them, & there be no fraud, such effects, though fluctuating, are not liable to his debts. But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; & if they determine the latter, the stock-in-trade is liable to the debts of the husband. But even in such a case the furniture is not, though removed to the husband's house. It is no objection to such a settlement that there is no inventory of the goods intended to be thus settled.—JARMAN *v.* WOOLLOTON (1790), 3 Term Rep. 618; 100 E. R. 765.

Annotations:—**Mentd.** Gordon *v.* East India Co. (1797), 7 Term Rep. 228; Lingham *v.* Biggs (1797), 1 Bos. & P. 82; Shaftesbury *v.* Russell (1823), 1 B. & C. 666; Bird *v.* Peagrum (1853), 13 C. B. 639; Duncan *v.* Cashin (1875), L. R. 10 C. P. 554; Phillips *v.* Barnett (1876), 24 W. R. 345; Norman *v.* Villars (1877), 36 L. T. 663.

697. ——.]—A., a butcher, not within the city of London, in consequence of confirmed intemperance, became incapable of continuing his business, & was removed to the workhouse infirmary suffering from delirium tremens. On his removal, a friend at various times lent his wife sums of money to enable her to purchase meat wherewith to carry on the business for the support of her family. She continued to do so for several months, her husband on his return from the infirmary never in any way interfering, but residing for part of the time in an upper room of the house. Meat which had been so purchased by the wife was seized in execution for a debt of the husband; & upon an interpleader summons the county ct. judge came to the conclusion, whether as matter of law or of fact did not appear, that the case was not within Married Women's Property Act, 1870 (c. 93). Upon appeal to a div. ct., it being agreed that the ct. should draw inferences from the facts stated by the judge:—*Held:* the case disclosed such a separate trading by the wife as to warrant them in holding that the goods seized were the property of the wife.—LOVELL *v.* NEWTON (1878), 4 C. P. D. 7; 39 L. T. 609; 43 J. P. 93; 27 W. R. 366, D. C.

Annotations:—**Folld.** *Re* Dearmer, James *v.* Dearmer (1885), 53 L. T. 905. **Refd.** Whittaker *v.* Whittaker (1882), 30 W. R. 787; *Re* Helsby, *Ex p.* Helsby (1893), 63 L. J. Q. B. 261.

698. ——.]—*Re* DEARMER, JAMES *v.* DEARMER, No. 705, *post.*

699. Burden of proof on wife — Corroboration.]—In the absence of proof of an unequivocal, complete, & final intention on the part of a husband to constitute himself a trustee for his wife, the ct. will not after his death, upon her uncorroborated statement that he expressly authorised her to carry on the business, on her own account, of a farm which she had rented before marriage, & to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm which were invested by him during his lifetime.—*Re* WHITTAKER, WHITTAKER *v.* WHITTAKER (1882), 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787.

700. ——.]—The case did not depend upon whether the husband had done anything to assert his marital right, but upon the conclusion that the wife had not made out that there had been any agreement or declaration of trust such as to exclude that marital right or to allow the ordinary rights of the parties as husband & wife. Resp. had not discharged the burden of proof that rested upon her (COTTON, L.J.).—*Re* STONE, STONE *v.* STONE (1885), 1 T. L. R. 478, C. A.

701. Husband residing on business premises — Assistance given to wife—Lodging house.]—The execution debtor, in an interpleader suit tried at a county ct., had rented a house in his own name for the purpose of his wife letting lodgings therein. She directed certain repairs to be made, but the builder credited them to her husband. His name was on the rate book & registers, he lived in the

696 iii. ——.]—Purchases of goods were made in the wife's name, for which she signed notes, but the orders were always given by her husband, & the correspondence, although conducted in her name, was written & signed by him without any communication with her. As soon as he obtained his discharge he substituted his own name for his wife's in correspondence & in notes. Upon a writ of attachment issued against her after her husband's discharge:—*Held:* even if the stock-in-trade was her separate property, she never employed it in trade separate from her husband, but allowed him to employ it in a business really his own; she was, therefore, not a trader within the Act of 1875.—*Re* GEARING (1879), 4 A. R. 173.—**CAN.**

696 iv. ——.]—LEVINE *v.* CLAFLIN (1881), 31 C. P. 600.—**CAN.**

696 v. ——.]—MERCHANTS BANK *v.* CARLEY (1892), 8 Man. L. R. 258.—**CAN.**

696 vi. ——.]—A. carried on a business, became financially embarrassed, & gave a bill of sale of his property to S. Thereafter S., with A.'s consent, sold the property at auction & bought it in. After the sale the whole of the property remained on A.'s premises & in his or his wife's possession for some years. Subsequently the wife of A. filed the usual certificate & consent, but the business continued as before, except that S. sold the property covered by the bill of sale to the wife of A. for $750, & she paid him $250 of her own money on account, & gradually paid him other sums out of the earnings of the business. The business was conducted in the wife's name, the husband, however, superintending it, & some of his debts were paid out of its earnings:—*Held:* the facts in evidence deprived the business of its separate character, & did not enable her to claim the business as her separate property.—ADAMS *v.* ARCHIBALD (1895), 40 N. S. R. 84.—**CAN.**

696 vii. ——.]—It depends on the circumstances of each case what is the degree or nature of the participation by the husband which prevents the finding of a separate business.—NICHOL *v.* GOCHER (1898), 12 Man. L. R. 177.—**CAN.**

696 viii. ——.]—Where all the circumstances of the case showed that a husband's claim that he is conducting a business as agent for his wife is a mere pretence to defraud his creditors, & where he has rendered himself personally liable to such creditors, there cannot be a separate trading by the wife under M. W. P. Act.—CAMPBELL *v.* SHOREY (1914), 14 E. L. R. 259.—**CAN.**

696 ix. ——.]—Where cattle belonging to a wife are placed on her husband's farm, fed from the crops grown thereon & looked after by him in carrying on farming operations, not as her agent or manager, but as his own business, & the offspring of the original stock are treated in the same way & sold from time to time & the proceeds invested in other stock, the increase of the original animals & the animals bought from the proceeds of the sale cannot be claimed by the wife, under Married Women's Property Act, R. S. C. c. 45, s. 4, as proceeds or profits of business or trade carried on separately by her.—MINAKER *v.* HADDEN, [1917] 3 W. W. R. 774.—**CAN.**

696 x. ——.]—LOGAN *v.* RECKEN-[1923] 2 W. W. R. 753; 3 D. L. R. 458.—**CAN.**

699 i. *Burden of proof on wife—Corroboration.*]—Clear & unequivocal evidence should be required of the reality of alleged separate occupation on the part of a wife, the evidence of the husband & wife alone does not suffice.—GOGGIN *v.* KIDD (1895), 10 Man. L. R. 448.—**CAN.**

700 i. ——.]—Where the husband ostensibly carries on upon the land of his wife the work of farming, it should be presumed, in the absence of evidence to the contrary, that his wife allows him the use of her land for the purpose & that the crops are his, & where he does the work with the assistance of a hired man, the *onus* is upon the wife, notwithstanding her ownership of the land, to establish that the husband is her servant, & the farming business really hers.—ADY *v.* HARRIS (1893), 9 Man. L. R. 127.—**CAN.**

701 i. *Husband residing on business premises — Assistance given to wife—Lodging house.*]—Where a husband acquiesces in his wife's carrying on any occupation or trade, *e.g.* keeping boarders though in a house where the husband & wife live together, for the

house, wrote his wife's correspondence, kept her accounts, & gave orders to tradesmen for her. He was, however, totally unfit from ill-health to take any part in the management of the house. The county ct. judge found, as a fact, that he acted throughout merely as his wife's agent in conducting her business. The furniture, which was seized by the execution creditor upon a judgment by default of appearance obtained against the husband for groceries supplied, had been purchased by the wife with earnings acquired by her from these lodgings since the passing of Married Women's Property Act, 1870 (c. 93) :—*Held :* this was not, under the circumstances, an employment, occupation, or trade in which the wife, who was claimant in the suit, was engaged, or which she carried on separately from her husband, within Married Women's Property Act, 1870 (c. 93), s. 1.—LAPORTE *v.* COSTICK (1874), 31 L. T. 434 ; 39 J. P. 7 ; 23 W. R. 131.

Annotations :—**Refd.** Lovell *v.* Newton (1878), 43 J. P. 93 ; *Re* Helsby, *Ex p.* Helsby (1893), 63 L. J. Q. B. 261.

702. —— —— Wholesale business.] — A woman in 1855 entered the service of a man as housekeeper in a house which was in his occupation but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name ; she kept a separate banking account, & he admitted that it was her own business, & was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name ; her husband resided in the house where it was carried on, but it did not appear that he took any further part in it than he had done before the marriage. He shortly afterwards died intestate : —*Held :* the stock-in-trade & capital of the business belonged to the widow, & were not part of the husband's estate.—ASHWORTH *v.* OUTRAM (1877), 5 Ch. D. 923 ; 46 L. J. Ch. 687 ; 37 L. T. 85 ; 25 W. R. 896, C. A.

Annotations :—**Consd.** Lovell *v.* Newton (1878), 4 C. P. D. 7 ; *Re* Dearmer, James *v.* Dearmer (1885), 53 L. T. 905. **Refd.** Baddeley *v.* Baddeley (1878), 26 W. R. 850 ; Whittaker *v.* Whittaker (1882), 30 W. R. 787 ; *Re* Helsby, *Ex p.* Helsby (1893), 63 L. J. Q. B. 261.

703. —— —— Married Women's Property Act, 1882 (c. 75), s. 1 (5).]—(1) A married woman who has sold a business carried on by her separately from her husband must be deemed to be still "carrying on" the business within above sub-sect. 5 so long as the debts she has incurred in the business remain unpaid ; & therefore, in such a case she is subject under above sub-sect. in respect of her separate property to the bkpcy. laws, so that a receiving order may be made against her at the instance of a trade creditor.

(2) A married woman who has bought a business out of her separate estate & is carrying it on as her own, is not the less "carrying on a trade separately from her husband" within above sub-sect. because the business happens to be carried on in the house in which she & her husband are living & the husband may be taking some part in the management of it. —*Re* WORSLEY, [1901] 1 K. B. 309 ; 17 T. L. R. 122 ; *sub nom. Re* WORSLEY, *Ex p.* LAMBERT, 70 L. J. Q. B. 93 ; 84 L. T. 100 ; 49 W. R. 182 ; 45 Sol. Jo. 116 ; 8 Mans. 8, C. A.

Annotation :—*As to* (1) **Refd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095.

704. —— No assistance from husband.]—LOVELL *v.* NEWTON, No. 697, *ante.*

705. —— ——.]—A lady, who was carrying on the business of a ladies' school, was married in 1862. A settlement was executed on the marriage, which did not in any way refer to or affect to deal with the business carried on by her or the goodwill thereof. After the marriage she continued to carry on the school. Her husband lived in the house, but he did not take any part in the business nor assist in any manner in the tuition. The prospectuses, etc., of the school were in her name. Out of the earnings of the school the wife contributed to, if she did not substantially pay, the household expenses. Some of the earnings were invested by the husband in his own name, & another portion was invested in the purchase of the lease of the premises in which the school was carried on. The husband died in 1877. He did not in any way affect to deal with the school property by his will, & he had not ostensibly by any act of his treated it as his own property. Upon his death the question arose between the exors. of his will, under which his infant children were interested, & his widow, who survived him, as to who was entitled to the goodwill, property, & effects of the business :—*Held :* upon the evidence, the business was carried on by the wife separately from her husband within Married Women's Property Act, 1870 (c. 93), s. 1 ; it made no difference that the marriage took place before the passing of that Act ; & the goodwill, stock, & effects belonging to the business, & all investments out of the earnings of the business since the passing of the Act, were the property of the wife.—*Re* DEARMER, JAMES *v.* DEARMER (1885), 53 L. T. 905 ; 2 T. L. R. 148.

706. Right to profits — Wife's interest in business.]—A married woman does not "carry on business separately from her husband" within Married Women's Property Act, 1882 (c. 75), s. 1 (5), because she has an interest in the business which is carried on, which is her separate property. The test is whether she is trading independently of her husband, & without being accountable to him for the profits of the business.—*Re* EDWARDS, *Ex p.* HARVEY (1895), 2 Mans. 182 ; 15 R. 362 ; *sub nom. Re* EDWARDES, *Ex p.* EDWARDES, 43 W. R. 509 ; 11 T. L. R. 338 ; 39 Sol. Jo. 398, D. C.

707. Husband manager of business — Agent for wife.]—A trade belonging exclusively to a married woman but managed by her husband on her behalf is a trade carried on by the married woman separately from her husband within Married Women's Property Act, 1882 (c. 75).—*Re* SIMON, [1909] 1 K. B. 201 ; 78 L. J. K. B. 392 ; 100 L. T. 133 ; 53 Sol. Jo. 117 ; 16 Mans. 96, C. A.

SECT. 7.—GIFT OR LIMITATION TO HUSBAND AND WIFE.

SUB-SECT. 1.—IN GENERAL.

See Married Women's Property Act, 1882 (c. 75).

708. Gift to husband & wife alone — Each purpose of earning money, which earnings are, as between themselves, to be hers absolutely, & in which business he has no legal interest, nor any legal control over the same, & he does not interfere therewith more than would naturally be expected from a person who lived in the same house & was the husband of one who was carrying on the business, such occupation or trade should be construed as being carried on by the wife, separately from her husband.—LOGAN *v.* RECKENBURG, [1923] 2 W. W. R. 753 ; 3 D. L. R. 458.—**CAN.**

p. —— *Separation from wife not essential.*]—MURRAY *v.* MCCALLUM (1883), 8 A. R. 277.—**CAN.**

Sect. 7.—*Gift or limitation to husband and wife: Sub-sects.* 1 & 2. *Sects.* 8, 9 & 10: *Sub-sect.* 1.]

entitled to own share—Ability to contract in respect of share.]—Since Married Women's Property Act, 1882 (c. 75), a gift of chattels can be made to a husband & wife jointly as effectively as it can to two persons between whom the marriage relationship does not exist. A husband & wife can make a valid contract with respect to the ownership or enjoyment of chattels in their joint possession as effectively as two persons can between whom the marriage relationship does not exist, & such a contract & its terms may be inferred from the terms & manner on & in which the parties have dealt & acted. If a husband & wife each have some cash & income, & they mutually arrange that her money & his shall form a joint fund kept in an account in the husband's name for the purpose of their joint establishment, & the ct. can infer that things have been purchased by the two & paid for out of the joint fund, such things are not exclusively the husband's in the sense that on deserting his wife he can bring an action to recover possession of them & claim to be entitled to deprive her of any right to them.—HUNT *v.* HUNT (1908), 25 T. L. R. 132.

709. Gift to husband & wife & third party—Will made before Married Women's Property Act, 1882 (c. 75)—Operating after Act.]—(1) In applying above Act to wills made before the passing of above Act, care should be taken not to give it a retrospective effect beyond what is unavoidable.

(2) Above Act does not expressly or impliedly require a will made before above Act came into operation to receive a different construction from that which it would have received had above Act not passed. The only rights altered by above Act are those *inter se* of husband & wife. A gift by will to A. & B. & his wife, made before but coming into operation after above Act came into operation, which according to the rule of construction prevailing before above Act would have been a gift in moieties, one to A., & the other to B. & his wife, is, notwithstanding above Act, still divisible into moieties; but by the operation of above Act the moiety given to B. & his wife is given to them as joint tenants as if they were unmarried, & the wife takes one-half of that moiety to her separate use.

(3) *Qu:* whether such a gift in a will made after above Act came into operation would be divisible into moieties or thirds.—*Re* MARCH, MANDER *v.* HARRIS (1884), 27 Ch. D. 166; 54 L. J. Ch. 143; 51 L. T. 380; 32 W. R. 941, C. A.

Annotations:—*As to* (1) **Apld.** Turnbull *v.* Forman (1885), 15 Q. B. D. 234. *As to* (3) **Consd.** *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148. *Generally*, **Mentd.** *Re* Bridger, Brompton Hospital for Consumption *v.* Lewis, [1894] 1 Ch. 297; *Re* Turnbull, Skipper *v.* Wade, [1905] 1 Ch. 726.

710. ——Husband & wife to take one moiety—Rule unaffected by statute.]—The rule of construction whereby, under a gift to a husband & wife & a third person, the husband & wife take only one moiety between them, has not been altered by Married Women's Property Act, 1882 (c. 75). A testator, by his will made in 1887, directed that a share of his residuary estate should be divided between his "sister M., D., her husband, & H., her step-daughter, in equal parts." M. & D. were married previously to the commencement of Married Women's Property Act, 1882 (c. 75):—*Held:* M. & D. each took one-fourth, & H. one-half of the share, the one-fourth of M. being her separate property according to the Act.—*Re* JUPP, JUPP *v.* BUCKWELL (1888), 39 Ch. D. 148; 57 L. J. Ch. 774; 59 L. T. 129; 36 W. R. 712.

Annotations:—**Consd.** *Re* Dixon, Byram *v.* Tull (1889), 42 Ch. D. 306; *Re* Jeffery, Nussey *v.* Jeffery, [1914] 1 Ch. 375.

711. —— Husband & wife take separate shares.]—Testatrix gave her residuary personal estate "between my brother W. his wife & their daughter." She died in 1913. W. & his wife were married in 1873:—*Held:* on the true construction of the will the residue was divisible in equal third shares, W. & his wife taking separately & not as one person.—*Re* JEFFERY, NUSSEY *v.* JEFFERY, [1914] 1 Ch. 375; 83 L. J. Ch. 251; 110 L. T. 11; 58 Sol. Jo. 120.

SUB-SECT. 2.—EFFECT OF DIVORCE.

See Part V., Sect. 1, *post.*

SECT. 8.—PARAPHERNALIA.

712. Effect of Married Women's Property Act, 1882 (c. 75).]—Above Act has not abolished the general law as to gifts of paraphernalia. A husband, who married after the passing of above Act made his wife valuable presents of jewellery. He stated that he only allowed her the use of them, she that he gave them to her absolutely; & her evidence was considered more to be relied upon than his. It also appeared that he made the presents in the same manner & with the same words that he had used in making her presents before marriage, & never gave her to understand that the jewels were only lent to her, till he took proceedings for a divorce. Most of the presents were made on Christmas Days or her birthdays, or as "peace offerings" after disputes; & she, to his knowledge, kept the jewels in her possession or at a bank in cases stamped with her initials:—*Held:* the question whether a gift to a married woman constitutes paraphernalia was to be determined on the same principle as before the Act, & the proper inference from the facts above stated was that the jewels were not paraphernalia, but the separate property of the wife.—TASKER *v.* TASKER, [1895] P. 1; 64 L. J. P. 36; 71 L. T. 779; 43 W. R. 255; 11 T. L. R. 51; 11 R. 619.

Annotation:— **Consd.** Masson, Templier *v.* De Fries, [1909] 2 K. B. 831.

713. ——.]—Wearing apparel purchased by a married woman for her personal use with money supplied for the purpose by her husband is *primâ facie* her separate property, &, in the absence of evidence to rebut this presumption or to limit or qualify her possessory title, cannot be claimed by the husband as against an execution creditor of the wife.

By [common law] the widow could not claim goods as her paraphernalia by reason of any gift from her husband, for such a gift was at common law impossible. The goods were the property of the husband & at his disposal in his lifetime, & liable to be taken in execution by his creditors, or to answer the claims of his creditors after his death (COZENS-HARDY, M.R.).

[Paraphernalia] was a right given by the common law to a widow; it was not a right of the husband's at all, but was a limitation of the legal rights of his exors. or administrators after his death.

Since above Act has destroyed the husband's right to all his wife's personal chattels & has enabled her to acquire & own them as her own, either absolutely or subject to any lawful condition to which she may agree as if she were a *feme sole*, a right which was merely a limitation or an exception out of the former legal right of the

husband has, in my opinion, no longer any existence. The widow's right arose solely by way of exception out of the generality of the husband's common law right to all her property. . . . I am of opinion that since above Act the old common law exception of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist (FARWELL, L.J.).

It appears to me that the only occasion on which an issue as to paraphernalia might perhaps still be raised is a dispute as to the possession of property in the nature of ornaments & the like articles between a wife & the representative of her deceased husband. As between husband & wife, during their lifetime, or between either of them & the execution creditor of the other the only question as to the property in such articles can be whether they belong to the husband as his own or are the separate property of the wife (KENNEDY, L.J.).

There can be no question of paraphernalia during the husband's life.—MASSON, TEMPLIER & CO. *v.* DE FRIES, [1909] 2 K. B. 831 ; 79 L. J. K. B. 24 ; 101 L. T. 476 ; 25 T. L. R. 781 ; 53 Sol. Jo. 744, C. A.

Annotation :—**Consd.** Rondeau, Legrand *v.* Marks (1917), 87 L. J. K. B. 215.

SECT. 9.—PIN MONEY.

See Part VI., Sect. 9, sub-sect. 2, C., *post.*

SECT. 10.—SAVINGS OF WIFE.

SUB-SECT. 1.—FROM SEPARATE PROPERTY.

714. Wife entitled to savings — Power of disposal.]—A *feme covert* who makes profit of a real or personal estate, settled to her separate use, may dispose of such profit as she pleases.—GORE *v.* KNIGHT (1705), 2 Vern. 535 ; Prec. Ch. 255 1 Eq. Cas. Abr. 66, pl. 4 ; 23 E. R. 946.

Consd. Messenger *v.* Clarke (1850), Exch 388 ; Humphery *v.* Richards (1856), 25 L. J. Ch. 442. **Apld.** Norman *v.* Villars (1877), 36 L. T. 663. **Refd.** *Re* Mackenzie, Mackenzie *v.* Edwards-Moss, [1911] 1 Ch. 578.

715. —— ——.]—Pltf. & his lady intermarried in 1863, & some years after the marriage an estate of inheritance of about £100 *per annum* descended to the lady ; whereupon she & her husband, by indenture, assigned & conveyed this estate to trustees & their heirs in trust to permit the lady from time to time, notwithstanding her coverture, without her husband, & not to be subject to his power or control, to apply & dispose of the rents, issues & profits thereof, as she should by any writing under her hand & seal, in the presence of two or more witnesses, direct & appoint the lady by parsimony & frugality had in about twenty-two years' time, saved about £1,400 out of this her separate estate :—*Held :* she having received the money had absolute power to dispose of it as she thought fit, for by this power she was made in the nature of a *feme sole ;* & so decreed the whole £1,400 to be well disposed of to the nieces, in regard the money being paid to her, was absolutely in her own disposal.—GOLD *v.* RUTLAND (1719), 1 Eq. Cas. Abr. 346 ; 21 E. R. 1092, L. C.

716. —— ——.]—Where personal property is given to a *feme covert*, to her sole & separate use, she may dispose of it by will without the assent of her husband.—FETTIPLACE *v.* GORGES (1789), 3 Bro. C. C. 8 ; 1 Ves. 46 ; 29 E. R. 374, L. C.

Annotations :—**Consd.** Messenger *v.* Clarke (1850), 5 Exch. 388. **Apld.** *In the Goods of* Smith (1858), 1 Sw. & Tr. 125. **Consd.** *Re* Smith's Estate, Clements *v.* Ward (1887), 35 Ch. D. 589 ; *Re* Lambert's Estate, Stanton *v.* Lambert (1888), 39 Ch. D. 626. **Refd.** Roach *v.* Haynes (1803), 8 Ves. 584 ; Sperling *v.* Rochfort (1803), 8 Ves. 164 ; Rich *v.* Cockell, Rich *v.* Hull (1804), 9 Ves. 369 ; Parkes *v.* White (1805), 11 Ves. 209 ; Tappenden *v.* Walsh (1811), 1 Phillim. 352 ; Spitty *v.* Bayley & Shuttleworth (1852), 18 L. T. O. S. 351 ; Bird *v.* Peagrum (1853), 13 C. B. 639 ; Roberts *v.* Watkins & Howells (1877), 46 L. J. Q. B. 552.

717. —— ——.]—HUMPHERY *v.* RICHARDS, No. 1109, *post.*

718. —— ——.]—(1) A married woman, out of the savings of her separate estate, purchased stock in the name of a niece, & told the niece by letter that it was her intention that the stock should be for the niece herself, but took from the niece a power of attorney to receive the dividends, & sell the stock :—*Held :* on the death of the aunt the niece was entitled to the stock.

(2) A husband furnished a house, which formed part of the separate estate of his wife, & allowed her to receive the profits from letting it as lodgings : —*Held :* he could not after her death question her disposal of such profits.—BEECHER *v.* MAJOR (1865), 2 Drew. & Sm. 431 ; 6 New Rep. 370 ; 13 L. T. 54 ; 13 W. R. 1054 ; 62 E. R. 684, L. C.

719. ——.]—BARRACK *v.* M'CULLOCH, No. 730, *post.*

720. ——.]—(1) The savings of a married woman out of her separate estate are her own property.

(2) When furniture is settled upon a married woman & she replaces worn-out articles by buying new out of her separate income, the new articles so bought become impressed with the original trust.—DUNCAN *v.* CASHIN (1875), L. R. 10 C. P. 554 ; 44 L. J. C. P. 225 ; 32 L. T. 497 ; 23 W. R. 561.

Annotations :—*Generally*, **Refd.** Norman *v.* Villars (1877), 36 L. T. 663. **Mentd.** Engelback *v.* Nixon (1875), L. R. 10 C. P. 645 ; Jennings *v.* Mather, [1901] 1 K. B. 108.

721. Savings invested in joint names of husband & wife.]—Real estate was purchased by a husband with savings arising from the separate estate of his wife ; & personal estate given to her separate use, was transferred into the name of her husband, who, during his life, received the income for her. The husband made a will devising the whole real & personal estate to his brother :—*Held :* to be the separate estate of the wife, & the brother was declared to be a trustee for her.

The savings of a wife's separate estate were invested in the joint names of husband & wife. The fund was afterwards applied in the purchase of a real estate. After the death of the husband :

PART IV. SECT. 10, SUB-SECT. 1.

714 i. *Wife entitled to savings—Power of disposal.*]—Money earned by a wife by her own labour in keeping boarders, & deposited in the Post Office Savings-Bank to an account in her own name, is her own absolute property, & beyond the control & dominion of her husband.—TAYLOR *v.* ALLEN (1900), 19 N. Z. L. R. 85.—**N.Z.**

q. —— —— *Acquiescence of husband.*]—CARROLL *v.* FITZGERALD (1881), 6 A. R. 93.—**CAN.**

719 i. ——.]—Married Women's Property Act, 1877, s. 3, does not apply unless the wife's employment was under some other person than her husband, or unless the trade, occupation, or business carried on by her was entirely removed from her husband's control.—DRYDEN *v.* M'GIBBON, [1907] S. C. 1131 ; 44 Sc. L. R. 741 ; 15 S. L. T. 125.—**SCOT.**

721 i. *Savings invested in joint names of husband & wife.*]—A wife living with her husband carried on in the home in which they lived the business of a washerwoman. She put her own & her husband's earnings which were about equal in amount into a common purse from which the expenses of the household were defrayed & she placed their savings from their joint earnings in deposit receipts repayable "to either of them & the survivor." The husband predeceased the wife :—*Held :* one-half of the sum so deposited belonged to the widow in her own right under 1877 Act, s. 3.—MORRISON *v.* TAWSE'S EXECUTRIX (1888), 16 R. (Ct. of Sess.) 247 ; 26 Sc. L. R. 160.—**SCOT.**

Sect. 10.—*Savings of wife: Sub-sects.* 1, 2 & 3, *A.*

—*Held:* on the evidence, the estate belonged to the wife.—DARKIN *v.* DARKIN (1853), 17 Beav. 578; 23 L. J. Ch. 890; 22 L. T. O. S. 278; 2 W. R. 135; 51 E. R. 1159.

Annotations:—**Refd.** Lloyd *v.* Pughe, Evans *v.* Pughe (1872), 42 L. J. Ch. 282; Dixon *v.* Dixon (1878), 9 Ch. D. 587; *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663.

722. Savings invested by husband for wife.]—BARRACK *v.* M'CULLOCH, No. 730, *post.*

723. Arrears of income of settled property.]—By a marriage settlement a sum of money, secured by a bond given to the trustees by J., was settled for the wife's separate use for life, with limitations over. J. was left in the management of the trust estate, which he retained for some years at interest, & ultimately invested in his own name jointly with that of the surviving trustee. After the death of the husband, some arrears of the income remaining in the hands of J. were invested by him for the benefit of the lady, & he informed her of the fact. Shortly after this she married again:—*Held:* the arrears invested were not separate estate, but passed to the second husband.—SPICER *v.* SPICER, SPICER *v.* DAWSON, LAWFORD *v.* SPICER (1857), 24 Beav. 365; 26 L. J. Ch. 704; 29 L. T. O. S. 136; 3 Jur. N. S. 1161; 5 W. R. 431; 53 E. R. 398.

Annotations:—**Refd.** Giacometti *v.* Prodgers (1873), 8 Ch. App. 338. **Mentd.** Heath *v.* Crealock (1873), 21 W. R. 380.

724. Property purchased with savings.]—Testatrix, having a general power of appointment reserved to her by her marriage settlement, by her will, gave a devise & bequest of all her residuary estate, except so much thereof as might remain subject to the trusts of her marriage settlement by reason of no specific disposition of any part thereof having been made by her under the power for that purpose therein contained, & of which that general devise & bequest was not to be taken as in execution:—*Held:* she did not thereby except property subsequently purchased with savings out of her separate estate, which was conveyed to uses similar to those contained in the settlement. *Semble:* a purchase with savings out of separate estate is not affected by a covenant to settle after-acquired property.—HUGHES *v.* JONES (1863), 1 Hem. & M. 765; 2 New Rep. 417; 32 L. J. Ch. 487; 9 L. T. 143; 11 W. R. 898; 71 E. R. 335.

725. ——.]—Co-owners of lands, partly customary freehold & partly leasehold, worked a quarry on part of them & let the rest to agricultural tenants. Part of the undivided profits were from time to time laid out in purchases of other lands for purposes of the quarry, the lands so purchased being, in most cases, conveyed to trustees on trust for the persons expressly by name who were interested in the undivided profits constituting the purchase moneys, their heirs & assigns, & being in other cases conveyed to trustees without any express declaration of trust. One of the co-owners, a woman, married, & on her marriage a settlement of her shares & interest in the lands & quarry, plant & machinery, was executed, by which her shares & interest in the customary freeholds were treated as real estate, & her shares & interest in the entire property, both real & personal were settled on herself for life for her separate use without power of anticipation, with remainder to her husband for life, with remainder, in default of issue, in trust for her, her heirs, exors., administrators & assigns. Further purchase of customary freehold land were, after her marriage, made from time to time, out of the undivided profits of the quarry, the land so purchased being conveyed to trustees, but without any trusts being declared, except in one instance, that of a purchase made in 1849, in which case trusts were expressed on the instrument of conveyance, & were for the benefit of the co-owners, by name, in undivided shares, their heirs & assigns. In the books of account kept by the manager of the business these purchases were treated as if they had been purchases of stock-in-trade. These accounts were from time to time submitted to the parties interested, &, in particular, to the husband of the married woman. She having died without issue:—*Held:* her share in the purchases of land so made after her marriage devolved as real estate, & not as personalty, & having been made with savings of income, were not comprised in the settlement, but passed at once on her death to pltf., her heir-at-law & customary heir.—STEWARD *v.* BLAKEWAY (1869), 4 Ch. App. 603, L. JJ.; *affg.* (1868), L. R. 6 Eq. 479.

Annotations:—**Mentd.** A.-G. *v.* Hubbuck (1883), 10 Q. B. D. 488; *Re* Hulton, Hulton *v.* Lister (1890), 62 L. T. 200; Davis *v.* Davis, [1894] 1 Ch. 393.

From statutory separate property.]—*See* Married Women's Property Act, 1882 (c. 75).

SUB-SECT. 2.—FROM PROCEEDS OF HUSBAND'S BUSINESS.

726. Savings belong to husband.]—A. was a baker, B. his wife, who lived with him, let apartments, & received the money. Having saved money by so doing, she, without A.'s knowledge, bought shares in a building society; she afterwards sold out the shares & gave the proceeds to C.:—*Held:* A. might recover such proceeds from C. in an action for money had & received.

The wife lived with him & merely assisted him in his business. While he attended to one branch she attended to another branch of it. She had no right to dispose of the money so acquired & could confer no title on deft. (WIGHTMAN, J.).—ARMSTRONG *v.* PARKINSON (1851), 17 L. T. O. S. 204.

727. —— **In default of evidence proving gift by husband.**]—MEWS *v.* MEWS, No. 1285, *post.*

728. ——.]—BARRACK *v.* M'CULLOCH, No. 730, *post.*

729. —— **Business carried on in husband's absence—Husband lunatic.**]—POPE *v.* BUSHELL & Co., BURGESS, ETC. CLAIMANTS (1888), 4 T. L. R. 610, C. A.

SUB-SECT. 3.—FROM ALLOWANCE BY OR ON BEHALF OF HUSBAND.

A. When Living Together.

730. General rule.]—(1) Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, & invested by her in her own name, belongs to her husband. *Secus* as to moneys saved by her out of the income of her separate estate, & so invested.

(2) Where such investment had been made by her husband for her, upon its being impeached by his creditors after his death:—*Held:* the *onus* was upon her to prove that the moneys were the savings of her separate estate.

(3) She proved that they were saved out of rents of furnished houses, which were settled to her separate use:—*Held:* that threw back upon

the creditors the *onus* of proving that the furniture belonged to the husband, &, also, what part of the rents were to be attributed to the furniture.—BARRACK *v.* M'CULLOCH (1856), 3 K. & J. 110; 26 L. J. Ch. 105; 28 L. T. O. S. 218; 3 Jur. N. S. 180; 5 W. R. 38; 69 E. R. 1043.

Annotations:—*As to* (1) **Apld.** Birkett *v.* Birkett (1908), 98 L. T. 540. **Refd.** *Re* Mackenzie, Mackenzie *v.* Edwards-Moss, [1911] 1 Ch. 578; Montgomery *v.* Blows, [1916] 1 K. B. 899. *As to* (3) **Refd.** Lumley *v.* Timms (1873), 28 L. T. 608. *Generally*, **Mentd.** Neale *v.* Day (1858), 7 W. R. 45; Stephens *v.* Heathcote (1860), 1 Drew. & Sm. 138; R. *v.* Smith (1870), L. R. 1 C. C. R. 266.

731. Pin money—Proceeds thereof—Seizure by husband's creditors.]—A widow's claim to paraphernalia must yield to the claims of her husband's creditors; though she may have bought the ornaments out of her own pin money; provided she was living with her husband.—TYRREL'S (LADY) CASE (1674), 1 Freem. K. B. 304; Freem. Ch. 304; 89 E. R. 221; *sub nom.* TIRRELL'S (LADY) CASE, 2 Eq. Cas. Abr. 155.

732. —— Wife's power of disposal.]—If a woman has pin money, or a separate maintenance settled on her, & she by management or good housewifery saves money out of it, she may dispose of such money so saved by her, or of any jewels, etc., bought with it, by writing in nature of a will, if she die before her husband, & shall have it herself, if she survive him, & such money, jewels, etc., shall not be liable to the husband's debts.—NEAL'S CASE (prior to 1691), cited Prec. Ch. 44; 24 E. R. 23.

733. —— ——.]—If a woman has pin money, or a separate maintenance settled on her, & she by management or good housewifery saves money out of it, she may dispose of such money so saved by her or of any jewels bought with it, by writing in nature of a will, if she die before her husband, & shall have it herself, if she survive him, & such jewels, etc., shall not be liable to the husband's debts.—HERBERT *v.* HERBERT (1692), Prec. Ch. 41; 1 Eq. Cas. Abr. 66; 24 E. R. 23.

——.]—*See, generally*, Part VI., Sect. 9, sub-sect. 2, C., *post*.

734. Maintenance allowance—Separate maintenance settled on wife—Wife's power of disposal.]—NEAL'S CASE, No. 732, *ante*.

735. —— —— ——.]—HERBERT *v.* HERBERT, No. 733, *ante*.

736. ——.]—Savings by a married woman from her maintenance money are her separate property.—BLETSOW *v.* SAWYER (1684), 1 Vern. 244; 23 E. R. 442; *subsequent proceedings, sub nom.* SAWYER *v.* BLETSOE (1694), 2 Vern. 328.

Annotation:—**Refd.** Shaftsbury *v.* Shaftsbury (1716), 2 Vern. 747.

737. Housekeeping allowance.]—Where the wife had saved a considerable sum of money out of housekeeping, & a bill being brought against her for a discovery of what she had saved, she insisted she was not bound to a discovery; & on exceptions the answer was held sufficient.—MANGEY *v.* HUNGERFORD (prior to 1734), cited in 2 Eq. Cas. Abr. App. 156; 22 E. R. 133.

Annotation:—**Refd.** Stanway *v.* Styles (1734), 2 Eq. Cas. Abr. 156.

738. ——.]—A husband voluntarily & after marriage allowed the wife for her separate use to make profit of all butter, eggs, pigs, poultry, & fruit beyond what is used in the family; out of which his wife saved £100 which the husband borrowed & died. The ct. allowed this agreement to encourage the wife's frugality: & the wife shall come in a creditor for this £100 especially there being no defect of assets to pay debts.

Testator allowed his first wife to dispose & make a profit of all such butter, eggs, poultry, pigs, fruit & other trivial matters arising from the farm, for her own separate use, calling it her pin money, . . . & he also confessed that . . . wanting some money, he had been obliged to borrow £100 of his wife. . . . It was the strongest proof of the husband's consent that the wife should have a separate property in the money arising by these savings, in that he had applied to her & prevailed with her to lend him this sum (*per* CUR.).—SLANNING *v.* STYLE (1734), 3 P. Wms. 334; 24 E. R. 1089; *sub nom.* STANWAY *v.* STYLES, 2 Eq. Cas. Abr. 156, n., L. C.

Annotations:—**Consd.** Walter *v.* Hodge (1818), 1 Wils. Ch. 445; Ashworth *v.* Outram (1877), 5 Ch. D. 923. **Refd.** Messenger *v.* Clarke (1850), 5 Exch. 388. **Mentd.** *Re* Parry, Scott *v.* Leak (1889), 42 Ch. D. 570; *Re* Ambler, Woodhead *v.* Ambler (1905), 74 L. J. Ch. 367.

739. —— Treated by husband as wife's property.]—WITHERS *v.* BERRY (1895), 39 Sol. Jo. 559, D. C.

B. When Living Apart.

740. Maintenance allowance—Wife's right to alienate savings.]—A wife being parted from her husband, & having a separate allowance, may make a gift of her savings, as if she were a *feme sole*; & the person to whom such gift is made, shall not be considered as a trustee for the husband.—GAGE *v.* LISTER (1705), 2 Bro. Parl. Cas. 4; 1 E. R. 755, H. L.

Annotation:—**Expld.** Messenger *v.* Clarke (1850), 5 Exch. 388.

741. —— —— Separation agreement not under seal.]—A husband & wife separated by agreement, not under seal, & at that time he agreed to allow her a certain sum weekly, for her support, which was paid, & she saved a certain portion of her allowance & invested it in stock, but a few days before her death she sold out the stock, & disposed of the proceeds by way of gift:—*Held:* the husband was entitled to recover back the money so given, in an action for money lent, against the person who received it.—MESSENGER *v.* CLARKE (1850), 5 Exch. 388; 19 L. J. Ex. 306; 15 L. T. O. S. 233; 14 Jur. 748; 155 E. R. 169.

Annotations:—**Consd.** Brooke *v.* Brooke (1858), 25 Beav. 342. **Refd.** Bird *v.* Peagrum (1853), 13 C. B. 639; De Chatelain *v.* De Pontigny (1859), 1 Sw. & Tr. 411.

742. ——.]—Husband & wife had, for many years, lived & were still living separate. The husband remitted money for her maintenance & support. She saved a considerable portion:—*Held:* the husband could not recover back these savings, & a demurrer to a bill by the husband against his wife & her bankers for that object was allowed.—BROOKE *v.* BROOKE (1858), 25 Beav. 342; 27 L. J. Ch. 639; 31 L. T. O. S. 244; 4 Jur. N. S. 472; 53 E. R. 667.

Annotations:—**Distd.** Birkett *v.* Birkett (1908), 98 L. T. 540. **Refd.** Butler *v.* Butler (1885), 16 Q. B. D. 374.

PART IV. SECT. 10, SUB-SECT. 3.—A.

i. *Housekeeping allowance.*]—[illegible]ys saved by a wife out of an allowance made to her by her husband for housekeeping purposes, & deposited by her from time to time in a Savings Bank in her own name, are within M. W. P. Act, 1890, & are deemed her separate property until the contrary is proved.—JACK *v.* SMAIL (1905), 2 C. L. R. 684.—**AUS.**

737 ii. ——.]—A husband who hands over all his earnings to his wife upon an agreement between them that any balance saved from the cost of living be invested in real estate for their mutual benefit, share & share alike, is entitled, in the event of a separation, to an undivided half interest in all investments so made.—MCKISSOCK *v.* MCKISSOCK (1913), 18 B. C. R. 401; 13 D. L. R. 822; 4 W. W. R. 1327.—**CAN.**

PART IV. SECT. 10, SUB-SECT. 3.—B.

740 i. *Maintenance allowance—Wife's right to alienate savings.*]—LOGAN *v.* LOGAN, [1920] S. C. 537.—**SCOT.**

Sect. 10.—*Savings of wife: Sub-sect.* 3, *B. Sects.* 11 & 12. *Part V. Sect.* 1: *Sub-sects.* 1 & 2.]

743. Alimony of divorced wife.] — A husband held not entitled, after his wife's death, to claim from her exors. money saved by her out of permanent alimony granted to her on her divorce from him *a mensâ et thoro*, & bequeathed by her will.—MOORE *v.* BARBER (1865), 5 Giff. 43; 6 New Rep. 316; 34 L. J. Ch. 667; 12 L. T. 664; 29 J. P. 677; 11 Jur. N. S. 539; 13 W. R. 935; 66 E. R. 915.

744. —— Husband a lunatic—Separate use not mentioned in lunacy order.]—The savings of an annual allowance for her separate maintenance, paid to the wife of a lunatic living apart from her husband, under an order in lunacy, are her separate property, although the order does not expressly state that the allowance is for her separate use.—*In the Goods of* THARP, THARP *v.* MACDONALD (1878), 3 P. D. 76; 38 L. T. 867; 26 W. R. 770, C. A.

Annotations:—**Refd.** *Re* Lambert's Estate, Stanton *v.* Lambert (1888), 39 Ch. D. 626. **Mentd.** Phillips *v.* Jenkins (1880), 44 L. T. 281; *In the Goods of* Tomlinson (1881), 6 P. D. 209; Harding *v.* Sutton (1888), 59 L. T. 838; *Re* Parker's Trusts, [1894] 1 Ch. 707; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192.

745. —— —— Wife's right to alienate.] — (1) A sum ordered by the Lords Justices, in exercise of their jurisdiction in Lunacy, to be paid to the wife of a lunatic is an allowance for her maintenance & personal benefit, & they will not order it to be paid to any other person.

(2) Alimony is not property within Matrimonial Causes Act, 1857 (c. 85), s. 25. Alimony is not in its nature property, but is a sum ordered by the ct., having regard to the circumstances of the husband & wife, to be paid to the wife for her sole maintenance, & is not alienable. A marred woman obtained a decree for judicial separation from her husband, & the ct. subsequently ordered the husband to pay her permanent alimony after the rate of £60 *per annum*. The husband became a lunatic, & an order was made in Lunacy that out of the interest of a fund standing to the credit of the lunacy the annual sum of £60 should be paid to the wife in respect of her aforesaid alimony. The wife purported to assign the annuity to her nephew:—*Held:* she could not alienate it.—*Re* ROBINSON (1884), 27 Ch. D. 160; 53 L. J. Ch. 986; 51 L. T. 737; 33 W. R. 17, C. A.

Annotations:—*As to* (2) **Consd.** Watkins *v.* Watkins, [1896] P. 222; Smith *v.* Smith, [1923] P. 191; Walls *v.* Legge, [1923] 2 K. B. 240. **Refd.** Linton *v.* Linton (1885), 15 Q. B. D. 239; Anderson *v.* Hay (1890), 7 T. L. R. 113; Kerr *v.* Kerr (1897), 77 L. T. 29; Maclurcan *v.* Maclurcan (1897), 77 L. T. 474.

746. Money remitted unconditionally.] — A husband who goes abroad temporarily to seek employment & during his absence remits sums of money to his wife unconditionally, part of which is used by the wife for the maintenance of herself & children, the balance being saved & deposited in the Post Office Savings Bank in her own name, is entitled, upon a separation taking place between the parties, to the sum so saved.—BIRKETT *v.* BIRKETT (1908), 98 L. T. 540; 24 T. L. R. 284; 52 Sol. Jo. 241, D. C.

Annotation:—**Refd.** Montgomery *v.* Blows, [1916] 1 K. B. 899.

SECT. 11.—CONFLICT OF LAWS.

See Part XV., *post*.

SECT. 12.—EFFECT OF DIVORCE OR SEPARATION.

See Part V., *post*.

Part V. Effect of Divorce or Separation with Regard to Wife's Property.

SECT. 1.—DIVORCE.

SUB-SECT 1.—PROPERTY LIMITED TO HUSBAND AND WIFE.

747. Land conveyed before 1883—Tenancy by entireties — Becomes joint tenancy.] — (1) Lands were conveyed before the commencement of Married Women's Property Act, 1882 (c. 75), to a husband & wife & to the survivor in fee:—*Held:* so long as the marriage lasted, husband & wife were tenants by entireties, but after the marriage was dissolved each became a joint tenant, & the wife's interest belonged to her separate use, & she was entitled to an account as from the date of the divorce.

(2) Other estates were conveyed after the commencement of Married Women's Property Act, 1882 (c. 75), in terms which but for their marriage would have given them a joint estate:—*Held:* the wife had therein a joint estate to her separate use, & she had a right to an account of the rents & profits as from the date when the husband & wife ceased to live together.—THORNLEY *v.* THORNLEY, [1893] 2 Ch. 229; 62 L. J. Ch. 370; 68 L. T. 199; 41 W. R. 541; 9 T. L. R. 254; 3 R. 311.

Annotation:—*As to* (1) & (2) **Consd.** Dunbar *v.* Dunbar, [1909] 2 Ch. 639.

748. Land conveyed after 1883—Joint tenancy —Unaffected by divorce.] — THORNLEY *v.* THORNLEY, No. 747, *ante*.

SUB-SECT. 2.—PROPERTY SUBJECT TO MARRIAGE SETTLEMENT.

749. No issue of the marriage — Wife absolutely entitled — Post-nuptial settlement.] — A

PART V. SECT. 1, SUB-SECT. 2.

r. *Effect on wife's interest.*]—By the law of Scotland, a married woman divorced by her adultery forfeits all the provisions made for her by her husband or his relatives by marriage contract, & she is considered with regard to such provisions as if she were naturally dead.—*Re* DRUMMOND (1865), 12 L. T. 172.—**SCOT.**

s. ——.]—Divorce for desertion involves a forfeiture of all claims under a marriage settlement, whether ante-nuptial or post-nuptial; the Statute of 1573, c. 55, declaring that "the offenders shall tyne & lose tocher & *donationes propter nuptias*." Divorce for adultery involves the same penal forfeiture as that which arises from divorce for desertion, although the statute is silent as to divorce for adultery.— *v.* FARQUHAR (1872), L. R. 2 Sc. Div. 192.—**SCOT.**

t. ——.]—By an ante-nuptial contract of marriage policies of insurance effected on a husband's life with the sums insured & bonuses arising thereon were conveyed by him to trustees with directions that upon his death they should pay to his spouse if she survived him the free income

married woman under a general power of appointment exercisable during coverture, by deed of appointment executed after marriage, appointed the property to trustees on trust during the joint lives of herself & her husband for her sole & separate use ; & if she should survive her husband, on trust for herself absolutely, but in case she predeceased him, as she should appoint ; & in default of her appointment, to her next of kin. There were no children, & the marriage having been dissolved by a final decree of dissolution on account of the husband's misconduct :—*Held :* the wife was absolutely entitled.—JESSOP *v.* BLAKE (1862), 3 Giff. 639 ; 6 L. T. 454 ; 8 Jur. N. S. 537 ; 10 W. R. 643 ; 66 E. R. 563.

Annotation :—**N.F.** Fitzgerald *v.* Chapman (1875), 1 Ch. D. 563.

750. —— —— Marriage articles.]—Under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely, if she survived. No settlement was executed on the wife's attaining twenty-one. There were no children of the marriage. A decree for dissolution of the marriage was made by the Divorce Ct. on the suit of the wife. The wife filed her bill against her late husband & the trustee of the marriage articles for payment of the trust fund :—*Held :* she was entitled to have the trust fund paid to her.—SWIFT *v.* WENMAN (1870), L. R. 10 Eq. 15 ; 39 L. J. Ch. 336 ; 22 L. T. 194 ; 18 W. R. 480.

Annotation :—**N.F.** Fitzgerald *v.* Chapman (1875), 1 Ch. D.

751. —— ——.]—By a marriage settlement property belonging to the wife was settled upon her for life for her separate use, & after her death, in case there should be no children of the marriage, & her husband should survive her, subject to the payment of the income thereof to the husband for his life, in trust for such of her kindred as she should by will appoint, & in default of appointment for her next of kin, & in case she should survive her husband in trust for her absolutely. Subsequently certain real & personal estate was devised & bequeathed to the trustees of the settlement to be held by them upon the same or the like trusts & subject to the same & the like powers & provisions as were in & by the same settlement declared. The marriage was dissolved by a decree of the Divorce Ct., & there having been no children of the marriage, the wife filed a bill against her former husband & the trustees of the settlement to have the property conveyed & transferred to her :—*Held :* she was absolutely entitled to the property comprised in the settlement, & also to that bequeathed to the trustees upon the trusts of the settlement.—FUSSELL *v.* DOWDING (1872), L. R. 14 Eq. 421 ; 41 L. J. Ch. 716 ; 27 L. T. 406 ; 20 W. R. 881 ; *subsequent proceedings* (1884), 27 Ch. D. 237.

Annotation :—**N.F.** Fitzgerald *v.* Chapman (1875), 1 Ch. D. 563.

752. Effect on husband's interest — Divorce before property in possession.]—By a decree of the Ct. of Divorce a marriage between a husband & wife was declared to be dissolved. At the date of the decree the wife was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, & had been the subject of a post-nuptial settlement. After the decree, the fund fell into possession & the divorced wife took steps to realise the fund, but before it was recovered she died :—*Held :* the same consequences as to property must follow the declaration of dissolution by the Divorce Ct., as if the marriage contract had been annihilated & the marriage tie broken on that date ; those rights of the divorced husband which depended upon the contract ceased at the same date ; & the exors. of the divorced wife were entitled to the fund.—WILKINSON *v.* GIBSON (1867), L. R. 4 Eq. 162 ; 36 L. J. Ch. 646 ; 16 L. T. 733 ; 15 W. R. 983.

Annotations :—**Refd.** Codrington *v.* Lindsay (1872), 8 Ch. App. 581 ; Fitzgerald *v.* Chapman (1875), 1 Ch. D. 563 ; Allcard *v.* Walker, [1896] 2 Ch. 369.

753. ——.]—By a marriage settlement property, in which the wife & her father were jointly interested, was settled upon trust for the wife during the joint lives of herself & her husband, &, after her decease, for him for his life, & then upon trusts for the children of the marriage, of whom there were none living, & in default of children, for the wife absolutely if she should survive, but if she should die in the husband's lifetime, then as she should by will appoint, & in default of appointment, for her father. The marriage was dissolved on the petition of the wife. In a suit by the wife claiming to be absolutely entitled to the trust fund :—*Held :* the husband's rights were not forfeited by the dissolution of the marriage, & the bill must be dismissed with costs.—FITZGERALD *v.* CHAPMAN (1875), 1 Ch. D. 563 ; 45 L. J. Ch. 23 ; 33 L. T. 587 ; 24 W. R. 130.

Annotations :—**Folld.** Burton *v.* Sturgeon (1876), 24 W. R. 772. **Refd.** *Re* Rosier's Trusts (1877), 37 L. T. 426 : Hamilton *v.* Hamilton, [1892] 1 Ch. 396.

754. ——.]—By a marriage settlement the wife's property was settled upon trust for her for life, & after her decease, as to one moiety, in trust as she should appoint, &, in default of appointment, as to real estate for her heirs, & as to personalty for her next of kin ; & as to the other moiety, in trust for the husband absolutely. The wife obtained an absolute decree for dissolution of the marriage, & afterwards filed a bill to have the settled property transferred to her :—*Held :* the husband's rights under the settlement were not forfeited by the dissolution of the marriage, & the bill must be dismissed.—BURTON *v.* STURGEON (1876), 2 Ch. D. 318 ; 45 L. J. Ch. 633 ; 34 L. T. 706 ; 24 W. R. 772, C. A.

Annotations :—**Refd.** *Re* Rosier's Trusts (1877), 37 L. T. 426 ; Hamilton *v.* Hamilton, [1892] 1 Ch. 396.

755. —— Settlement induced by husband's misrepresentation.]—By a marriage settlement alleged to have been made in consequence of false representations by the husband, a policy of assurance on the life of the wife's mother was settled on the usual trusts, giving the husband a life interest after the death of the wife. The marriage was dissolved soon after its celebration on the ground of the husband's adultery & desertion. There was no issue. The trustees of the settlement,

thence arising during her lifetime as an alimentary allowance, not affectable by the deeds or debts of any future husband she might marry. The marriage having been dissolved by decree of divorce obtained by the wife on account of her husband's adultery :—*Held :* she was not entitled to aliment until the sums insured should become payable by his death.—STEWART *v.* STEWART (1872), 10 Macph. (Ct. of Sess.) 472 ; 44 Sc. Jur. 264.—**SCOT.**

a. ——.]—A husband executed a trust deed *inter viros* in which he provided an annuity for his wife should she survive him. Six weeks after he raised an action of divorce against her & subsequently obtained decree of divorce :—*Held :* the wife's right to the annuity was extinguished by the decree of divorce.—RITCHIE *v.* RITCHIE'S TRUSTEES (1874), 1 R. (Ct. of Sess.) 987 ; 11 Sc. L. R. 569.—**SCOT.**

b. ——.]—A liferent provision in a wife's favour in the trust assignation is a proper matrimonial provision which is forfeited in consequence of the divorce.—HEDDERWICK *v.* MORISON (1901), 4 F. (Ct. of Sess.) 163.—**SCOT.**

Sect. 1.—Divorce: Sub-sect. 2. Sect. 2: Sub-sects. 1 & 2.]

having no funds to keep up the policy, assigned it absolutely to the wife, who paid the premiums from the date of such assignment. On the death of the assured the assurance society, after some delay, paid the money due on the policy into ct. on the ground that the wife could not give a discharge:—*Held:* under the special circumstances, the husband had no claim on the fund; the society was nevertheless justified in paying the money into ct., but it must pay interest from the time when the money became payable till it was paid into ct., though there was then no legal hand to receive it.—*Re* ROSIER'S TRUSTS (1877), 37 L. T. 426.

Variation of settlements.]—*See* Part XIII., Sect. 22, sub-sect. 5, *post*.

Marriage settlements generally.]—*See* SETTLEMENTS.

SECT. 2.—SEPARATION.

SUB-SECT. 1.—SEPARATION UNDER AGREEMENT.

756. Wife entitled to property acquired during separation.]—By a deed of separation between a husband & wife residing in America, who agreed to live apart, it was agreed that the wife should be at liberty to carry on business, & retain for her own use all her present & future property. Under the will of R. she became entitled to a sum of £3 per cent. Consols, which, by an order of the ct., made after the separation, was carried to the account of the share of the husband & wife. Nothing having been heard of, though inquiries had been made for, the husband during a period of fourteen years, the ct., on a petition presented by the wife, asking for the transfer into her name of the Consols, directed that they should be sold & the proceeds paid to her on her sole receipt.—WHITLOW *v.* DILWORTH (1854), 2 Sm. & G. 35; 18 Jur. 445; 2 W. R. 150; 65 E. R. 290.

757. ——.]—A. & B. married in 1811; in 1817 they verbally agreed to separate, & not to interfere with each other, & divided their then furniture & effects. They never again cohabited, & the wife supported herself by her own industry, & acquired property, which she disposed of by will in 1856. Probate of this will was opposed by the husband, who asserted his marital right to his wife's property:—*Held:* under the circumstances, the property had been acquired to the wife's sole & separate use, & the *jus disponendi* would therefore attach to such property.—HADDON *v.* FLADGATE (1858), 1 Sw. & Tr. 48; 27 L. J. P. & M. 21; 30 L. T. O. S. 370; 6 W. R. 456; 164 E. R. 623.

Annotations:—**Refd.** *In the Goods of* Pepper (1874), 31 L. T. 274; *In the Goods of* Tharp (1878), 3 P. D. 76.

758. Agreement by husband in separation deed—Resigning claims to wife's property.]—A husband, in a deed of separation from his wife, B., covenanted with trustees to assign upon certain trusts for her benefit one-half of all property coming to her or him in her right, & it was agreed that the other half should belong to him absolutely. One of the trustees, by will, gave a share of her property to A., a married lady, for her separate use for life, with a general power of appointment on her decease. She gave another share to B., the wife who was separated from her husband, for her separate use for life, with remainder to her children. By a codicil she revoked the bequest of this last share, & directed B. should have her share the same as A., to be at her own disposal, independent of her children, so that no part of it should be under trust, but to be "entirely at her own disposal, to give to any of her children who may be kind & dutiful to her":—*Held:* (1) the husband's covenant did not extend to the property so bequeathed to his wife for her separate use, so as to entitle him to have a moiety of it; (2) the wife, B., took an estate for her separate use during her life, & she had a general power of appointment.—KER *v.* RUXTON (1852), 19 L. T. O. S. 268; 16 Jur. 491.

759. —— ——.]—Where the acknowledgment of a party to a fine was taken before comrs. who were aware of the fact of her being a married woman, & of the non-concurrence of her husband, but the parties were living separate under a deed by which the husband covenanted not to interfere with his wife's property, the ct. refused to reverse the fine, at the instance of the husband, but left him to his common law remedy.—CHEEK *v.* BOOTLE (1834), 4 Moo. & S. 460.

760. —— —— **Grant of administration.**]—*Qu.:* whether a husband who, by a deed of separation, has resigned all claim to the property of his wife is thereby excluded upon her death, in his lifetime, from taking any interest as her representative. In such a case the ct. will not grant administration to the next of kin of the wife unless the husband be cited.—*In the Goods of* ORANMORE & BROWNE (1861), 30 L. J. P. M. & A. 183; 25 J. P. 504.

761. —— —— ——.]—By a deed of separation it was provided that all the property of which the wife was possessed should be for her separate use, without interference on the part of the husband, in like manner as if he were dead; & that, in case of the wife's death, her property should go to the persons who would have been entitled under Statute of Distributions if she had survived her husband. The wife afterwards died intestate & without issue. The ct. passed over the husband, & granted administration to the father of the intestate, limited to the property covered by the separation deed.—ALLEN *v.* HUMPHRYS (1882), 8 P. D. 16; 52 L. J. P. 24; *sub nom. In the Goods of* HUMPHREYS, ALLEN *v.* HUMPHREYS, 48 L. T. 125; *sub nom.* HUMPHREYS *v.* ALLEN, 47 J. P. 24; 31 W. R. 292.

Annotation:—**Refd.** *In the Goods of* Megson (1899), 80 L. T. 295.

762. —— —— ——.]—A married woman executed a deed of separation, which provided that on her death her property should go as though her husband were already dead, & died while the deed was alleged to be still in operation, & while the husband was said to be largely indebted to the estate of deceased for payments due under the deed:—*Held:* letters of administration ought not to be granted to deceased's next of kin without citing the husband, on the ground that he might dispute the deed.—*In the Goods of* MEGSON (1899), 80 L. T. 295.

763. Wife's power of disposition.]—HADDON *v.* FLADGATE, No. 757, *ante*.

764. —— **By will.**]—By a deed of separation made between a husband & a wife & trustees, & duly acknowledged by the wife, it was agreed that the wife should hold all the real & personal estate of the husband & wife, or either of them in right of the wife, as her separate property, & should have power, by will, to devise or bequeath same. The husband then purported to convey to a trustee all such real & personal estate, to be held upon corresponding trusts:—*Held:* though the wife did not expressly convey real estate vested in her, it was the intention of the deed that she should

have power to dispose thereof as if she was unmarried, & accordingly that a certain estate of which a trustee was seized in trust for her separate use during her life, with remainder to herself in fee, passed by her will. A married woman may pass her separate real estate by deed or will as a feme sole.—PRIDE *v.* BUBB (1871), 7 Ch. App. 64; 41 L. J. Ch. 105; 25 L. T. 890; 20 W. R. 220, L. C.

Annotations:—**Consd.** Carter *v.* Carter, [1896] 1 Ch. 62. **Refd.** Dye *v.* Dye & Beloe (1883), 47 J. P. 520; Johnson *v.* Johnson (1887), 56 L. J. Ch. 326.

Contracts of separation.]—*See* Part XI., *post.*

SUB-SECT. 2.—JUDICIAL SEPARATION.

See Matrimonial Causes Act, 1857 (c. 85), s. 25; Matrimonial Causes Act, 1858 (c. 108), s. 8, &, *now* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 194.

765. Wife entitled to property acquired during separation.]—A husband deserted his wife immediately after her marriage in 1846, & she was supported by her sister. In 1848 an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863 the ct., on the petition of the wife & her sister, ordered the whole accumulations, amounting to £1,315 stock, to be paid over to the sister to the exclusion altogether of the husband.—*Re* FORD (1863), 32 Beav. 621; 2 New Rep. 349; 33 L. J. Ch. 180; 8 L. T. 625; 9 Jur. N. S. 740; 11 W. R. 845; 55 E. R. 244.

766. ——.]—Where a married woman entitled to a reversionary interest in personality has joined with her husband in mortgaging such interest, & has afterwards obtained a decree of judicial separation, & is living apart from her husband, on the property coming into possession she is entitled to it absolutely under Matrimonial Causes Act, 1857 (c. 85), s. 25, & Matrimonial Causes Act, 1858 (c. 108), s. 8.—*Re* INSOLE (1865), L. R. 1 Eq. 470; 35 Beav. 92; 35 L. J. Ch. 177; 13 L. T. 455; 11 Jur. N. S. 1011; 14 W. R. 160; 55 E. R. 829.

Annotations:—**Apld.** *Re* Emery's Trusts (1884), 50 L. T. 197. **Refd.** Waite *v.* Morland (1888), 38 Ch. D. 135.

767. ——.]—By a decree of judicial separation the wife's choses in action not reduced into possession at the date of the decree become, under Matrimonial Causes Act, 1857 (c. 85), s. 25, her absolute property as if she were a *feme sole.* Where a wife instituted a suit to enforce her equity to a settlement of a trust fund, & while the suit was pending obtained a decree of judicial separation from her husband on the ground of cruelty, the ct. ordered the fund to be paid to her, & refused the husband his costs.—JOHNSON *v.* LANDER (1869), L. R. 7 Eq. 228; 38 L. J. Ch. 229; 19 L. T. 592; 17 W. R. 272.

Annotations:—**Apld.** *Re* Coward & Adam's Purchase (1875), L. R. 20 Eq. 179. **Folld.** *Re* Emery's Trust (1884), 50 L. T. 197.

768. ——.]—Testator by will dated July 2, 1870, gave a legacy to a married woman for her separate use without power of anticipation, & directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the purpose." Previously to the date of the will the legatee had been judicially separated from her husband, & had ever since lived apart from him:—*Held:* she was entitled to have the legacy paid to her.—MUNT *v.* GLYNES (1872), 41 L. J. Ch. 639; 27 L. T. 366; 20 W. R. 823.

769. ——.]—A married woman, subsequently to obtaining a decree of judicial separation from her husband, became absolutely entitled to certain sums of stock:—*Held:* under Matrimonial Causes Act, 1857 (c. 85), s. 25, the stock belonged to her as if she were a *feme sole*, & was not included in a covenant in her marriage settlement to settle all property which she or her husband in her right might acquire "during the coverture."—DAWES *v.* CREYKE (1885), 30 Ch. D. 500; 54 L. J. Ch. 1096; 53 L. T. 292; 33 W. R. 869.

Annotations:—**Consd.** Davenport *v.* Marshall, [1902] 1 Ch. 82. **Refd.** Waite *v.* Morland (1888), 38 Ch. D. 135.

770. ——.]—A marriage settlement contained a covenant to settle all property to which the wife then was, or she or her husband in her right should, during the intended marriage, become beneficially entitled in possession or reversion. A judicial separation was subsequently decreed between the husband & wife. At the date of the settlement the wife was entitled to a reversionary interest, which fell into possession during the separation; & she became entitled during the separation to some personal property under the will of her mother:—*Held:* (1) the reversionary interest was bound by the covenant; (2) the property acquired during the separation was not bound, because the object of the covenant was to exclude the husband, &, inasmuch as he was excluded by Matrimonial Causes Act, 1857 (c. 85), s. 25, the covenant was inoperative during the separation.—DAVENPORT *v.* MARSHALL, [1902] 1 Ch. 82; 71 L. J. Ch. 29; 85 L. T. 340; 50 W. R. 39; 46 Sol. Jo. 30.

Annotation:—*Generally*, **Mentd.** *Re* Bankes, Reynolds *v.* Ellis, [1902] 2 Ch. 333.

771. Subsequent death of husband—Right of widow to share in effects.]—A widow, who has been divorced *a mensâ et thoro*, on the ground of adultery, is nevertheless entitled to a share in the effects of her deceased husband, under Statute of Distributions, 1671 (c. 10).—ROLFE *v.* PERRY (1863), 1 New Rep. 428; 32 L. J. Ch. 149; 9 Jur. N. S. 491; 11 W. R. 357.

Annotation:—**Refd.** *Re* Elcom, Layborn *v.* Grover Wright, [1894] 1 Ch. 303.

772. Reversionary interest falling in during separation.]—DAVENPORT *v.* MARSHALL, No. 770, *ante.*

773. Acquisition must be after decree.]—WAITE *v.* MORLAND, No. 886, *post.*

774. Effect of resumption of cohabitation.]—A husband & wife, when before the Divorce Ct., made an agreement in writing that if judicial separation were decreed the wife should be permitted to enjoy during her life certain furniture, but that if she annoyed her husband her enjoyment of it should cease. Judicial separation was decreed, & the wife took possession of the furniture. The husband & wife afterwards resumed cohabitation:—*Held:* in an action by the wife to recover the furniture, that the agreement came to an end when cohabitation was resumed; & as the wife was entitled to the furniture during separation only, she took nothing under Matrimonial Causes Act, 1857 (c. 85), s. 25, which relates to property acquired by a wife during separation.—NICOL *v.* NICOL (1886), 31 Ch. D. 524; 55 L. J. Ch. 437; 54 L. T. 470; 50 J. P. 468; 34 W. R. 283; 2 T. L. R. 280, C. A.

Annotation:—**Refd.** Haddon *v.* Haddon (1887), 18 Q. B. D. 778.

775. Alimony payable under order—Wife's power to charge.]—Alimony received by a wife under a decree for judicial separation from her husband is not "separate estate" chargeable by the wife.—ANDERSON *v.* HAY (LADY) (1890), 55 J. P. 295; 7 T. L. R. 113.

Sect. 2.—*Separation: Sub-sect.* 3. *Part VI. Sect.* 1: *Sub-sect.* 1.]

SUB-SECT. 3.—PROTECTION ORDERS, ETC.

See Matrimonial Causes Act, 1857 (c. 85), s. 21; Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226, &, *generally*, Part XIII., sect. 27, sub-sect. 3, E., *post*.

776. Wife separately entitled as from date of desertion.]—A married woman, deserted by her husband, was left extrix. & residuary legatee under a will; after proving which, she obtained from a magistrate, under Matrimonial Causes Act, 1857 (c. 85), s. 21, an order for the protection of her property:—*Held:* she was entitled to transfer Consols standing in the name of her testatrix in the books of the Bank of England, & to receive dividends thereon as if she were a *feme sole*. *Semble:* the same rule would have applied if she had been merely extrix., without taking any beneficial interest under the will.—BATHE *v.* BANK OF ENGLAND (1858), 4 K. & J. 564; 27 L. J. Ch. 630; 31 L. T. O. S. 230; 22 J. P. 400; 4 Jur. N. S. 505; 6 W. R. 612; 70 E. R. 235.

777. ——.]—A wife was deserted by her husband. Afterwards, her father bequeathed a fund for her separate use, without power of anticipation, & she subsequently obtained a protecting order under Matrimonial Causes Act, 1857 (c. 85). s. 21:—*Held:* she was entitled to payment.—COOKE *v.* FULLER (1858), 26 Beav. 99; 53 E. R. 834.

Annotation:—**Distd.** Waite *v.* Morland (1888), 38 Ch. D. 135.

778. ——.]—A wife obtained an order for protection under the Matrimonial Causes Act, 1857 (c. 85), s. 21:—*Held:* she was entitled to payment of a fund in ct. representing a legacy bequeathed to her.—*Re* KINGSLEY'S TRUSTS (1858), 26 Beav. 84; 28 L. J. Ch. 80; 4 Jur. N. S. 1010; 6 W. R. 849; 53 E. R. 828; *sub nom. Re* KINGSLEY, *Ex p.* WOOLLEY, 32 L. T. O. S. 25; 23 J. P. 132.

779. ——.]—A married woman who has obtained a protection order under Matrimonial Causes Acts, 1857 (c. 85), & Matrimonial Causes Act, 1858 (c. 108), may present a petition without a next friend, & the ct. will order the payment out of ct. to her of a legacy, to the payment of which she became entitled subsequently to her desertion by her husband.—*Re* RAINSDON'S TRUSTS (1859), 4 Drew. 446; 28 L. J. Ch. 334; 32 L. T. O. S. 290; 5 Jur. N. S. 55; 7 W. R. 184; 62 E. R. 172; *sub nom. Re* RAMSDEN'S TRUSTS, 23 J. P. 132.

780. ——.]—Where a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, under Matrimonial Causes Act, 1857 (c. 85), s. 21:—*Held:* the legacy on being paid to her after the date of the order, was property which then came to or devolved upon her within Matrimonial Causes Act, 1857 (c. 85), ss. 21, 25, & her receipt was a good discharge.—*Re* COWARD & ADAM'S PURCHASE (1875), L. R. 20 Eq. 179; 44 L. J. Ch. 384; 32 L. T. 682; 39 J. P. 708; 23 W. R. 605.

Annotations:—**Consd.** Nicholson *v.* Drury Buildings Estate Co. (1877), 7 Ch. D. 48; *Re* Emery's Trusts (1884), 50 L. T. 197; Waite *v.* Morland (1888), 38 Ch. D. 135.

781. ——.]—A married woman became in 1866 entitled, on the death of an intestate, to a share of his estate. Part of her share was paid by the administrator to the husband, & in 1867 some shares in a joint stock co., which had been appropriated by the administrator in respect of the remainder of the wife's share, were, with the assent of the husband & wife, transferred into their joint names. In May, 1874, the husband deserted the wife, & in Nov. 1874, she obtained from the justices a protection order, by which her property & earnings acquired since the date of the desertion were protected from her husband. In 1876 the co. resolved upon a voluntary liquidation, & the liquidator gave notice to the husband & wife that he was prepared to refund £900 in respect of the capital of the shares. The wife thereupon, suing as a *feme sole* under the protection order, commenced an action against the co. & the husband, claiming payment of the £900 to her as a *feme sole*. The money was paid into ct.:—*Held:* the transfer into the joint names did not amount to a reduction into possession by the husband, & the wife was entitled to the £900 as a *feme sole* under the protection order, as being property acquired by her after the desertion.—NICHOLSON *v.* DRURY BUILDINGS ESTATE CO. (1877), 7 Ch. D. 48; 47 L. J. Ch. 192; 37 L. T. 459; 26 W. R. 76.

782. —— **Unlawful earnings.**]—The protection of an order granted to a wife under Matrimonial Causes Act, 1857 (c. 85), s. 21, is confined to the lawful earnings of lawful industry, & does not extend to earnings, or property purchased with earnings acquired by her as keeper of a brothel.—MASON *v.* MITCHELL (1865), 3 H. & C. 528; 5 New Rep. 316; 34 L. J. Ex. 68; 11 L. T. 714; 29 J. P. 119; 11 Jur. N. S. 89; 13 W. R. 349; 159 E. R. 638.

783. ——.]—A woman having been deserted by her husband, acquired some property by her own exertions, which she disposed of by will. Subsequently she obtained an order from the magistrates protecting her earnings & property:—*Held:* such order had a restrospective effect, extending back to the commencement of the desertion; & the will was a valid instrument to pass the property acquired by her during such desertion.—*In the Goods of* ELLIOTT (1871), L. R. 2 P. & D. 274; 40 L. J. P. & M. 76; 25 L. T. 203; 35 J. P. 712; 19 W. R. 1072.

Annotation:—**Refd.** *In the Goods of* Tharp, Tharp *v.* Macdonald (1878), 3 P. D. 76.

784. Payment out of fund in court—Separation must be continuing—Evidence.]—Where, upon the further consideration of an administration suit instituted by a married woman who had obtained a protection order suing as a *feme sole* by virtue of the provisions of Matrimonial Causes Act, 1857 (c. 85), ss. 21, 25, 26, it was proposed to pay to the married woman her share of testator's estate:—*Held:* evidence must be produced that the separation was a continuing one, but the ct. accepted the affidavit of the married woman as to this fact, & also as to no settlement or agreement for a settlement having been made.—EWART *v.* CHUBB (1875), L. R. 20 Eq. 454; 45 L. J. Ch. 108.

785. Effect of discharge of order.]—A married woman obtained an order from a magistrate, protecting her property, on the ground of desertion by her husband, under Matrimonial Causes Act, 1857 (c. 85). A bill was filed against her, her husband not being a party, & she obtained leave to put in a separate answer, & a decree was made against her. Another suit was instituted for the same purposes as the former suit, & she & her husband were made defts. On his application to the magistrate who granted the protection order, the husband satisfied his worship that there had been no desertion, & the protection order was discharged. Pltf. in the first suit thereupon, under Chancery Practice Amendment Act, 1852 (c. 86), s. 52, made the husband a deft. by supplemental order in that suit; but, upon the applica-

tion of the husband, the order was discharged by one of the Vice-Chancellors. On appeal, by pltf. in the first suit:—*Held:* the supplemental order was proper.—RUDGE *v.* WEEDON (1859), 4 De G. & J. 216; 28 L. J. Ch. 788; 33 L. T. O. S. 214; 23 J. P. 756; 5 Jur. N. S. 723; 7 W. R. 519; 45 E. R. 84, L. JJ.

Annotation:—**Refd.** Hills *v.* Springett (1868), L. R. 5

786. Death of wife intestate in husband's lifetime—Grant of administration.]—M. having been deserted by her husband, obtained a protection order, under Matrimonial Causes Act, 1857 (c. 85), s. 21, by reason of his desertion. On her death, in the life of her husband, intestate, the ct. decreed letters of administration, limited to such personal property as she had acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin.—*In the Goods of* WORMAN (1859), 1 Sw. & Tr. 513; 29 L. J. P. M. & A. 164; 5 Jur. N. S. 687.

787. —— ——.]—Where a married woman, living separate from her husband, having obtained a protection order, died, leaving him & a minor son her surviving, the ct. made a grant of administration of her effects to a guardian elected by the son for his use & benefit without citing the father, requiring justifying securities.—*In the Goods of* STEPHENSON (1866), L. R. 1 P. & D. 287; 36 L. J. P. & M. 20; 15 L. T. 296; 15 W. R. 281

Annotation—**Apld.** *In the Goods of* Jones (1904), 74 L. J. 27.

788. —— ——.]—When a married woman has obtained an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (*a*), a general grant with justifying sureties may be made to her estate passing over her husband without citing him.—*In the Goods of* JONES (1904), 74 L. J. P. 27; *subsequent proceedings* (1905), 74 L. J. P. 164.

789. Resumption of cohabitation.]—A married woman was entitled in reversion to two funds, subject to life interests. On Apr. 21, 1882, the tenant for life of one of the funds died, but no steps were taken by the husband to reduce the fund into possession. On June 13, 1882, the wife obtained a protection order under Matrimonial Causes Act, 1878 (c. 19), s. 4, but on July 21, 1882, she resumed cohabitation with her husband. Prior to Apr. 24, 1882, the funds had been mortgaged by the husband, but the deeds were not acknowledged by the wife, although she was made a party thereto. On July 26, 1882, the tenant for life of the other fund also died. On Sept. 20, 1882, the husband & wife mortgaged both funds by a deed duly acknowledged by the wife. The trustees of the funds paid them into ct., & the mtgees. under the last-mentioned mtge., together with the wife, petitioned for the payment out to them of the funds. This application was opposed by the prior mtgees.:—*Held:* (1) both funds became the property of the wife during the separation as if she were a *feme sole*, the effect of the resumption of cohabitation being expressly provided for by Matrimonial Causes Act, 1857 (c. 85), s. 25 (2), as the funds belonged to the wife as against her husband they must equally belong to her as against his assigns; & petitioners were accordingly entitled to payment out.—*Re* EMERY'S TRUSTS (1884), 50 L. T. 197; 32 W. R. 357.

790. Property restrained from anticipation.]—A married woman, who was entitled to an equitable life interest in the rents of certain premises for her separate use without power of anticipation, was deserted by her husband & obtained a protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21. She afterwards executed a mtge. of her life interest covenanting to pay the mtge. debt. Judgment was obtained against her as a *feme sole* in an action on the covenant:—*Held:* her life interest having devolved upon her before the desertion, the restraint on anticipation still attached, & consequently a receiver of her life interest could not be appointed by way of equitable execution on the judgment.

The question to be determined in this case involves the point as to whether deft., being a married woman, could validly mortgage her interest in property vested in trustees & settled to her separate use without power of anticipation. . . . It is quite clear that unless the statute [Matrimonial Causes Act, 1857] can be brought into play, she could not do so (A. L. SMITH, L.J.).—HILL *v.* COOPER, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423; 69 L. T. 216; 57 J. P. 664; 41 W. R. 500; 9 T. L. R. 457; 37 Sol. Jo. 475; 4 R. 418, C. A.

Annotation:—**Refd.** *Re* Hughes, Brandon *v.* Hughes, [1898] 1 Ch. 529.

791. Wife's power of disposal—By will.]—*In the Goods of* ELLIOTT, No. 783, *ante*.

792. —— **Act inter vivos.**]—*Re* HUGHES, BRANDON *v.* HUGHES, No. 1177, *post*.

Part VI.—Disposition of Property.

SECT. 1.—RESTRAINT ON ANTICIPATION OR ALIENATION.

SUB-SECT. 1.—NATURE OF DOCTRINE.

793. Doctrine of equity—To protect property of married woman.]—If property be given or settled to the separate use of a woman unmarried when the settlement or gift takes effect & she be prohibited against anticipating it, it will, if not alienated by her when *discovert*, be enjoyed by her as her separate estate, during any coverture or covertures to which she may afterwards be subject; & she will, during the existence of such coverture or covertures, be unable to anticipate it.

There is no principle upon which it can be held that the separate estate operates during a coverture subsequent to the gift, but that the provision against anticipation, with which the gift was qualified, does not (LORD COTTENHAM, C.).

The separate estate & the prohibition of anticipation are equally creatures of equity, & equally inconsistent with the ordinary rules of property. The one is only a restriction & qualification of the other. The two must stand or fall together (LORD COTTENHAM, C.).

When once it was established that the separate estate of a married woman was to be so enjoyed

---

PART VI. SECT. 1, SUB-SECT. 1.

793 i. *Doctrine of equity—To protect property of married women.*]—LAWSON *v.* LAIDLAW (1878), 3 A. R. 77.—**CAN.**

793 ii. —— ——.]—HORNER *v.* KERR (1880), 6 A. R. 30.—**CAN.**

iii. —— ——.]—FITZPATRICK *v.* DRYDEN (1891), 30 N. B. R. 558.—**CAN.**

Sect. 1.—*Restraint on anticipation or alienation: Sub-sects.* 1 & 2, *A.* & *B*

by her as a *feme sole*, as to bring with it all the incidents of property . . . it was found that to secure to her the desired protection against the marital rights, it was necessary to qualify & fetter the gift of the separate estate by prohibiting anticipation (LORD COTTENHAM, C.).—TULLETT *v.* ARMSTRONG (1840), 4 My. & Cr. 377; 9 L. J. Ch. 41; 4 Jur. 34; 41 E. R. 147, L. C.; *affg.* (1838), 1 Beav. 1.

Annotations:—**Apld.** Dixon *v.* Dixon (1838), 2 Jur. 960. **Expld.** Newlands *v.* Paynter (1840), 4 My. & Cr. 408. **Folld.** Scarborough *v.* Borman (1840), 4 My. & Cr. 407. **Consd.** Baggett *v.* Meux (1846), 1 Ph. 627; Wright *v.* Wright (1862), 2 John. & H. 647; *Re* Teague's Settlmt. (1870), L. R. 10 Eq. 564. **Apld.** Hawkes *v.* Hubback (1870), L. R. 11 Eq. 5; Abergavenny *v.* Sugden (1886), 2 T. L. R. 754. **Consd.** Stogdon *v.* Lee, [1891] 1 Q. B. 661; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717. **Refd.** Rennie *v.* Ritchie (1845), 12 Cl. & Fin. 204; *Re* Gaffee's Settlmt. (1849), 7 Hare, 101; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Winter *v.* Easum (1864), 33 L. J. Ch. 665; *Re* Gaskell's Trusts (1865), 12 L. T. 763; Taylor *v.* Meads (1865), 4 De G. J. & Sm. 597; London Chartered Bank of Australia *v.* Lemprière (1873), 9 Moo. P. C. C. N. S. 426; *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409; Flower *v.* Buller (1880), 15 Ch. D. 665; *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411; Studley *v.* Studley, [1913] P. 119; *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56. **Mentd.** Borton *v.* Borton (1849), 13 L. T. O. S. 5; Gilbert *v.* Lewis (1862), 1 De G. J. & Sm. 38.

794. —— ——.]—BAGGETT *v.* MEUX, No. 805, *post.*

795. —— ——.]—That [restraint on anticipation] was purely an equity doctrine, the invention of the Chancellors, & is, as I have said, an exception to the general law which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it her without such a restraint would be, practically, to give it to her husband, & therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income & thus fettering the free alienation of her property (JESSEL, M.R.).—*Re* RIDLEY, BUCKTON *v.* HAY (1879), 11 Ch. D. 615; 48 L. J. Ch. 563; 41 L. T. 336; 43 J. P. 588; 27 W. R. 527.

Annotations:—**Refd.** Herbert *v.* Webster (1880), 15 Ch. D. 610; *Re* Errington, Bawtree *v.* Errington, [1887] W. N. 23; *Re* Ferneley's Trusts, [1902] 1 Ch. 543; *Re* Game, Game *v.* Tennent, [1907] 1 Ch. 276.

796. Power to commit waste — Whether consistent with restraint.] — Testator devised his residuary real estate to his trustees in trust for his granddaughter P. in fee at twenty-one or marriage, & directed that if she should marry under twenty-one his trustees should settle the real estate on her for life for her separate use, without power of anticipation, with remainder to her children as tenants in common in tail; & he authorised his trustees to give a life estate to his granddaughter's husband, to commence after her decease, & to be either with or without impeachment of waste:—*Held:* the life estate given to the granddaughter must not be without impeachment of waste; such an estate being inconsistent with the restraint on anticipation.

It appeared to me difficult to conceive how a power to commit waste can exist consistently with a restraint on anticipation (JAMES, L.J.).—CLIVE *v.* CLIVE (1872), 7 Ch. App. 433; 41 L. J. Ch. 386; 26 L. T. 409; 20 W. R. 477, L. JJ.

797. —— ——.]—*Re* LUMLEY, *Ex p.* HOOD BARRS, No. 804, *post.*

798. Restraint a condition of trust — By which interest conferred.]—*Re* RUSH, WARRE *v.* RUSH, No. 906, *post.*

799. "Anticipation" & "alienation" equivalent terms.]—It was argued that where a fund given absolutely to a married woman is not an income-bearing fund, the ct. will order it to be paid to her, notwithstanding that she is restrained from anticipation, but that it is otherwise where the fund produces income or where the restriction is expressed to be not merely of anticipation, but of alienation. On principle I can see no reason for this distinction. A clause restraining anticipation is construed as meaning that the married woman shall not assign her interest; whether the words are without any power of "alienation" or of "anticipation," the effect is the same (KAY, J.).

In *Re Croughton's Trusts*, No. 811, *post*, the restraint was "so that she shall not have power to deprive herself of the benefit thereof by sale, mtge., charge or otherwise in the way of anticipation," which is a very common form of the restriction & shows that the word "anticipation" includes a sale, mtge. or charge (KAY, J.).—*Re* BOWN, O'HALLORAN *v.* KING (1883), 27 Ch. D. 411; 49 L. T. 165; *on appeal* (1884), 27 Ch. D. 419, C. A.

Annotations:—**Consd.** *Re* Hutchings to Burt (1887), 58 L. T. 6. **Refd.** *Re* Spencer, Thomas *v.* Spencer (1885), 30 Ch. D. 183; *Re* Currey, Gibson *v.* Way (1886), 32 Ch. D. 361; *Re* Grey's Settlmts., Acason *v.* Greenwood (1887), 34 Ch. D. 712; *Re* Tippett's & Newbould's Contract (1888), 37 Ch. D. 444; *Re* Holmes, Hallows *v.* Holmes (1892), 67 L. T. 335; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; *Re* Fearon, Hotchkin *v.* Mayor (1896), 45 W. R. 232; *Re* Bankes, Reynolds *v.* Ellis, [1902] 2 Ch. 333; *Re* Millward, Steedman *v.* Hobday (1902), 87 L. T. 476; Bagot *v.* Chapman (1907), 23 T. L. R. 562; *Re* Game, Game *v.* Tennent, [1907] 1 Ch. 276.

800. ——.]—*Re* CURREY, GIBSON *v.* WAY, No. 941, *post.*

SUB-SECT. 2.—TO WHAT PROPERTY OR INTEREST APPLICABLE.

A. In General.

801. Separate estate—Requisite of restraint.]—TULLETT *v.* ARMSTRONG, No. 793, *ante.*

802. —— ——.]—By a will a husband left money to trustees upon trust to pay the income arising from it to his wife for her life, subject to a restraint on alienation & anticipation. After his death the wife married again:—*Held:* such a restraint is valid only as an accessory to the separate estate of a married woman; the ct. could not infer a separate estate from the existence of its accessory, & therefore the restraint was void.—STOGDON *v.* LEE, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669; 64 L. T. 494; 55 J. P. 533; 39 W. R. 467, C. A.

Annotations:—**Refd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; *Re* Lumley, Hood Barrs *v.* Cathcart (1894), 70 L. T. 622; *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717; Paquin *v.* Beauclerk, [1906] A. C. 148; Johnson *v.* Clark, [1908] 1 Ch. 303; *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1.

803. —— **Effect of desertion by husband — Matrimonial Causes Act, 1857 (c. 85), ss. 21, 25.**]—HILL *v.* COOPER, No. 790, *ante.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 194 (1), (2).

804. —— **Effect of Married Women's Property Act, 1882 (c. 75)—Limitation to separate use not required.**]—(1) A restraint on anticipation may, in a settlement made since the above Act came into operation, be effectually annexed to a life estate thereby given to a married woman, though not in terms limited to her separate use, & only made separate estate by force of the Act. (2) Such restraint is not invalidated by the life estate being given without impeachment of waste.

(3) A judgment cannot be enforced against arrears of income of property of a married woman, settled upon her for her separate use without power of anticipation, which have accrued due after the date of the judgment.—*Re* LUMLEY, *Ex p.* HOOD BARRS, [1896] 2 Ch. 690; 65 L. J. Ch. 837; 75 L. T. 236; 45 W. R. 147; 12 T. L. R. 630.

Annotation:—**Apld.** *Re* Williams, Williams *v.* Grant (1897), 76 L. T. 150.

805. Real or personal estate.]—(1) Equity, which has created the separate estate, will so mould it as to render it effectual for its object, the protection of a married woman; &, therefore, where an intention to restrain anticipation is plainly expressed, the ct. will give effect to it.

Where an absolute interest or a fee-simple is given to a *feme covert*, the restriction on anticipation is equally binding during coverture as it is whereas limited or life interest is given.

(2) A freehold house was settled on a married woman in fee, for her separate use, but so that she should not "sell, mortgage, charge, or incumber it." A lease was granted by her of this house to E., in trust for the husband, for thirty-one years, at a very low rent, payable to the husband & wife, & the survivor of them, & the heirs & assigns of the wife; & E. did not enter into any covenants:—*Held:* this lease was invalid, as being an incumbrance on the property.

(3) A freehold estate was devised to a married woman in fee, followed by a declaration "that she should not sell, mortgage, charge or incumber the estate, & that she should have, receive, & take such estate for her own sole & separate use, benefit, & disposal, & have the management thereof independent of her husband, & the same should not be liable to his debts, control, or intermeddlings":—*Held:* the estate was effectually settled on her, in fee, for her separate use, but without power to sell, mortgage, charge, or incumber it, during the coverture.—BAGGETT *v.* MEUX (1846), 1 Ph. 627; 15 L. J. Ch. 262; L. T. O. S. 41; 10 Jur. 213; 41 E. R. 771, L. C.

Annotations:—*As to* (1) **Consd.** Lechmere *v.* Brotheridge (1863), 32 Beav. 353; *Re* Gaskell's Trusts (1868), 12 L. T. 763; *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409; *Re* Hutchings to Burt (1887), 58 L. T. 6. **Refd.** Thomas *v.* Price (1877), 46 L. J. Ch. 761; *Re* Curry, Gibson *v.* Way (No. 2) (1887), 56 L. T. 80; *Re* Grey's Settlmts., Acason *v.* Greenwood (1887), 34 Ch. D. 712; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717. *As to* (2) **Refd.** *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. *Generally*, **Refd.** Taylor *v.* Meads (1865), 4 De G. J. & Sm. 597; Stogdon *v.* Lee, [1891] 1 Q. B. 661; Loftus *v.* Heriot, [1895] 2 Q. B. 212; Studley *v.* Studley, [1913] P. 119. **Mentd.** *Re* Yalden (1851), 1 De G. M. & G. 53.

806. Estate in fee simple or for life—Though no limitation over.]—BAGGETT *v.* MEUX, No. 805, *ante*.

807. Capital as well as income.]—*Re* GREY'S SETTLEMENTS, ACASON *v.* GREENWOOD, No. 861, *post*.

808. Chattels—Furniture.]—Under a marriage settlement certain furniture & effects were vested in trustees upon trust to permit the wife to use the same during her life for her sole & separate use, & after her death to permit her husband to use the same during his life, & the settlement contained a power, under certain conditions, to sell the furniture & invest the proceeds, & that the trustees should stand possessed of the annual income therefrom in trust for such persons as the husband & wife should during their joint lives jointly appoint, or as the survivor should appoint, & in default of such appointment for the wife for her life for her sole & separate use, & so that she should not have power to anticipate the same, with other trusts over in favour of the children. Upon an application by a judgment creditor of the husband & wife for the appointment of a receiver of the several interests of the husband & wife under the settlement:—*Held:* having regard to the terms of the settlement, the ct. had no power to appoint a receiver of the interests of the husband & wife under the settlement.—WHITAKER *v.* COHEN (1893), 69 L. T. 451; 9 T. L. R. 505; 37 Sol. Jo. 562, D. C.

809. Property subject to statutory charge—Property of alien married woman—Settled fund in England—Treaty of Peace Order, 1919.]—The charge imposed by sect. 1 (xvi) of above Order, upon all property, rights & interests in this country belonging to German nationals at the date of the coming into force of the Treaty of Versailles attaches to the interest of a married woman, who is a German national, in property in England settled upon her for life without power of anticipation, notwithstanding the restraint upon anticipation.—PUBLIC TRUSTEE *v.* WOLF, [1923] A. C. 544; 92 L. J. Ch. 520; 129 L. T. 738; 39 T. L. R. 553; 67 Sol. Jo. 637, H. L.; *revsg.* S. C. *sub nom.* *Re* RUSH, WARRE *v.* RUSH, [1923] 1 Ch. 56, C. A.

Annotations:—**Refd.** Morgan *v.* Morgan & Kirby, [1923] P. 1. **Mentd.** *Re* Neuburger's Settlmt., Foreshew *v.* Public Trustee, [1923] 1 Ch. 508.

B. Property Producing or Not Producing Income.

810. Validity of restraint.]—*Re* ELLIS' TRUSTS, No. 907, *post*.

clause restraining anticipation does not apply to an absolute gift of a fund or cash not producing income.

Testatrix bequeathed to a married woman by name, describing her as married, a reversionary share of a fund of mixed real & personal estate, expectant on a life interest. The will declared that every gift thereby made to a married woman should be for her separate use, without power of anticipation, & that her receipts alone should be good discharges for the same. The tenant for life died in the lifetime of testatrix, who nevertheless did not alter her will. The married woman's share of the residue being now represented by a sum of cash standing in ct., uninvested, upon petition by the married woman to have the cash paid out to her, upon her separate receipt:—*Held:* she was so entitled.—*Re* CROUGHTON'S TRUSTS (1878), 8 Ch. D. 460; 47 L. J. Ch. 795; 38 L. T. 447; 26 W. R. 574.

Annotations:—**Distd.** *Re* Benton, Smith *v.* Smith (1882), 19 Ch. D. 277. **Refd.** *Re* Clarke's Trusts (1882), 21 Ch. D. 748; *Re* Taber, Arnold *v.* Kayess (1882), 51 L. J. Ch. 721; *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411.

812. ——.]—Testator bequeathed a sum of £20,000 to S., & if he died in his lifetime bequeathed the said sum to S.'s children equally, & declared that every bequest made for the benefit of any female during her coverture should be for her separate use & without power of anticipation or alienation. S. died in testator's lifetime, leaving two children, who survived testator, one of whom was a married woman:—*Held:* the married woman was entitled to have one moiety of the £20,000 paid over to her, notwithstanding the restraint on anticipation.—*Re* TABER, ARNOLD *v.* KAYESS (1882), 51 L. J. Ch. 721; 46 L. T. 805; 30 W. R. 883.

813. ——.]—Testator bequeathed an annuity to his wife, & he directed his trustees & exors. to provide for the same either by setting apart a sufficient portion of the produce of his residuary personal estate or by purchasing an annuity. After bequeathing some pecuniary legacies he devised & bequeathed all his real estate & the

Sect. 1.—*Restraint on anticipation or alienation: Sub-sect.* 2, *B.; sub-sect.* 3, *A.*]

residue of his personal estate to his two daughters, their heirs, etc., as tenants in common so that the same might be enjoyed by them during any & every coverture as separate property free from marital control & without power of anticipation. The exors. paid testator's debts funeral & testamentary expenses & legacies & purchased an annuity for the widow. The residue of the estate then consisted of two sums of stock & a sum of cash. One of the daughters was married :—*Held :* (1) the married daughter's share of the stocks, they being income-bearing funds could not be transferred to her but only the income arising from them could be paid to her ; (2) her share of the cash might be paid to her on her separate receipt.—*Re* CLARKE'S TRUSTS (1882), 21 Ch. D. 748 ; 51 L. J. Ch. 855 ; 47 L. T. 43 ; 30 W. R. 778.

Annotation :—**Dbtd.** *Re* Bown, O'Halloran *v.* King (1881), 27 Ch. D. 411.

814. ——.]—Gift by testatrix of real & personal estate to trustees upon trust to convert & invest, & to stand possessed of the stocks, funds, & securities representing the same in trust for her children who being male attained twenty-one, or being female attained that age or married under that age ; with a declaration that the shares of daughters should be for their sole & separate use without power of anticipation. Power was given to the trustees, upon the marriage of any of the daughters to revoke the trusts so far as related to the share of any daughter so marrying, & to settle the same for the benefit of the daughter & her issue as to the trustees should seem fit. The residuary estate was represented by a sum of cash & certain leasehold houses :—*Held :* the gift being of an income producing fund with a restraint upon anticipation, the trustees could not pay to the daughters during coverture their shares upon their separate receipt.—*Re* BENTON, SMITH *v.* SMITH (1882), 19 Ch. D. 277 ; 51 L. J. Ch. 183 ; 45 L. T. 786 ; 30 W. R. 242.

815. —— Governed by intention of donor to restrain.]—Where a testator makes a bequest to a married woman for her separate use absolutely, & follows it by a clause restraining her from anticipation, the question whether the restraint on anticipation is effectual does not depend on the question whether it is a gift of an income-bearing fund or of a sum of cash, but whether testator has or has not shown an intention that the trustees should keep the investment & pay the incomes to the married woman.

Testatrix directed her trustees to raise & invest a sum of £4,500, & to pay the income to B. during her life, & after her death to hold two shares in trust for two of her nieces for life, & then for their children, & as to one other share to pay it to the daughters of a deceased niece, & as to the remaining share to pay it to H., a married woman, for her separate use without power to anticipate the same, & her receipt alone to be a sufficient discharge :—*Held :* on the construction of the will, on the death of B., H. was entitled to receive the capital of her share, notwithstanding the restraint on anticipation.

The point in dispute has never been brought in this distinct form before the Ct. of Appeal. . . . In my opinion the effect of the restraint on anticipation must in all these cases depend upon the intention of testator as expressed in the will (BAGGALLAY, L.J.).

Some importunate expressions have been used by judges making this distinction, that where there is a gift of an income-bearing fund the restraint on anticipation is effectual, but that it is not effectual if it is a gift of a sum of cash. That distinction is erroneous. The question depends on the intention of testator declared in his will. Has he declared an intention that the money should be paid to her, or that the income should be paid to her from time to time? It is not enough that it should be an income-bearing fund, but the intention of the testator must be shown that the married woman is to have the enjoyment of it in the way of income. . . . That is the true rule which does not turn on the accident as to how the money is invested at the death of testator or at any other time. If testator shows that the married woman is to enjoy the gift not as a mere money fund, but as an annuity, that is a strong intimation of his intention that he means the restraint on anticipation to apply not only to the income but also to the capital. In the present case, therefore, it is not material whether the gift was of a sum of cash or of a share of an invested fund, because . . . there is no indication of an intention that the trustees should retain the investments in their hands & let her enjoy the income, but they are to pay the fund to her for her sole & separate use, & her receipt is to be a sufficient discharge. In this will, having regard to the fact that it is a reversionary gift, the words restraining anticipation may have full effect given to them by preventing the lady from charging the fund before it falls into possession (COTTON, L.J.).—*Re* BOWN, O'HALLORAN *v.* KING (1881), 27 Ch. D. 411 ; 53 L. J. Ch. 881 ; 50 L. T. 796 ; 33 W. R. 58, C. A.

Annotations :—**Folld.** *Re* Spencer, Thomas *v.* Spencer (1885), 30 Ch. D. 183. **Consd.** *Re* Currey, Gibson *v.* Way (1886), 32 Ch. D. 361 ; *Re* Grey's Settlmts., Acason *v.* Greenwood (1887), 34 Ch. D. 712. **Distd.** *Re* Hutchings to Burt (1887), 58 L. T. 6 ; *Re* Tippett's & Newbould's Contract (1888), 37 Ch. D. 444. **Folld.** *Re* Fearon, Hotchkin *v.* Mayor (1896), 45 W. R. 232. **Refd.** *Re* Holmes, Hallows *v.* Holmes (1892), 67 L. T. 335 ; Hood Barrs *v.* Catheart, [1894] 2 Q. B. 559 ; *Re* Bankes, Reynolds *v.* Ellis, [1902] 2 Ch. 333 ; *Re* Millward, Steedman *v.* Hobday (1902), 87 L. T. 476 ; Bagot *v.* Chapman (1907), 23 T. L. R. 562 ; *Re* Game, Game *v.* Tennent, [1907] 1 Ch. 276.

SUB-SECT. 3. HOW

A. In General.

816. General rule — Question of intention of donor—Formal words unnecessary.]—No particular form of words is necessary to impose a restraint on anticipation in a limitation to the separate use of a married woman, the question being one of intention.

Property was devised in trust for testator's daughter & her assigns for her life, & to permit her to receive the income for her life for her separate use, with a direction that her receipts alone, or of some person or persons authorised by her to

PART VI. SECT. 1, SUB-SECT. 3.—A.

c. *General rule.*]—No particular form of words is necessary to create a separate use ; but the intention to give property to a married woman in opposition to the legal rights of her husband must be clear & unequivocal.—FITZPATRICK *v.* DRYDEN (1891), 30 N. B. R. 558.—**CAN.**

d. *Words restricting alienation—Anticipation & alienation.*]—Lands were devised to a married woman with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years ; & also that the devise should be for her separate use, independent of her husband's control :—*Held :* the restraint against alienation was valid, but the restraint on alienation was not a restraint on anticipation.—*Re* WELLER (1888), 16 O. R. 318.—**CAN.**

e. —— *Not to be sold or mortgaged.*]—Testator devised houses, held under a lease for lives renewable for ever, to M. for her sole use, neither to

receive any payment of the income, after such payment should have become due, should, alone, notwithstanding her marriage, be good discharges: —*Held:* she was restrained from anticipation.—BAKER *v.* BRADLEY (1855), 7 De G. M. & G. 597; 25 L. J. Ch. 7; 26 L. T. O. S. 160; 2 Jur. N. S. 98; 4 W. R. 78; 44 E. R. 233, L. JJ.

Annotations:—**Folld.** *Re* Smith, Chapman *v.* Wood (1884), 51 L. T. 501. **Mentd.** Wright *v.* Vanderplank (1856), 8 De G. M. & G. 133; Jonner *v.* Jenner (1860), 2 De G. F. & J. 359; Berdoe *v.* Dawson (1865), 34 Beav. 603; Chambers *v.* Crabbe (1865), 11 Jur. N. S. 277; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Lovell *v.* Wallis, No. 2 (1884), 50 L. T. 681; Barron *v.* Willis, [1899] 2 Ch. 578; De Witte *v.* Addison (1899), 80 L. T. 207; London & Westminster Loan & Discount Co. *v.* Bilton (1911), 27 T. L. R. 184.

817. Apart from nature of property.]—*Re* BOWN, O'HALLORAN *v.* KING, No. 815, *ante.*

818. Intention ascertained from instrument—By which property given.]—*Re* BOWN, O'HALLORAN *v.* KING, No. 815, *ante.*

819. —— ——.]—*Re* GREY'S SETTLEMENTS, ACASON *v.* GREENWOOD, No. 861, *post.*

Words restricting alienation—"Anticipation" & "alienation"—Whether distinction material.]—*See* No. 815, *ante*, No. 941, *post*; *compare* No. 805, *ante.*

820. —— **"Without liberty to sell or assign"—Necessity for gift over on default.**]—Testator gave a sum of money for the separate use of his daughter, a *feme sole*; & declared that she should not be at liberty to sell or dispose of it, &, if she attempted so to do, that such sale should be void. The daughter afterwards married:—*Held:* the restraint on the alienation was void, there being no gift over.—NEWTON *v.* REID (1830), 4 Sim. 141; 5 L. J. Ch. 137, n.; 58 E. R. 54.

Annotations:—**Consd.** Brown *v.* Pocock (1833), 2 Russ. & M. 210; Knight *v.* Knight (1834), 6 Sim. 121. **Expld.** Benson *v.* Benson (1835), 6 Sim. 126; Malcolm *v.* O'Callaghan (1835), 5 L. J. Ch. 137. **Consd.** Nedby *v.* Nedby (1839), 4 My. & Cr. 367; Tullett *v.* Armstrong, Scarborough *v.* Borman (1839), 4 My. & Cr. 377. **Refd.** Massey *v.* Parker (1834), 2 My. & K. 174; Davies *v.* Thornycroft (1836), 6 Sim. 420; Johnson *v.* Freeth (1836), Donnelly, 16; Maber *v.* Hobbs (1836), 2 Y. & C. Ex. 317; *Re* Gaffee (1850), 1 Mac. & G. 541.

821. —— —— ——.]—Bequest of money & leaseholds to a *feme sole* "for her own absolute use, without liberty to sell or assign during her life":—*Held:* she took the property absolutely, without power of disposition during her life.—BAKER *v.* NEWTON, NEWTON *v.* RICHARDS (1839), 2 Beav. 112; 8 L. J. Ch. 306; 3 Jur. 649; 48 E. R. 1122.

822. —— **Direction not to "sell, charge, mortgage, or encumber."**]—BAGGETT *v.* MEUX, No. 805, *ante.*

823. "Not to be sold or mortgaged."]—(1) When a bequest of property to a married woman to her separate use for life directs that the property shall "not be sold or mortgaged," these words amount to a clause against anticipation.

(2) Bequests of leaseholds to a married woman "for her whole & sole use during her life, free from the control of any future husband, & not to be sold or mortgaged, & after her decease to her heir or heirs, & provided her child or children should die before her, then that she may, at her decease, leave them to whom she will for the remainder of the term." The husband & wife demised the premises to a purchaser, & the purchaser demised them to another. The wife then filed her bill to have the underlease set aside:—*Held:* the gift was to the separate use of the wife, as well during the present as during a future coverture; the under lessees from the purchaser must be treated as having notice of the wife's interest; & the underlease to the purchaser should be set aside, but without costs.—STEEDMAN *v.* POOLE (1847), 6 Hare, 193; 11 Jur. 449; 67 E. R. 1136; *sub nom.* STEADMAN *v.* POOLE, 16 L. J. Ch. 348; *sub nom.* STEDMAN *v.* POOLE, 9 L. T. O. S. 218.

Annotations:—*As to* (2) **Consd.** King *v.* Lucas (1883), 23 Ch. D. 712. **Refd.** Harrison *v.* Harrison (1888), 13 P. D. 180.

824. —— ——.]—Lands were devised to trustees "for the use & benefit of T., the rents & profits of which estate she shall receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain anything authorising a sale or mtge., testatrix directed that no sale or mtge. of the estate or its rents should take place during the life of T. T. was unmarried when the will was made, but married after the death of testatrix:—*Held:* she took an estate for life for her separate use, without power of anticipation, & a mtge. made by her & her husband was therefore invalid.—GOULDER *v.* CAMM (1859), 1 De G. F. & J. 146; 29 L. J. Ch. 135; 1 L. T. 224; 6 Jur. N. S. 113; 8 W. R. 156; 45 E. R. 315, L. JJ.

825. —— **"Separate & inalienable provision during coverture"—Subsequent general power of disposition.**]—A declaration, concerning funds in settlement, that they are to be "a separate, personal & inalienable provision for A. during the intended coverture," operates as a restraint on anticipation during the coverture, although a subsequent clause in the settlement gives to A. a general power of disposition by deed or will.—SPRING *v.* PRIDE (1864), 4 De G. J. & Sm. 395; 10 L. T. 473; 10 Jur. N. S. 646; 12 W. R. 892; 46 E. R. 971, L. JJ.

Annotations:—**Refd.** *Re* Gaskell's Trusts (1865), 12 L. T. 763; *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409; Harrison *v.* Harrison (1888), 13 P. D. 180. **Mentd.** *Re* Clinton's Trust, Hollway's Fund, *Re* Clinton's Trust, Weare's Fund (1872), L. R. 13 Eq. 295; *Re* Pride, Shackell *v.* Colnett (1891), 61 L. J. Ch. 9.

826. —— **"Separate & inalienable use."**]—Absolute gift by will to a married woman for her separate & inalienable use. The property having been paid into ct.:—*Held:* it could not be parted with during coverture, but the dividends only should be paid to the wife.—*Re* GASKELL'S TRUSTS (1865), 12 L. T. 763; 11 Jur. N. S. 780.

Annotations:—**Consd.** *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409. **Refd.** *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411.

827. —— ——.]—A decree for dissolution of marriage having been made on the wife's petition, an order was made under Matrimonial Causes Act, 1857 (c. 85), s. 32, directing her husband to secure to her for life the annual sum of £130. Upon application by the solrs. who had acted for the wife under the petition for an order under Solicitors Act, 1860 (c. 127), s. 28, charging their costs upon such annual sum of £130:—*Held:* such annual sum was "property recovered or preserved by the solrs.," & therefore liable to a charging order under sect. 28; but the ct. refused, in the exercise of its discretion, to make the order, on the ground that upon the facts it could not be presumed that the wife had entered into a contract

mortgaged nor sold, & at her ise to descend to her next-of-kin, & neither to be mortgaged nor sold as long as the lease of the said house should last:—*Held:* M. took only a interest for her separate use, with a restraint on anticipation during coverture.—SHAW *v.* SHAW, [1914] 1 I. R. 111.—IR.

f. —— ——.]—Testator bequeathed a leasehold house to his daughter, F., for her sole use & benefit, subject to one condition—that she should not mortgage nor dispose of same by sale or otherwise. F. entered into a contract to sell the house:—*Held:* the condition against alienation

Sect. 1.—*Restraint on anticipation or alienation:*

with the solrs. so as to bind her separate property; the husband was therefore *primâ facie* responsible, & for anything that appeared the costs could be recovered from him.

The income of the reversionary interest when it falls into possession is to be held for her "sole, separate, & inalienable use." It is very true that she had separate property, but it was property with which she could in no way deal (COTTON, L.J.). —HARRISON *v.* HARRISON (1888), 13 P. D. 180; 58 L. J. P. 28; 60 L. T. 39; 36 W. R. 748; 4 T. L. R. 646, C. A.

Annotations:—**Consd.** Leak *v.* Driffield (1889), 24 Q. B. D. 98; Watkins *v.* Watkins, [1896] P. 222; Maclurcan *v.* Maclurcan (1897), 77 L. T. 474; *Re* Wingfield & Blow, [1904] 2 Ch. 665. **Refd.** Bonner *v.* Lyon (1890), 38 W. R. 541; Braunstein *v.* Lewis (1891), 7 T. L. R. 246; Everett *v.* Paxton (1891), 65 L. T. 383; Pelton *v.* Harrison, [1891] 2 Q. B. 422; *Re* Tatham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Savary *v.* Savary (1898), 79 L. T. 607; *Re* Fieldwick, Johnson *v.* Adamson (1908), 78 L. J. Ch. 153. **Mentd.** Wood *v.* Wood, [1891] P. 272; Arkwright *v.* Arkwright (1895), 73 L. T. 287.

828. —— "Free from marital control & liability"—"Inalienable by husband & wife."]—*Re* SAREL, No. 939, *post.*

829. —— —— Sufficiency.] —SYMONDS *v.* WILKES, No. 966, *post.*

830. —— "Free from her debts or engagements."]—Testator bequeathed his property to trustees upon trust to pay a third of the income arising from it to G. during the whole of her natural life, free from her debts or engagements, whether any such might be contracted by herself or any husband or husbands whom she might marry:—*Held:* these words imported a restriction on anticipation, & consequently a charge on her annual income created by G. in favour of certain creditors of her husband could not be sustained.—WHITE *v.* HERRICK (1873), 21 W. R. 454.

Compare No. 842, *post.*

831. —— No power of election—Of capital value of annuity.]—Testator directed his exors. out of his residuary estate to purchase an annuity of £100 during the life of M. for her benefit to her sole & separate use, & he declared that she should not be entitled to elect to receive the value of the annuity in lieu of it; & in case M. should sell, alien, assign, transfer or incumber the annuity, then immediately thereupon the annuity should cease & become part of the residue of testator's personal estate:—*Held:* the restraint on anticipation was valid, & on the death of testator, M. was not entitled to require the exors. to pay over to her in bulk the value of the annuity.—HATTON *v.* MAY (1876), 3 Ch. D. 148; *sub nom.* HALTON *v.* MAY, 24 W. R. 754.

Annotations:—**Expld.** Roper *v.* Roper (1876), 3 Ch. D. 714. **Refd.** *Re* Mabbett, Pitman *v.* Holborrow, [1891] 1 Ch. 707; *Re* Strange, Lamb *v.* Bossi Leu (1916), 60 Sol. Jo. 640.

—— ——.]—*See, further,* EQUITY, Vol. XX., pp. 424–426, Nos. 1549–1554.

832. —— Mere wish or request insufficient.]—The will of testator contained the following devise: "I give, devise, & bequeath unto my said two daughters, the said H. & M., all my freehold & leasehold messuages, dwelling-houses, lands, hereditaments, & premises with their & every of their rights, members, & appurtenances, to hold the same freehold & leasehold messuages, dwelling-houses, lands, hereditaments, & premises, unto & to the use of my said two daughters, the said H. & M. & their respective heirs, exors., administrators, & assigns, unto & equally between them, share & share alike, as tenants in common, & not as joint tenants, & to & for their several & respective sole & separate use & benefit absolutely; & it is my will & request that they shall not sell or dispose of any part of my said freehold or leasehold premises." A subsequent part of the will contained a bequest of a sum of stock to trustees, in trust to pay the income to another daughter for her life "for her own sole & separate & inalienable use & benefit, & without power of anticipation." H. was a married woman:—*Held:* the words of the devise, even if they had stood alone, would have been insufficient to operate as a restraint on anticipation; the cases as to precatory trusts did not apply, as there was no trust imposed in favour of some other person; & the subsequent bequest strengthened this construction by showing that testator, when he intended to impose a restraint on anticipation, knew of & used the appropriate words for so fettering the estate.—*Re* HUTCHINGS TO BURT (1888), 59 L. T. 490, C. A.

833. Words ineffective to restrain alienation.]—Where a married woman is entitled to property for her separate use without power of anticipation, the restraint on anticipation does not apply to income accrued due; & a judgment creditor may enforce the judgment against income which has accrued due at or before the date of the judgment.

In early days, when the effect of placing a married woman in the position of a *feme sole* with regard to her separate property came to be understood, there was an inclination to treat separate income as a purely personal provision intended for maintenance. Arguments more or less plausible were founded on the various expressions employed in the copious style of conveyancing to limit or develop "separate use." Where the direction was that the income was to be paid "from time to time," it was argued that the prescribed mode of payment was inconsistent with an absolute power of disposition. But the authorities the other way were too strong, & that attempt failed. The usual direction, that the income was to be paid "into the proper hands" of the married woman, & that "her receipts alone were to be a good discharge," was not more efficacious. The ct. always said that a married woman might dispose of her separate estate, "& her assignee," to use Lord Eldon's words "would take it; as if there was a contract entitling the assignee, this ct. would compel her to give her own receipt, if that was necessary to enable him to receive it." Nor did words requiring payment to be made on "personal appearance & receipt" carry the matter any further, for no payment, as Lord Cranworth observed, could be made into her proper hands without her personal appearance. In fact, these & such like expressions, however stringent they appear at first sight, were regarded as "only an unfolding of all that is implied in a gift to the separate use" (LORD MACNAGHTEN). —HOOD BARRS *v.* HERIOT, [1896] A. C. 174; 65 L. J. Q. B. 352; 74 L. T. 353; 60 J. P. 612; 44 W. R. 481, H. L.; *revsg.* S. C. *sub nom.* LOFTUS *v.* HERIOT, [1895] 2 Q. B. 212, C. A.

Annotations:—**Consd.** Whiteley *v.* Edwards, [1896] 2 Q. B. amounted to a restraint upon anticipation during the daughter's coverture.—*Re* DILLON, LOWE *v.* HARLING (1916), 50 I. L. T. 144.—**IR.**

g. ——.]—By a post-nuptial settlement, a husband & wife settled a policy of insurance on the husband's life upon trust for the wife during widowhood & after her death for the children of the marriage. Under the provisions of the policy the proceeds of the policy were, on the husband's death, payable to the widow, & the policy contained a condition against assignment or attempted assignment:

Held: there was a restraint on anticipation, & the settlement was ineffective so far as the policy was concerned.—BOLSTER *v.* BOLSTER, [1916] 1 I. R. 57.—**IR.**

48 ; Wood *v.* Lewis, [1914] 3 K. B. 73. **Refd.** *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690 ; *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630 ; Bolitho *v.* Gidley, [1905] A. C. 98 ; *Re* Rush's Settlmt., Warre *v.* Rush (1922), 127 L. T. 713. **Mentd.** Hood Barrs *v.* Crossman & Prichard, [1897] A. C. 172.

834. Right to disclaim.]—Since the passing of the Married Women's Property Act, 1882 (c. 75), a married woman is entitled to disclaim a gift by her will or other disposition of personal property, notwithstanding that the property so given is subject to a restraint on anticipation.

Testatrix gave an annuity to a married woman, during her life for a separate use, without power of anticipation. The annuity was to commence from the death of testatrix & to be paid quarterly, & testatrix directed defts., whom she appointed exors. & trustees of her will, to set apart a fund for securing the annuity & testatrix gave the residue of her estate to tenants in common. Testatrix died in Feb. 1913. In May, 1913, defts. ascertained that it would be difficult to set aside a fund to answer the annuity without selling leasehold property which the residuary legatees were desirous of retaining. As the result of negotiations between the married woman & the residuary legatees, she agreed to disclaim the annuity in consideration of a lump sum to be paid her by them. On an application by the married woman for a declaration that she was at liberty to refuse & disclaim the annuity :—*Held :* having done nothing to accept the bequest of the annuity, she was entitled to refuse & disclaim it.—*Re* WIMPERIS, WICKEN *v.* WILSON, [1914] 1 Ch. 502 ; 83 L. J. Ch. 511 ; 110 L. T. 477 ; 58 Sol. Jo. 304.

——.]—*See, further*, GIFTS, Vol. XXV., pp. 520, 521, Nos. 136–140.

Validity of restraint clause—Offending rule against perpetuities.]—*See* PERPETUITIES.

B. Form of Receipt Clause.

835. Addition of negative words—Necessity for.]—Construction of a clause framed to restrain anticipation by a married woman of property settled to her separate use. It is not in all cases necessary that negative words should be introduced in the receipt clause, to complete the restraint on anticipation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement.

By the settlement made on the marriage of Mr. & Mrs. V., part of the lady's property was vested in trustees, upon trust to pay the income thereof into the proper hands of Mrs. V., or to her appointees, by any note or writing under her hand at any time during her life, but not so as, during the joint lives of herself & Mr. V., to dispose thereof or deprive herself of the benefit thereof by mtge., charge, sale, assignment or otherwise in the way of anticipation, to the intent that the same might be for the sole & separate use of Mrs. V. & not subject to the debts, control, disposition or engagements of Mr. V., or any other person with whom she might, after his decease, happen to intermarry, & it was thereby agreed & declared, that the receipt or receipts of Mrs. V. or of her appointees, should be sufficient discharges to the trustees :—*Held :* the first part of the above clause amounted to a restraint against anticipation by Mrs. V. of the income settled to her separate use, & the effect of the first part of the clause was not destroyed by the absence of negative words in the second part of the clause, relating to the power of giving receipts.—HARROP *v.* HOWARD (1845), 3 Hare, 624 ; 14 L. J. Ch. 182 ; 4 L. T. O. S. 352 ; 9 Jur. 82 ; 67 E. R. 529.

836. —— —— Where intention clear.]—BROWN *v.* BAMFORD, No. 854, *post*.

837. —— Sufficiency.]—Where a married woman is entitled to a life interest to her separate use, under her marriage settlement, her receipt alone to be a sufficient discharge, that is not a restraint upon anticipation ; but where the trustees, upon the clause, as to the separate receipt, consider it so far doubtful that they refuse to pay either to the married woman or her assignee, & a bill is filed, they are still entitled to their costs in priority.—ROSE *v.* SHARROD (1863), as reported in 11 W. R. 356.

838. Payment of income to wife—Receipts from time to time sufficient discharge—Effect to create separate estate.]—Power of disposition of a *feme covert* over estate settled to her separate use. A sale by the husband & wife by fine was under all the circumstances established as to the separate estate of the wife & her reversion in fee ; though to the trustee for her separate use, & to support the contingent remainders : but set aside as to the remainders, to such persons, & uses, etc., as she should appoint by will, &, in default of appointment, to her children, upon her bill ; & two wills, obtained from her, decreed to be delivered up.

The trustees were to receive all the dividends & from time to time to pay them into the proper hands of the wife, receipts to be given from time to time. . . . These words have no more effect than to create in the view of the ct. a separate interest of the wife in the property (LORD ELDON, C.).—PARKES *v.* WHITE (1805), 11 Ves. 209 ; 32 E. R. 1068, L. C.

Annotations :—**Consd.** Jackson *v.* Hobhouse (1817), 2 Mer. 483 ; Baker *v.* Bradley (1855), 7 De G. M. & G. 597 ; Hood Barrs *v.* Heriot, [1896] A. C. 174. **Refd.** Johnson *v.* Freeth (1836), Donnelly, 16. **Mentd.** Chalmer *v.* Bradley (1819), 1 Jac. & W. 51 ; Digby *v.* Howard (1831), 4 Sim. 588 ; Scott *v.* Davis (1838), 4 My. & Cr. 87 ; Johnson *v.* Gallagher, Johnson *v.* Cazenove, Johnson *v.* Sturgis (1861), 3 De G. F. & J. 494 ; Taylor *v.* Meads (1865), 34 L. J. Ch. 203.

839. —— ——.]—WITTS *v.* DAWKINS, No. 848, *post*.

840. —— ——.]—Under a bequest of stock, in trust to permit a woman to receive the dividends for life for her sole & separate use, etc., & to pay the same into her own proper hands, & that her receipt & receipts should from time to time be sufficient discharges, a sale by her during coverture of part of the dividends established.—BROWNE *v.* LIKE (1807), 14 Ves. 302 ; 33 E. R. 537.

Annotation :—**Mentd.** Charretie *v.* Vause (1827), 1 Sim. 153.

841. —— As same should become due—Receipt of wife to be discharge.]—Testator devised a freehold estate to trustees, in trust to pay the rents, as the same should become due & payable, into the hands of his wife, & not otherwise, for her life, for her separate use ; & directed that the receipts of his wife alone for what should be actually paid into her own proper hands, should be good discharges to his trustees :—*Held :* the wife had power to alienate her life estate.—ACTON *v.* WHITE (1823), 1 Sim. & St. 429 ; 57 E. R. 172.

Annotations :—**Consd.** Tullet *v.* Armstrong (1840), 9 L. J. Ch. 41. **Expld.** Baker *v.* Bradley (1855), 7 De G. M. & G. 597. **Consd.** *Re* Smith, Chapman *v.* Wood (1884), 51 L. T. 501. **Refd.** Medley *v.* Horton (1844), 14 Sim. 222.

842. —— —— ——.]—Devise & bequest of real & personal estate in trust to pay the rents, dividends & interest from time to time as the same should become due & be received, unto & for the only use & behoof of testator's daughter, for & during the term of her natural life, & to pay the same into her own hands, independent of her present or future husband, & not in any manner subject to the debts, control, or engagement of

Sect. 1.—Restraint on anticipation or alienation: Sub-sect. 3, B., C. & D.]

such present or future husband, & her receipt to be a sufficient discharge to the trustees, as if she were sole & unmarried:—*Held:* the wife had a power of alienation of her life interest.—GLYN *v.* BASTER (1827), 1 Y. & J. 329; 148 E. R. 697, Ex. Ch.

843. —— —— Receipt to be discharge after payment due—Power of wife to appoint.]—A marriage settlement directed the trustees, during the lady's life, to receive the income of the settled property when & as often as the same should become due, & to pay it to such person or persons as she might from time to time appoint, or to permit her to receive it for her separate use; & it declared that her receipts, or the receipts of any person or persons to whom she might appoint the same after it should become due, should be valid discharges for it:—*Held:* the lady was restrained from anticipating the income provided for her.—FIELD *v.* EVANS (1846), 15 Sim. 375; 7 De G. M. & G. 609, n.; 60 E. R. 661.

Annotations:—**Consd.** White *v.* Herrick (1873), 21 W. R. 154; *Re* Smith, Chapman *v.* Wood (1884), 51 L. T. 501. **Refd.** Baker *v.* Bradley (1855), 7 De G. M. & G. 597.

844. —— —— —— ——.]—BAKER *v.* BRADLEY, No. 816, *ante*.

845. —— —— —— ——.]—By a settlement, dated in 1861, freehold property was conveyed to trustees upon trust to let the same, & pay the rents & annual proceeds to W., a married woman, during her life, for her own sole & separate use, free from the debts, control or engagements of her present or any future husband; "the receipts of her . . . for the said rents & annual proceeds to be given after the same shall have become due" to be "good & effectual discharges" to the trustees for the same; & from & after the decease of W. then upon trust to pay the rents & annual proceeds to her husband, in case he survived her, during his life; with ultimate trusts for sale & division amongst the children & issue of W. by her then present or any future husband, as should be living at the time of such division. In 1881 W. & her husband mortgaged the income of the settled property to secure a loan of £1,000, & in 1883 they further charged such income, together with other property, with the payment of £500. Notices of the mtge. & further charge were duly given to the trustees of the settlement. W. did not receive any of the money secured thereby, but her husband received the same, & applied the whole in payment of his own debts. The question was whether the mtge. was a valid charge upon the income of the settled property, & who was entitled to be paid such income:—*Held:* W. was restrained from anticipation, & her receipt was the only discharge which the trustees could accept.—*Re* SMITH, CHAPMAN *v.* WOOD (1884), 51 L. T. 501.

846. —— —— ——.]—*Re* WOOD, WOOD *v.* HOOPER, No. 875, *post*.

847. —— "On her personal appearance & receipt."]—Testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain, during her life, & be, under the order of the trustees, made a duly administered provision for her, & the interest of it given to her, on her personal appearance & receipt, by any banker the trustees might appoint:—*Held:* the wife was not prohibited from alienating her interest in the stock.—*Re* ROSS'S TRUST, *Ex p.* COLLINS (1851), 1 Sim. N. S. 196; 20 L. J. Ch. 293; 15 Jur. 241; 61 E. R. 76.

Annotations:—**Refd.** Hood Barrs *v.* Heriot, [1896] A. C. 174. **Mentd.** *Re* Bangley's Trust (1852), 19 L. T. O. S. 269; *Re* Field's Trust (1852), 16 Beav. 146; *Re* Turnley's Trusts (1866), 35 L. J. Ch. 313.

Compare Nos. 850, 921, 939, post.

C. Power of Appointment.

848. Power to appoint income—From time to time.]—Trust by marriage settlement to pay the rents & profits according to the appointment of the wife, from time to time, in default of appointment to her for her sole & separate use, the receipts of herself, or the person she should appoint from time to time to be from time to time effectual releases, etc. Sale by her & her husband of her separate interest established.—WITTS *v* DAWKINS (1806), 12 Ves. 501; 33 E. R. 190.

849. —— Anticipation excepted—To donee's separate use in default of appointment.]—An annuity was assigned to trustees, in trust to pay the same to such persons as B. should, by any writing signed by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation; & for want of such appointment, in trust to pay the same to B. for her separate use:—*Held:* B. had not only a limited power of appointment, but also, under the latter part of the clause, the general uncontrolled dominion over the annuity.—BARRYMORE *v.* ELLIS (1836), 8 Sim. 1; 59 E. R. 1.

Annotations:—**Distd.** Medley *v.* Horton (1844), 14 Sim. 222; Brown *v.* Bamford (1846), 1 Ph. 620. **Consd.** Vaughan *v.* Vanderstegen (1853), 2 Drew. 165. **Refd.** Moore *v.* Moore, (1844), 1 Coll. 54.

850. —— —— General power inconsistent with restraint.]—Testator gave his residuary estate to trustees to pay the annual proceeds to such persons as his daughter should appoint, & in default of appointment into her proper hands for her sole & separate use, independently of her husband, & her receipts alone to be sufficient discharges to the trustees, who were to be at liberty to require from his daughter a separate receipt for such quarterly payment, it being testator's intention that the interest should not be sold, charged, or disposed of:—*Held:* the general power of disposition, first given by testator, could not be affected by the subsequent restraint on alienation, & the daughter had full power to charge her separate estate.—MEDLEY *v.* HORTON (1841), 14 Sim. 222; 13 L. J. Ch. 442; 8 Jur. 853; 60 E. R. 343.

851. Receipt of donee or appointee as discharge.]—MOORE *v.* MOORE, No. 921, *post*.

852. —— —— ——.]—Property was held, in trust to pay the dividends to such person as a married woman should, but not by way of anticipation, appoint, & in default of appointment, to her for her separate use, & it was declared that the receipts of her or her appointee should be good discharges:—*Held:* she could not, by anticipation, charge the dividends not accrued due; but as to the dividends that had already become due on the sum of stock, an order was to be made for payment of them.—HARNETT *v.* MACDOUGALL (1845), 8 Beav. 187; 5 L. T. O. S. 18; 50 E. R. 74; *sub nom.* HARNETT *v.* M'DOUGALL, FLACK *v.* ASHTON, 14 L. J. Ch. 173.

Annotation:—**Consd.** Hood Barrs *v.* Heriot, [1896] A. C. 174.

853. —— —— ——.]—HARROP *v.* HOWARD, No. 835, *ante*.

854. —— —.]—(1) Gift by will of leasehold & other personal estates to trustees in trust to pay the rents, etc., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, & in default of such appointment, or so far as the same should not extend, into her proper hands for her sole &

separate use, with a direction that her or her appointees' receipts, notwithstanding coverture, should be good discharges, & after her death in trust for her children :—Held : upon the particular terms of the gift, the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges.

(2) The form commonly used by conveyancers for limiting property to the separate use of a married woman, with the clause against anticipation of the income, is sufficient, as it plainly indicates the intention to prevent the married woman from charging the property & anticipating her income, without the insertion of express negative words.

(3) The intention of the settlor to give a married woman a life interest in the property without the power of anticipating the income, operates & controls the whole clause.—BROWN *v.* BAMFORD (1846), 1 Ph. 620 ; 15 L. J. Ch. 361 ; 7 L. T. O. S. 249 ; 10 Jur. 447 ; 41 E. R. 769, L. C. ; *revsg.* (1842), 11 Sim. 127.

Annotations :—As to (1) **Distd.** Medley *v.* Horton (1844), 14 Sim. 222 ; Moore *v.* Moore (1844), 13 L. J. Ch. 124. **Consd.** Vaughan *v.* Vanderstegen (1853), 2 Drew. 165. **Refd.** Spring *v.* Pride (1864), 12 W. R. 510.

See, also, Sub-sect. 3, B., *ante.*

855. —— —— Joint appointment by husband & wife.]—By a post-nuptial settlement property was vested in trustees, upon trust to pay the income to such persons as H., a married woman, should from time to time appoint, without power of anticipation ; & in default of appointment, into her own hands for her separate use, independently of B. her husband ; & after her decease to B. for life ; & after the death of the survivor to the children of the marriage. B. died, & H. having married again, joined with her second husband in assigning the income of the trust fund :—*Held :* upon the construction of the settlement, the restriction against anticipation was co-extensive with the life of H., & its effect was not cut down by the subsequent reference to the then existing coverture ; &, therefore, the assignment by the wife & her second husband was void.—*Re* GAFFEE (1850), 1 Mac. & G. 541 ; 1 H. & Tw. 635 ; 19 L. J. Ch. 179 ; 15 L. T. O. S. 409 ; 14 Jur. 277 ; 41 E. R. 1375, L. C.

Annotations :—**Consd.** Moore *v.* Morris (1857), 4 Drew. 33. **Apld.** Hawkes *v.* Hubback (1870), L. R. 11 Eq. 5 ; Stroud *v.* Edwards (1897), 77 L. T. 280. **Refd.** King *v.* Lucas (1883), 23 Ch. D. 712 ; Abergavenny *v.* Sugden (1886), 2 T. L. R. 754. **Mentd.** *Re* Cazneau's Legacy (1856), 2 K. & J. 219.

856. —— —— ——.]—By a marriage settlement the income of a trust fund was to be paid during the joint lives of husband & wife, as they should appoint, "but not so as to deprive themselves of the benefit thereof by charge or otherwise in the way of anticipation." Upon a divorce *a mensâ*, etc., they appointed the income between themselves in equal moieties :—*Held :* the appointment was valid.—*Re* LINZEE'S SETTLEMENT (1856), 23 Beav. 241 ; 53 E. R. 94.

—— Receipt of donee or appointee to be discharge—After payment due.]—*See* Nos. 816, 843, *ante.*

857. Power to appoint corpus—Subject to life interest of donee—Appointment to be inoperative until death.]—Although a bequest of stock for a married woman, for her separate use for her life, & after her decease, for her appointees by deed or will, directs that any appointment by deed shall not come into operation until after her death, the married woman is not thereby restrained from *anticipation, or prevented from appointing the fund by an irrevocable deed.—*ALEXANDER *v.* YOUNG *(1848), 6 Hare, 393 ; 12 Jur. 996 ; 67 E. R. 1219.*

858. —— Life interest settled on donee.]—LONDON CHARTERED BANK OF AUSTRALIA *v.* LEMPRIÈRE, No. 1182, *post.*

859. —— ——.]—MAYD *v.* FIELD, No. 1183, *post.*

See, further, POWERS.

D. Direction for Payment of Fund.

860. Inconsistent with restraint—Restraint inoperative.]—Under several bequests to living persons for life, with remainder to their children born & unborn with a general proviso that the shares of females shall be for their separate inalienable use :—*Held :* the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children & a proviso that their receipts should be good discharges.—ARMITAGE *v.* COATES (1865), 35 Beav. 1 ; 55 E. R. 794.

Annotations :—**Refd.** *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409 ; *Re* Michael's Trusts (1877), 46 L. J. Ch. 651 ; *Re* Ridley, Buckton *v.* Hay (1879), 11 Ch. D. 645. **Mentd.** *Re* Russell, Dorrell *v.* Dorrell (1895), 12 R. 499.

861. —— ——.]—Testator having a general power of appointment over a settled fund, appointed that a sum of £1,500 should be raised & paid to his daughter, who was a married woman, absolutely for her separate use, without power of anticipation ; & appointed that one-fourth of the residue of the fund should be held upon trust for the same daughter absolutely for her separate use without power of anticipation :—*Held :* the daughter was not entitled to payment of the capital of one-fourth of the residue.

Testator first directs that a sum of £1,500 shall be raised & paid to the same daughter, absolutely for her separate use. That gift is followed by words restraining her from anticipation, but still there is testator's direction that it shall be paid to her & she is entitled to receive the capital. Then testator appoints one-fourth of the residue of the settled fund for the benefit of his daughter, using quite different words. . . . Testator in effect directs that the share of the residue is to be retained by the trustees for the benefit of the lady. Therefore she is precluded from disposing of the capital by the restraint on anticipation. For it has been decided that a clause restraining anticipation may apply to a gift of capital as well as to a gift of income as in *Baggett* v. *Meux*, No. 805, *ante* (COTTON, L.J.).

The effect of the clause restraining anticipation must depend on the intention of the testator as declared in his will (LOPES, J.).—*Re* GREY'S SETTLEMENTS, ACASON *v.* GREENWOOD (1887), 34 Ch. D. 712 ; 56 L. J. Ch. 511 ; 56 L. T. 350 ; 35 W. R. 560, C. A.

Annotations :—**Apld.** *Re* Tippett's & Newbould's Contract (1888), 37 Ch. D. 444. **Expld.** *Re* Wood, Wood *v.* Hooper (1889), 61 L. T. 197. **Distd.** *Re* Holmes, Hallows *v.* Holmes (1892), 67 L. T. 335. **Consd.** *Re* Fearon, Hotchkin *v.* Mayor (1896), 45 W. R. 232 ; *Re* Millward, Steedman *v.* Hobday (1902), 87 L. T. 476. **Refd.** *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

862. —— ——.]—A bequest of a fund in trust for a married woman "to be paid to her for her separate use without power of anticipation," there being no further indication that the income only is to be paid to her during coverture, will be construed as a direction that the corpus is to be forthwith paid to her, & the words "in restraint of anticipation" will be disregarded.—*Re* FEARON, HOTCHKIN *v.* MAYOR (1896), 45 W. R. 232 ; 41 Sol. Jo. 127.

Sect. 1.—Restraint on anticipation or alienation: Sub-sect. 3, D.; sub-sect. 4, A. & B

863. Gift subject to prior life interest — Payment directed on termination of prior interest—Restraint operative during prior interest.] —*Re* BOWN, O'HALLORAN *v.* KING, No. 815, *ante*.

864. —— —— ——.]—Under a gift to a woman by will of a legacy payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture shall be paid to her for her separate use when & as the same shall become due & payable, & so that she shall not have the power to deprive herself of the benefit thereof by anticipation, the legatee is at the date of the payment entitled to have the legacy paid to her, & the restraint on anticipation then ceases to operate; & a covenant by her contained in an ante-nuptial settlement executed before the death of testator, to settle after-acquired property is effectual to bind the property when transferred to her.—*Re* BANKES, REYNOLDS *v.* ELLIS, [1902] 2 Ch. 333; 71 L. J. Ch. 708; 87 L. T. 432; 50 W. R. 663; 46 Sol. Jo. 601.

Annotations:—**Refd.** Bagot *v.* Chapman (1907), 23 T. L. R. 562. **Mentd.** Lloyd *v.* Prichard, [1908] 1 Ch. 265.

865. —— ——.]—Testator devised & bequeathed his residuary real & personal estate to his trustees upon trust for conversion, & upon further trust to pay to his wife the annual income of the trust property during her life; & after her decease as to both the capital & income of the trust property, in trust for his children living at her decease, & the issue, if any, then living of such children of his as should be then dead, & who, whether a child or other issue, should either before or after that time attain the age of twenty-one years, or marry, in equal shares. Testator declared that all moneys, whether capital or income, to which any female should become entitled under his will should "be paid into her own hands for her separate use free from marital control," when & as the same should become actually due & payable, "& not by way of anticipation," & her receipts alone should, notwithstanding coverture, be sufficient discharges for the same:—*Held:* all the shares of testator's children & issue, including those of females, were to be paid to them on the death of his widow; & the restraint on anticipation was not operative to prevent payment to such females, whether under coverture or not.—*Re* HOLMES, HALLOWS *v.* HOLMES (1892), 67 L. T. 335, C. A.

Annotations:—**Folld.** *Re* Bankes, Reynolds *v.* Ellis, [1902] 2 Ch. 333. **Refd.** *Re* Game, Game *v.* Tennent, [1907] 1 Ch. 276.

4.—DURATION.

A. In General.

866. Operation from date of coverture—Though no coverture at date of gift—& restraint clause not confined to coverture.]—CLARK *v.* JAQUES, No. 888, *post*.

867. —— —— ——.]—TULLETT *v.* ARMSTRONG, No. 793, *ante*.

868. —— —— ——.]—SCARBOROUGH *v.* BORMAN (1840), 4 My. & Cr. 377, 407; 9 L. J. Ch. 48; 4 Jur. 38; 41 E. R. 147, 158, L. C.

Annotations:—**Refd.** Newlands *v.* Paynter (1840), 4 My. & Cr. 408; *Re* Gaffee (1850), 1 Mac. & G. 541; Hawkes *v.* Hubback (1870), L. R. 11 Eq. 5.

869. Confined to coverture—Whether coverture only contemplated by settlement.]—A gift for the separate use of a single woman without anticipation, will not prevent alienation by her unless it is made with reference to an intended marriage.—BROWN *v.* POCOCK (1834), 5 Sim. 663; 4 L. J. Ch. 15; 58 E. R. 488.

Annotations:—**Consd.** Bradley *v.* Hughes (1836), Donnelly, 116. **Refd.** Johnson *v.* Freeth (1836), Donnelly, 16; Tullett *v.* Armstrong (1840), 4 My. & Cr. 390.

870. —— ——.]—JOHNSON *v.* FREETH, No. 879, *post*.

871. —— — -.]—*Re* GAFFEE, No. 855, *ante*.

872. —— **Rights before marriage — Transfer free from restraint.**]—Testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will & the death of testator, & this annuity he gave to her separate use, & independent of any husband she might happen to marry, & without power to sell or assign the same by anticipation:—*Held:* the legatee was entitled, if she chose, to the fund at once, without having it laid out, & this option was not affected by the clause against anticipation.—WOODMESTON *v.* WALKER (1831), 2 Russ. & M. 197; 9 L. J. O. S. Ch. 257; 39 E. R. 370, L. C.

Annotations:—**Apld.** Brown *v.* Pocock (1833), 2 Russ. & M. 210. **Consd.** Malcolm *v.* O'Callaghan (1835), 5 L. J. Ch. 137; Bradley *v.* Hughes (1836), Donnelly, 116. **Distd.** Stiffe *v.* Everitt (1836), 5 L. J. Ch. 138. **Consd.** Tullett *v.* Armstrong (1840), 4 My. & Cr. 390; Hatton *v.* May (1876), 3 Ch. D. 148. **Refd.** Knight *v.* Knight (1834), 6 Sim. 121; Massey *v.* Parker (1834), 2 My. & K. 174; Davies *v.* Thornycroft (1836), 6 Sim. 420; Johnson *v.* Freeth (1836), Donnelly, 16; Scarborough *v.* Borman (1840), 4 Jur. 38; *Re* Gaffee (1850), 1 Mac. & G. 541. **Mentd.** Power *v.* Hayne (1869), L. R. 8 Eq. 262.

873. —— —— **Assignment of whole interest.**]—A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age & before marriage, from effectually assigning her whole interest in the legacy.—BROWN *v.* POCOCK (1833), 2 Russ. & M. 210; Coop. *temp.* Brough. 70; 39 E. R. 374, L. C.; *subsequent proceedings* (1834), 5 Sim. 663.

Annotations:—**Refd.** Massey *v.* Parker (1834), 2 My. & K. 174; Davies *v.* Thornycroft (1836), 6 Sim. 420; Tullett *v.* Armstrong (1840), 4 My. & Cr. 390; *Re* Gaffee (1850), 1 Mac. & G. 541.

874. —— —— **Where no specific marriage contemplated.**]—JOHNSON *v.* FREETH, No. 879, *post*.

875. —— —— **Covenant to settle.**]—H. appointed by deed, in pursuance of a will, that after her death the trustees of the will should hold her share in certain real & personal estate, as to £1,000 upon trust for & to be paid & transferred to her daughter M., & as to certain residue of the same share upon trust for M. & two others equally to be divided, with a proviso that M.'s share as well as the £1,000 should be for her sole & separate use, & that her receipts should from time to time after the same became due, & not by way of anticipation, be a sufficient discharge for the income. M. married in 1882, & by her marriage settlement she & her intended husband covenanted to settle the appointed property. H. died in 1889:—*Held:* though the appointment created a restraint on anticipation, it was removed by the covenant.—*Re* WOOD, WOOD *v.* HOOPER (1889), 61 L. T. 197.

Annotation:—**Refd.** *Re* Chrimes, Locovich *v.* Chrimes, [1917] 1 Ch. 30.

876. —— **Rights on death of husband—Assign-**

PART VI. SECT. 1, SUB-SECT. 4.—A.

h. *Confined to coverture.*]—On the facts:—*Held:* a devise to married women of lands free from the debts & control of their respective husbands & without power of alienation was valid so long & only so long as the coverture lasted.—*Re* HARRISON'S ESTATE (1913), 24 O. W. R. 824; 4 O. W. N. 1455; 12 D. L. R. 60.—**CAN.**

k. *Whether applicable to subsequent marriages.*]—By settlement, a jointure

ment of whole interest.]—*Bequest of dividends of stock to a feme covert for life, not to be subject to the debts or control of her then present or any other husband, & without power to charge or anticipate the growing payments thereof :—Held :* the legatee, on becoming discovert might validly dispose of her entire life interest.—JONES *v.* SALTER (1815), 2 Russ. & M. 208 ; 39 E. R. 374.

Annotations :—**Refd.** Massey *v.* Parker (1834), 2 My. & K. 174 ; Davies *v.* Thornycroft (1836), 6 Sim. 420 ; Johnson *v.* Freeth (1836), Donnelly, 16 ; Tullett *v.* Armstrong (1840), 4 My. & Cr. 390.

877. —— —— Transfer free from restraint.]—Settlement in trust for the separate use of a married woman for life, but so as not to anticipate with remainder as she should appoint by will ; & in default of appointment to A. On the death of her husband the restraint on anticipation ceases, & therefore she is entitled with the concurrence of A. to a transfer of the fund.—BARTON *v.* BRISCOE (1822), Jac. 603 ; 37 E. R. 978.

Annotations :—**Apld.** Woodmeston *v.* Walker (1831), 2 Russ. & M. 197. **Consd.** Massey *v.* Parker (1834), 2 My. & K. 174 ; Tullett *v.* Armstrong (1840), 4 My. & Cr. 390 ; Brown *v.* Bamford (1846), 1 Ph. 620. **Refd.** Brown *v.* Pocock (1833), 2 Russ. & M. 210 ; Malcolm *v.* O'Callaghan (1835), 5 L. J. Ch. 137 ; Davies *v.* Thornycroft (1836), 6 Sim. 420 ; Johnson *v.* Freeth (1836), Donnelly, 16. **Mentd.** Vaughan *v.* Vanderstegen (1854), 23 L. J. Ch. 793.

878. —— .]—By a marriage settlement the wife's property was vested in trustees, in trust for her separate use for life, independently of her then or any future husband, without anticipation, with remainder, in the events which happened, as she should, notwithstanding her coverture, appoint by will, &, in default of appointment, in trust for her exors. & administrators :—*Held :* the lady & an after-taken husband were entitled to a transfer of the settled fund.—MALCOLM *v.* O'CALLAGHAN (1835), 5 L. J. Ch. 137.

Annotations :—**Consd.** Tullett *v.* Armstrong (1840), 4 My. & Cr. 390. **Refd.** Bradley *v.* Hughes (1836), Donnelly, 116 ; Davies *v.* Thornycroft (1836), 5 L. J. Ch. 140 ; *Re* Gaffee's Setthmt. (1850), 1 H. & Tw. 635.

879. —— ——.]—In the case of a gift to a person unmarried, or to a person under coverture, who afterwards became *discovert*, the clause against anticipation would not apply (SHADWELL, V.-C.).

Except as to the marriage with reference to which the settlement containing the clause against anticipation is made, that clause is to be taken as a nullity (SHADWELL, V.-C.). —JOHNSON *v.* FREETH (1836), Donnelly, 16 ; 5 L. J. Ch. 143 ; 47 E. R. 197.

Annotation :—**Consd.** Tullett *v.* Armstrong (1840), 4 My. & Cr. 390.

880. —— —— **Transfer of legal estate from trustees.**]—A. devised lands to trustees upon trust for testator's daughter for life, for her separate use, without power of anticipation, with remainder to the use of her children as tenants in common in tail, remainder to the use of another daughter in similar form, with remainders over to nephews & nieces :—*Held :* the first daughter having become a widow, & *sui juris*, could compel a conveyance of the legal estate by the trustees of the will.—BUTTANSHAW *v.* MARTIN (1859), John. 89 ; 33 L. T. O. S. 300 ; 70 E. R. 351 : *sub nom.* BURTANSHAW *v.* MARTIN, 5 Jur. N. S. 647.

Rights after divorce.]—*Compare* Nos. 893–895, *post.*

881. Liability on death of husband Property available for creditors.]—PIKE *v.* FITZGIBBON, MARTIN *v.* FITZGIBBON, No. 968, *post.*

882. —— —— ——.]—Where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband & becomes bkpt., her separate estate, subject to the restraint on anticipation, vests in her trustee in bkpcy. &, on the death of her husband on her lifetime, is assets for her creditors. In such a case the restraint on anticipation is in the nature of an incumbrance which is removed by the death of the husband.—*Re* WHEELER'S SETTLEMENT TRUSTS, BRIGGS *v.* RYAN, [1899] 2 Ch. 717 ; 68 L. J. Ch. 663 ; 81 L. T. 172 ; 48 W. R. 10 ; 15 T. L. R. 545 ; 6 Mans. 372.

Annotation :—**Refd.** *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56.

883. Effect of protection order — Property acquired after desertion—Before order.]—COOKE *v.* FULLER, No. 777, *ante.*

884. —— **Property acquired before desertion.**]—HILL *v.* COOPER, No. 790, *ante.*

885. Effect of judicial separation — Property falling due after separation.]—MUNT *v.* GLYNES, No 768, *ante.*

886. —— ——.]—The property with respect to which a married woman who has obtained a decree for judicial separation is, by Matrimonial Causes Act, 1857 (c. 85), s. 25, to be considered as a *feme sole*, is only such property as shall be acquired by, or come to, or devolve upon her after the date of the decree & during the continuance of the separation. Accordingly a decree for judicial separation will not take off the fetter of the restraint upon anticipation from property to which the wife was entitled in possession previously to the date of the decree.—WAITE *v.* MORLAND (1888), 38 Ch. D. 135 ; 57 L. J. Ch. 655 ; 59 L. T. 185 ; 36 W. R. 484 ; 4 T. L. R. 418, C. A.

Annotation :—**Consd.** Hill *v.* Cooper, [1893] 2 Q. B. 85.

887. —— **Property accruing before decree.**] —WAITE *v.* MORLAND, No. 886, *ante.*

——.]—*See, now,* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 194 (1), (2).

Duration for period offending rule against perpetuities.]—*See* PERPETUITIES.

Remarriage.]—*See* Sub-sect. 4, B., *post.*

Removal by court.]—*See* Sect. 2, *post.*

Removal by single woman.]—*See* Sub-sect. 6, A., *post.*

B. Effect of Remarriage.

888. Restraint revival — Subject to disposition during discoverture.]—Where property is given to the separate use of a woman, without power of anticipation, she will have the absolute property in the fund before marriage, or upon becoming discovert, by the death of her husband ; but if she does not alienate the property, in that case, upon her subsequent marriage, the separate use clause, & the prohibition against alienation, will both become operative.

Testator bequeathed certain property to trustees, upon trust to pay an annuity of £50 to S. for her life, for her separate use, without anticipation. S. was a single woman at the death of testator, but married some years afterwards, & on the death of her first husband, contracted a second marriage. S. & her second husband contracted to sell the annuity, & presented a petition that it might be ordered to be paid to the proposed purchaser :—*Held :* the limitation in the will to her separate use, & also the restraint upon alienation, were both operative on her marriage ; & the contract for

was limited to the sole & separate use of K. in case she should survive M., her intended husband, with a restraint on anticipation :—*Held :* such limitation referred as well to the then intended marriage as to every future coverture, so as to prevent K. from incumbering or otherwise dealing with the jointure during the life of M.—*Re* MOLYNEUX'S ESTATE (1872), 6 I. R. Eq. 411.—**IR.**

Sect. 1.—*Restraint on anticipation or alienation: Sub-sect.* 4, *B. & C.; sub-sect.* 5, *A. & B.* (*a*) *i.*]

the sale of the annuity was consequently invalid.—CLARK *v.* JAQUES (1838), 1 Beav. 36; 8 L. J. Ch. 25; 2 Jur. 915; 48 E. R. 851.

889. —— —— Notwithstanding words applicable only to earlier coverture.]—*Re* GAFFEE, No. 855, *ante*.

Compare Nos. 873, 879, *ante*.

890. ——.]—Where a fund was settled, on the marriage of a lady, for her separate use, without power of anticipation during that or any future coverture, with a limitation to her absolutely, if there were no children of the marriage, & she survived her husband:—*Held:* on the event of her husband's death, in her lifetime, without children, the two limitations for her benefit did not coalesce, so as to prevent the separate use & anticipation clauses from taking effect on her second marriage.—DIXON *v.* DIXON (1838), 1 Beav. 40; 8 L. J. Ch. 25; 2 Jur. 960; 48 E. R. 853.

891. ——.]—STEEDMAN *v.* POOLE, No. 823, *ante*.

892. ——.]—By a marriage settlement certain moneys were vested in trustees upon trust to invest the same & to pay the annual income thereof to the wife during her life for her separate use, independently of the debts or control of her intended husband, & so that her receipts alone should be sufficient discharges, & so that she should not have power to deprive herself thereof by anticipation. The husband died, & the lady married a second time:—*Held:* as the trust for the lady's separate use without power of anticipation was for her life, the restraint against anticipation revived on her second marriage.—HAWKES *v.* HUBBACK (1870), L. R. 11 Eq. 5; 40 L. J. Ch. 49; 23 L. T. 643; 35 J. P. 279; 19 W. R. 117.

Annotations:—**Consd.** King *v.* Lucas (1883), 23 Ch. D. 712. **Folld.** Abergavenny *v.* Sugden (1886), 2 T. L. R. 751.

893. Remarriage after divorce.]—A husband, being entitled in remainder to an estate for his life in certain real property, settled the same during the joint lives of himself & his wife, for her separate use independently of his control, & without power of anticipation. The wife subsequently obtained a divorce, & married again without a settlement:—*Held:* notwithstanding the special circumstances of the case, the trust for separate use & the restraint on anticipation revived on the second marriage.—SHAFTO *v.* BUTLER (1871), 40 L. J. Ch. 308; 24 L. T. 412; 19 W. R. 595.

894. —— ——.]—On the marriage of D. & X. in 1871, a fund was settled upon trust to pay the income to X. during her life, but during their joint lives for the separate use of X., with a restraint on anticipation. In 1878 X. was divorced from D., & afterwards married S.:—*Held:* the separate use & restraint on anticipation attached upon the second marriage.—ABERGAVENNY (MARQUIS) *v.* SUGDEN (1886), 2 T. L. R. 754.

895. —— ——.]—By a settlement made upon the marriage of deft. with P. her property was settled upon trust to pay the income to her for life for her separate use without power of anticipation, & there was an ultimate trust for her absolutely if she survived P. Deft. obtained a divorce from P. & subsequently married E. There was no evidence whether P. was alive or not. Pltf. obtained judgment against deft. as a married woman, & then obtained an order appointing a receiver of her interest under the settlement:—*Held:* the restraint on anticipation became operative upon the second marriage, & therefore an order for a receiver ought not to have been made.—STROUD *v.* EDWARDS (1897), 77 L. T. 280, C. A.

C. Restraint for limited Period.

896. Gift subject to prior life interest—Restraint limited to duration of life estate.]—Testator directed surplus income of real & personal estate, after providing an annuity, to be accumulated during the life of his wife, & after her death he gave the capital to his children; he directed that the shares of his daughters should be for their separate use, without power of alienation or anticipation during the wife's life:—*Held:* his married daughters during the life of their mother were entitled to receive only the income of invested income.—*Re* SPENCER, THOMAS *v.* SPENCER (1885), 30 Ch. D. 183; 55 L. J. Ch. 80; 34 W. R. 62.

—— Direction to pay on termination of life estate.]—*See* Nos. 815, 864, 865, *ante*.

See, also, No. 922, *post*.

897. Fund subject to particular estate—No implied restriction of restraint.]—Where a fund subject to a particular estate is given absolutely to a married woman with a restraint on anticipation, the restraint will not in the absence of any other ground be confined to the continuance of that particular estate.—*Re* TIPPETT'S & NEWBOULD'S CONTRACT (1888), 37 Ch. D. 444; 58 L. T. 754; 36 W. R. 597, C. A.

Annotations:—**Consd.** *Re* Millward, Steedman *v.* Hobday (1902), 87 L. T. 476. **Refd.** *Re* Holmes, Hallows *v.* Holmes (1892), 67 L. T. 335; *Re* Fearon, Hotchkin *v.* Mayor (1896), 41 Sol. Jo. 127.

SUB-SECT. 5.

A. In General.

898. Payment of income in advance—Liability of trustees to repay—Without reimbursement from subsequent income.]—LEACH *v.* WAY, No. 1389, *post*.

899. Extent of protection—General rule.]—What is the force & effect of this restraint on anticipation? It provides that nothing done, or omitted to be done, by W. [the married woman] at any given time shall deprive her of the right to receive from the trustees the next & every succeeding payment of the income of the fund as it becomes due. A provision for a married woman who is restrained from anticipation is regarded as giving the highest security known to the law that the married woman shall, come what may to herself & her husband, have from half-year to half-year, some moneys paid into her very hands to increase her comforts or to supply her with maintenance. This security would be seriously imperilled if, by the doctrine of election, she could take in lieu of this inalienable provision a sum of money or other benefit which she might forthwith make over to her husband, or squander at her choice (FRY, L.J.).—*Re* VARDON'S TRUSTS (1885), Ch. D. 275; 55 L. J. Ch. 259; 53 L. T. 895; W. R. 185; 2 T. L. R. 204, C. A.

Annotations:—**Distd.** Carter *v.* Silber, Carter *v.* Hasluck, [1891] 3 Ch. 553. **Consd.** Hamilton *v.* Hamilton, [1892] 1 Ch. 396; Haynes *v.* Foster, [1901] 1 Ch. 361. **Expld.** *Re* Hargrove, Hargrove *v.* Pain, [1915] 1 Ch. 398. **Refd.** *Re* Quecade's Trusts (1885), 54 L. J. Ch. 786; *Re* Tancred's Settlmt., Somerville *v.* Tancred, *Re* Selby, Church *v.* Tancred, [1903] 1 Ch. 715. **Mentd.** *Re* Brooksbank, Beauclerk *v.* James (1886), 34 Ch. D. 160; *Re* Wells' Trusts, Hardisty *v.* Wells (1889), 42 Ch. D. 646.

900. Against laches of married woman.]—*Semble:* a clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time &

acquiescence.—DERBISHIRE *v.* HOME (1853), 3 De G. M. & G. 80 ; 43 E. R. 32, L. JJ.

Annotations :—**Refd.** Macnaghten *v.* Paterson (1907), 97 L. T. 442. **Mentd.** *Re* Lush's Trusts (1869), 4 Ch. App. 591.

901. —— Defaulting trustees—Power of woman to release liability.]—A married woman, restrained from anticipation, cannot agree to release her trustees from liability incurred by their disregard of that restraint.—DICKSON *v.* HOOK (1866), 14 W. R. 552.

902. —— Against fraud by married woman.]—A married woman having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mtge. of such property, concealing the restraint upon anticipation. The mtgee. obtained a judgment against her for the amount lent, & a charging order to charge her next accruing dividend :—*Held :* such charging order must be discharged ; for in no case & by no device could the restraint upon anticipation be evaded.—STANLEY *v.* STANLEY (1878), 7 Ch. D. 589 ; 47 L. J. Ch. 256 ; 37 L. T. 777 ; 26 W. R. 310.

Annotations :—**Expld.** Cahill *v.* Cahill (1883), 8 App. Cas. 420. **Apld.** Bateman *v.* Faber, [1898] 1 Ch. 144. **Refd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532 ; Hyde *v.* Hyde (1888), 13 P. D. 166 ; Hood Barrs *v.* Catheart, [1894] 2 Q. B. 559.

903. —— ——.]—BATEMAN (LADY) *v.* FABER, No. 918, *post.*

904. —— Doctrine of election excluded.]—*Re* VARDON'S TRUSTS, No. 899, *ante.*

See, further, EQUITY, Vol. XX., pp. 424-426, Nos. 1519–1554.

905. —— Doctrine of estoppel excluded.]—BATEMAN (LADY) *v.* FABER, No. 918, *post.*

906. —— Statutory charge on property—Enemy alien—Treaty of Peace Order, 1919, s. 1, (16).]—Where property settled upon a married woman for her separate use is subject to a restraint on anticipation, the restraint is not a mere personal liability attaching to the married woman, but is a condition of the trust under which she takes her interest, & as such it cannot, any more than any other condition of the trust, be destroyed, except by the express words of some statutory enactment or by necessary implication, &, except in such case, any charge upon that interest must be subject to the restriction under which she takes the interest.

The Treaty of Peace signed at Versailles on June 28, 1919, came into force on Jan. 10, 1920. By the above sub-sect., which has effect as a statutory enactment, it is provided that "all property, rights & interests" within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty came into force, with an immaterial exception, & the net proceeds of their sale, liquidation or other dealings therewith are thereby charged with the payments therein mentioned. On Jan. 10, 1920, applt., a German national, was entitled under her marriage settlement to a reversionary life interest in certain funds in England which were settled upon her for her separate use without power of anticipation. She was then & still was under coverture :—*Held :* although the Order created a charge upon her interest under the settlement it created it only upon the interest as it then existed—namely, subject to the restraint on anticipation—& there was therefore no effective charge which operated to deprive her of the instalments of income when they became due.—*Re* RUSH, WARRE *v.* RUSH, [1923] 1 Ch. 56 ; 92 L. J. Ch. 87 ; 127 L. T. 713 ; 38 T. L. R. 900 ; 67 Sol. Jo. 31, C. A.

Annotations :—**Refd.** Morgan *v.* Morgan & Kirby, [1923] P. 1.

Mentd. *Re* Neuburger's Settlmt., Foreshew *v.* Public Trustee, [1923] 1 Ch. 508.

907. Rights of married woman in corpus—Payment of income only.]—Where a fund producing income is given absolutely to a married woman, & the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture.

Testatrix, by her will, gave to a married woman a sum of consols ; & by a codicil directed that all gifts & provisions, whether absolute or limited, thereby or by her will made for any female should be for her separate use, whilst she should be under coverture, without any power of anticipation. The exor. transferred the fund into ct. under Trustee Relief Act, & the married woman presented a petition for the transfer of the fund to herself :—*Held :* she could only have the income paid to her during her coverture. *Qu. :* as to the effect of a clause restraining anticipation on an absolute gift of a fund not producing income.—*Re* ELLIS' TRUSTS (1874), L. R. 17 Eq. 409 ; 43 L. J. Ch. 414 ; 38 J. P. 566 ; 22 W. R. 448.

Annotations :—**Consd.** *Re* Croughton's Trusts (1878), 8 Ch. D. 460 ; *Re* Taber, Arnold *v.* Kayess (1882), 51 L. J. Ch. 721. **Apld.** *Re* Clarke's Trusts (1882), 21 Ch. D. 718. **Expld. & Distd.** *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411. **Refd.** *Re* Benton, Smith *v.* Smith (1882), 19 Ch. D. 277 ; *Re* Bankes, Reynolds *v.* Ellis, [1902] 2 Ch.

908. —— ——.]—Testator gave his residue to his two daughters as tenants in common as separate property without power of anticipation ; the residue after administration consisted of consols, railway securities, & some cash :—*Held :* a married daughter could during coverture receive the income only of the property other than the cash.—*Re* CLARKE'S TRUSTS (1882), 21 Ch. D. 748 ; 51 L. J. Ch. 855 ; 47 L. T. 43 ; 30 W. R. 778.

Annotation :—**Dbtd.** *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411.

909. —— ——.]—*Re* SPENCER, THOMAS *v.* SPENCER, No. 896, *ante.*

910. —— ——.]—*Re* GREY'S SETTLEMENTS, ACASON *v.* GREENWOOD, No. 861, *ante.*

Right of disclaimer.]—*See* No. 834, *ante*, &, *generally*, GIFTS, Vol. XXV., pp. 520, 521, Nos.

Power of court to remove restraint.]—*See* Subsect. 6, B., *post.*

B. On Dealings with Property.

(*a*) *Alienation.*

i. *In General.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

911. Assignment inoperative—Transfer to husband to secure annuity.]—Settlement by a husband of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife of the interest to become due, & of the principal sum in the event of there being no children of the marriage :—*Held :* the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement ; a charge of fraudulent concealment not being sufficiently established. & even if fraud had been fully made out against the wife, it seems that it would not be sufficient to support the assignment, which would be to give her a power of alienation against the intention of the settlor.—JACKSON *v.*

Sect. 1.—*Restraint on anticipation or alienation: Sub-sect.* 5, *B.* (*a*) *i. & ii.*]

HOBHOUSE (1817), 2 Mer. 483; 35 E. R. 1025, L. C.

Annotations:—**Consd.** Barrow *v.* Barrow (1858), 4 K. & J. 409. **Apld.** Clive *v.* Carew (1859), 1 John. & H. 199; Arnold *v.* Woodhams (1873), L. R. 16 Eq. 29; Stanley *v.* Stanley (1878), 47 L. J. Ch. 256. **Consd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532. **Refd.** Johnson *v.* Freeth (1836), Donnelly, 16; Baggett *v.* Meux (1844), 1 Coll. 138; Sharpe *v.* Foy (1868), 4 Ch. App. 35; Thomas *v.* Price (1877), 46 L. J. Ch. 761; Bateman *v.* Faber, [1897] 2 Ch. 223. **Mentd.** Tullett *v.* Armstrong (1838), 1 Beav. 1; Moore *v.* Moore (1844), 13 L. J. Ch. 124; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; Willoughby *v.* Middleton (1862), 2 John. & H. 344.

912. —— Though by consent in court.]—A married woman cannot by consent, on examination in ct., part with her interest in a fund settled on her marriage for her separate use during her life, with a clause against anticipation, with remainder to the survivor of her & her husband.—RITCHIE *v.* BROADBENT (1821), 2 Jac. & W. 456; 37 E. R. 702.

913. —— Assignment to creditors.]—Testator in Scotland gave all his property to trustees; first, to pay his debts; secondly, to pay Mrs. R., a married woman, so much of the annual proceeds as they might deem necessary for the support of her & family during her life, declaring the same to be alimentary & exclusive of her husband, & not to be attachable, nor assignable, nor subject to any deeds or debts of her or her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property; first, to pay debts affecting it; secondly, to pay part of the rents to Mrs. R. for aliment; thirdly, to apply the residue in payment of the debts due to the assignee:—*Held:* the assignment was void, as it violated the express prohibition against alienation, & in this respect the law in Scotland is the same as in England.—RENNIE *v.* RITCHIE (1845), 12 Cl. & Fin. 204; 8 E. R. 1379; *sub nom.* RITCHIE *v.* RENNIE, 9 Jur. 435, H. L.

Annotations:—**Refd.** Hood Barrs *v.* Heriot, [1896] A. C. 174; *Re* Rush's Settlmt., Warre *v.* Rush (1922), 127 L. T. 713.

914. Court cannot assist assignment—Though other benefits taken in exchange—Legacy.]—ROBINSON *v.* WHEELWRIGHT, No. 1004, *post.*

915. —— Interest accruing de die in diem.]—Testator, by his will, bequeathed his residuary estate to trustees, upon trust to pay the income "when & as the same should be due & received," to S. C., a married lady, for her separate use, without power of anticipation. The residue comprised a bond on which interest was payable yearly on Oct. 31. On May 23, 1860, S. C. assigned to A. B. all interest & moneys comprised in the bequest which had "accrued & become payable":—*Held:* the interest on the bond debt between Oct. 31, 1859, & May 23, 1860, did not pass by the assignment; as well because the interest was not at the date of assignment "due & received" within the meaning of the clause restraining anticipation, as also because it had not "accrued & become payable" within the meaning of the deed of assignment.—*Re* BRETTLE, JOLLANDS *v.* BURDETT (1864), 2 De G. J. & Sm. 79; 3 New Rep. 596; 33 L. J. Ch. 471; 10 L. T. 7; 10 Jur. N. S. 349; 12 W. R. 562; 46 E. R. 305, L. JJ.

Annotations:—**Consd.** Everett *v.* Paxton (1891), 65 L. T. 383; Hood Barrs *v.* Heriot, [1896] A. C. 174.

916. —— Though fraud on assignee—Restraint disclosed.]—There is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint on anticipation appears from the instrument in respect of which relief is sought. A married woman who had previously to her marriage settled certain property upon trust for herself during the joint lives of herself & her husband for her separate use, without power of anticipation, & after the death of one of them, for the survivor for life, & after trusts for the benefit of the children of the marriage, upon such trusts as she should by deed or will appoint, &, there being no children of the marriage, had by deed irrevocably appointed her reversionary interest in favour of her mother, subsequently, &, as she alleged, under the compulsion of her husband, made another absolute irrevocable appointment of her reversionary interest in favour of her husband without noticing the previous appointment. The husband deposited the appointment in his favour to secure a debt to himself:—*Held:* on bill filed by the assignee of the debt & security, that assuming the second appointment to be fraud on the part of the wife, inasmuch as it was not based upon any active misrepresentation by her, but disclosed the restraint on anticipation, & only attempted to deal with the reversionary interest, the assignee of the security was not entitled to impound the income during her life to make good his loss by such fraud.—ARNOLD *v.* WOODHAMS (1873), L. R. 16 Eq. 29; 42 L. J. Ch. 578; 28 L. T. 351; 21 W. R. 694.

Annotations:—**Apld.** Stanley *v.* Stanley (1878), 47 L. J. Ch. 256. **Consd.** *Re* Glanvill, Ellis & Johnson (1886), 31 Ch. D. 532. **Refd.** Thomas *v.* Price (1877), 46 L. J. Ch. 761.

917. —— ——.]—BATEMAN (LADY) *v.* FABER, No. 918, *post.*

918. —— Assignor not estopped from denial of validity.]—A married woman was entitled to the income of property during her life, for her separate use without power of anticipation, subject to a proviso that on a specified event her interest should cease, & the property be held in trust for her husband. In order to assist her husband to make an arrangement with a creditor, she executed a deed-poll, whereby she admitted, believing then that it was true, though, as she afterwards alleged, it was not in fact true, that the event mentioned in the proviso had occurred, & that her life interest had determined, & she released that interest in favour of her husband. On the faith of this deed the creditor entered into arrangements with the husband for his benefit. The wife subsequently, notwithstanding the deed, claimed to receive the income of the property during her life:—*Held:* she could not by admission or estoppel or in any other way by her own act get rid of the protection afforded by the restraint on anticipation, & her right to receive the income was unaffected by her admission contained in the deed-poll.

A married woman cannot even by her own fraud deprive herself of this protection (LINDLEY, M.R.).—BATEMAN (LADY) *v.* FABER, [1898] 1 Ch. 144; 67 L. J. Ch. 130; 77 L. T. 576; 46 W. R. 215; 14 T. L. R. 81; 42 Sol. Jo. 80, C. A.

Annotation:—**Expld.** *Re* Wimperis, Wicken *v.* Wilson, [1914] 1 Ch. 502.

919. Power to bind corpus—By compromising action.]—In a suit instituted by a married woman by her next friend against the trustees of a will for an account:—*Held:* a married woman having property to her separate use, without power of anticipation, had power to bind the corpus of the estate by a compromise entered into by her.—WILTON *v.* HILL (1855), 25 L. J. Ch. 156; 26 L. T. O. S. 253; 4 W. R. 66.

920. Attempt to alienate where no gift over—

Order for payment of dividend—Form of order.] STEWART *v.* FLETCHER, No. 944, *post*.

ii. *By Way of Charge.*

921. Charge on income—To secure loans—Income accrued at date of charge.]—On the marriage of M. with E., funds were settled upon trust, during their joint lives, to pay the income unto such persons as E., notwithstanding her coverture, should, by any writing under her hand, excepting by any mode of anticipation, appoint: &, in default of appointment, unto her sole, separate, & peculiar use, independently of her husband; & so that her receipts, notwithstanding the coverture, or the receipts of the appointee might be good discharges. The trustees of the settlement having improperly invested the trust-fund, a suit was instituted against them for its restitution. Considerable arrears of the income arising from the fund accrued; & E., to secure re-payment of moneys advanced to her by A., mortgaged to him "all those the dividends, interest, & annual produce, or moneys equivalent to interest, dividends, & annual produce, then due & owing, or which thereafter might be decreed to be then due & owing, or which, on the further hearing of the cause on further directions, might be decreed or ordered to be paid to E. for her separate use, under & by virtue of the settlement." On a petition presented by A. to have the money due to him on the mtge., together with the costs of the petition repaid to him out of the arrears of income due to E.:—*Held:* (1) E. could not appoint the income by way of anticipation; (2) the mortgage by her to A. only affected the arrears of income due at its date.

(3) The separate fund of a married woman protected against costs, on the ground that, under the instrument through which she derived title, she was restrained from anticipation.—MOORE *v.* MOORE (1844), 1 Coll. 54; 13 L. J. Ch. 124; 63 E. R. 318; *sub nom.* MOORE *v.* MOORE, *Ex p.* ASPREY, 8 Jur. 139.

Annotations:—*As to* (1) **Refd.** Medley *v.* Horton (1844), 8 Jur. 853. *As to* (3) **Consd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532. **Refd.** Morrell *v.* Cowan (1877), 6 Ch. D. 166.

922. —— ——.]—A married woman, S., was entitled to a gross sum, payable on the death of her father, for her separate use, subject to a restraint on anticipation. During her father's life she promised by letters to repay to D. out of the fund, when it fell in, advances made by him to her & her husband. After the death of her father the fund was paid into ct., & S., being still under coverture, verbally promised D. that he should be paid out of the fund if he would offer no opposition to her application for payment out of ct.; & it was accordingly paid to her:—*Held:* D. had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation, & the subsequent parol promise being void for want of consideration & under Stat. Frauds.—*Re* SYKES' TRUSTS (1862), as reported in 2 John. & H. 415; 70 E. R. 1120.

Annotations:—**Dbtd.** *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409. **Apprvd.** Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454; *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411. **Refd.** Roberts *v.* Watkins & Howells (1877), 46 L. J. Q. B. 552; *Re* Croughton's Trusts (1878), 8 Ch. D. 460. **Mentd.** *Re* Quartz Hill, etc. Co., *Ex p.* Young (1882), 21 Ch. D. 642.

923. —— **To secure annuity.**]—A married woman having personal property under a will for life & absolutely, a settlement is made of it to her separate use without power of anticipation, with a power of appointment by deed. Without adverting to the clause against anticipation, & in alleged ignorance of its existence, she & her husband grant an annuity in consideration of £215, & an order is made for payment of the dividends of her separate property to the grantee to secure the annuity, & he receives the dividends & hands over the surplus from time to time. The clause against anticipation is then discovered, & the wife petitions for discharge of the order for payment of the dividends to the grantee of the annuity, for restitution of the money received, & for costs against the grantee & his solr.:—*Held:* the order must be discharged, & the restitution not being pressed for, no order made upon that part of the petition, but costs given against the grantee, his solr., & her husband.—FORTY *v.* REAY (1855), 3 W. R. 317.

924. —— **To secure husband's creditors.**]—WHITE *v.* HERRICK, No. 830, *ante*.

925. Mortgage of whole interest—Mortgagee with notice of restraint.]—(1) A real estate may be devised to a married woman in fee simple for her separate use, yet in such a manner as to disable her during the coverture from making any sale, mtge., charge or incumbrance to take effect against it during her life or during her coverture. Hence where A. devised a real estate to his daughter B., a married woman, in fee, but with a declaration that she should not sell, charge, mtge. or incumber it, followed by another declaration that she should take it for her own sole & separate use & benefit & disposal, & have the sole management thereof, independent of her husband & free from his debts, etc.:—*Held:* the prohibitory clause was not void, inasmuch as it must be taken in connection as well with the succeeding as the preceding words; & therefore a security, by way of equitable mtge., executed by the husband & wife to a party who had notice of the wife's title under the will, was void as against the wife.

(2) *Feme covert* is entitled under a will to an estate in fee simple, subject to an outstanding lease for thirty-one years from June, 1816, at a rent of £60 *per annum*, & subject to a clause in the will prohibiting her from mortgaging or incumbering the property during coverture. In June, 1840, the husband took an assignment to himself of the lease of 1816, & the husband & wife executed a new lease to E., as a trustee for the husband, for the term of thirty-one years, at the same rent as before. In this lease no notice was taken of the wife's separate estate, & E. entered into no covenants. In 1841 the property was let at £90 *per annum*:—*Held:* the new lease was an incumbrance within the meaning of the prohibitory clause contained in the will.—BAGGETT *v.* MEUX (1844), 1 Coll. 138; 13 L. J. Ch. 228; 3 L. T. O. S. 122; 8 Jur. 391; 63 E. R. 355; *affd.* (1846), 1 Ph. 627, L. C.

Annotations:—*As to* (1) **Consd.** Lechmere *v.* Brotheridge (1863), 32 Beav. 353; *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409. **Expld. & Apld.** *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411. **Consd.** *Re* Hutchings to Burt (1887), 58 L. T. 6. **Refd.** *Re* Yalden (1851), 1 De G. M. & G. 53; *Re* Gaskell's Trusts (1865), 12 L. T. 763; Taylor *v.* Meads (1865), 4 De G. J. & Sm. 597; Thomas *v.* Price (1877), 46 L. J. Ch. 761; *Re* Currey, Gibson *v.* Way (No. 2) (1887), 56 L. T. 80; *Re* Grey's Settlmt., Acason *v.* Greenwood (1887), 34 Ch. D. 712; Stogdon *v.* Lee, [1891] 1 Q. B. 661; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Loftus *v.* Heriot, [1895] 2 Q. B. 212; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717; Studley *v.* Studley, [1913] P. 119. *As to* (2) **Refd.** *Re* Ellis' Trusts (1874), L. R. 17 Eq. 409.

926. —— **By husband & wife.**]—GOULDER *v.* CAMM, No. 824, *ante*.

927. —— **Restraint not disclosed—Fraud of married woman.**]—Property limited to the separate use of a married woman without power of anticipation is not bound, at least during the coverture, by

1.—*Restraint on anticipation or alienation: Sub-sect.* 5, *B.* (*a*) *ii.*, (*b*), (*c*), (*d*), (*e*) & (*f*).]

a charge fraudulently created by her in favour of a mtgee. without notice of the restraint. Therefore, where the property was a fund in ct. & the mtgee. had, by virtue of a power in his security, obtained an order directing payment of future dividends to him, the order was upon the application of the married woman discharged.—THOMAS *v.* PRICE (1877), 46 L. J. Ch. 761.

Annotation:—**Apld.** Stanley *v.* Stanley (1878), 47 L. J. Ch. 256.

928. —— —— ——.]—STANLEY *v.* STANLEY, No. 902, *ante*.

929. —— **Effect on forfeiture clause.**]—Testator gave a fund to trustees, upon trust to pay the income to his sister "for her separate use, free from the debts & control of any husband, without power of anticipation, & for & during the term of her natural life, & from & after her decease or on her anticipating" the income, or any part thereof, the principal was to be on trust for her children equally. At the time of testator's death the sister was married. The husband was still living. The sister executed a deed assigning her life interest by way of mtge.:—*Held:* "anticipating" could not be read as meaning "attempting to anticipate," &, as, by reason of the restraint on anticipation during coverture, the assignment of the life interest was wholly inoperative, there had been no forfeiture.—*Re* WORMALD, FRANK *v.* MUZEEN (1890), 43 Ch. D. 630; 59 L. J. Ch. 404; 62 L. T. 423; 38 W. R. 425.

Annotations:—**Folld.** *Re* Adamson, Public Trustee *v.* Billing (1913), 108 L. T. 179. **Refd.** *Re* Porter, Coulson *v.* Capper, [1892] 3 Ch. 481.

930. —— ——.]—Testator by his will bequeathed an annuity to his daughter for life without power of anticipation during coverture & declared that if his daughter, whether under any disability or not, should assign, dispose of, or charge the annuity bequeathed to her or any part thereof, or should become bkpt. or do or suffer anything whereby the said annuity or any part thereof should become payable to or vested in some other person, then & in every such case the annuity should immediately thenceforth cease as if she were dead. The daughter while still under coverture executed an assignment of her annuity by way of mtge.:—*Held:* the daughter being precluded by reason of her coverture & the restraint upon anticipation from making an effectual assignment, the assignment was invalid apart from the forfeiture clause in the will, & therefore no forfeiture was effected thereby.—*Re* ADAMSON, PUBLIC TRUSTEE *v.* BILLING (1913), 109 L. T. 25; 29 T. L. R. 594; 57 Sol. Jo. 610, C. A.

931. —— **Subsequent to protection order—Matrimonial Causes Act, 1857 (c. 85), s. 21.**]—HILL *v.* COOPER, No. 790, *ante*.

See, now, Supreme Court of Judicature Act, 1925 (c. 49), s. 194 (1), (2).

932. Pledge of goods on loan—Liability to refund loan—Before possession recovered.]—In 1859, A., by deed of settlement, devised certain plate to trustees for the sole & separate use of his wife B. for life, but she was not to alien or dispose of it. In 1872 the plate was deposited by A. with C. as security for the loan of a sum of money advanced by C., the deposit being made with the knowledge & consent of B. Since 1874 repeated demands were made by A., B., & the trustees for possession of the plate:—*Held:* (1) inasmuch as B. had parted with the possession of the plate, & had the benefit herself, & it was received *bonâ fide*, she could recover possession without repaying the advance; (2) the right to sue of A., or the trustees, or B.'s exors. after her death, was unaffected.—VAUGHAN *v.* WILKINSON (1885), 1 T. L. R. 537.

933. Mortgage while widow—Restraint revived on remarriage—Subsequent mortgage to third party—Marshalling.]—A., a widow, who was entitled for her life to the income of a fund in ct., mortgaged her life interest to B., & afterwards married again, upon which event a restraint on anticipation as to part of the income revived. A. subsequently charged her life interest, so far as she could bind the same, in favour of C. The interest on B.'s mtge. was alone sufficient to absorb almost the whole of that part of the income which alone was available for payment of the interest on C.'s charge:—*Held:* the securities must be marshalled, & B.'s interest must be paid out of that part of the income which was not available for the payment of the interest on C.'s charge.—*Re* LODER'S TRUSTS (1886), 56 L. J. Ch. 230; 55 L. T. 582; 35 W. R. 58.

See, further, MORTGAGE.

(*b*) *Leases.*

934. Wife's estate subject to existing term—Assignment to husband—Subsequent grant of new term—Encumbrance.]—BAGGETT *v.* MEUX, No. 925, *ante*.

Compare No. 1033, *post*.

See, generally, LANDLORD & TENANT.

(*c*) *Powers in Relation to Settled Property.*

See Settled Estates Act, 1877 (c. 18), s. 50; Settled Land Act, 1882 (c. 38), ss. 22, 24, 31.

936. Appointment under maintenance clause—Maintenance of children beyond minority—Life interest affected.]—By an ante-nuptial settlement a fund was declared to be held by the trustees upon trust for the intended wife for life, for her separate use, without power of anticipation, & after her death in trust for the intended husband for life, & after the decease of the survivor, in trust for the children of the marriage as the intended husband & wife should jointly appoint, &, subject thereto & to a separate power of appointment in the survivor, in trust for the children equally to be vested in sons at twenty-one & in daughters at twenty-one or marriage. There was also a power for the trustees, at the request of the husband & wife, during their joint lives, to advance, for the benefit of any child whose portion should not be vested, any part of his or her presumptive portion, & to apply for or towards the maintenance or education of any such child or children all or any part of the income of such his, her, or their presumptive portions. The only children of the marriage were two sons & a daughter. The husband & wife appointed the trust fund to the three children equally, to be vested in sons at twenty-one & in the daughter at twenty-one or marriage, with trusts for accruer in the event of any child dying before attaining a vested interest. By the same deed the husband & wife requested the trustees to pay for five years after the date of the deed certain sums for the maintenance of the three children, & after the expiration of that period, to pay £150 towards the maintenance & education of the children during the residue of the life of the wife:—*Held:* the maintenance clause did not enable the wife to affect her life interest by such a prospective provision, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughter.—

HORLOCK *v.* HORLOCK (1852), 2 De G. M. & G. 644 ; 42 E. R. 1023, L. JJ.

937. Cost of repairs — Trustees with power to charge estate.] — A married woman, tenant for life, without power of anticipation, had power to direct trustees to do repairs, & charge the estate. She employed a builder to do repairs :— *Held :* he was entitled to be paid by having the amount raised by a charge on the estate.— SKINNER *v.* TODD (1881), 51 L. J. Ch. 198 ; 46 L. T. 131 ; 30 W. R. 267.

938. Estate in fee simple subject to restraint— Powers of tenant for life—Settled Land Act, 1882 (c. 38).]—A restraint on anticipation attached to a married woman's estate in fee-simple for her separate use does not create a settlement within above Act so as to give her the powers of a tenant for life under the Act.—BATES *v.* KESTERTON, [1896] 1 Ch. 159 ; 65 L. J. Ch. 108 ; 73 L. T. 656 ; 44 W. R. 150 ; 40 Sol. Jo. 97.

See, generally, SETTLEMENTS.

(d) Covenant to Settle After-Acquired Property.

939. Not bound — Husband's covenant to settle wife's property.]—S., by her will, gave to her niece J. £3,000 & also gave the residue of her personal estate equally between her nieces J., A. & C. : & she directed that any pecuniary legacy or share of her nieces as should be married at the time of her death should be paid into the proper hands of such respective nieces, or into the hands of such person or persons as such respective nieces should respectively appoint, so as that the same or any part thereof, should not in any respect be subject or liable to the control, debts, or incumbrances of their respective husbands, nor be alienable by them & their respective husband, & that the receipts of her nieces alone signed with their proper hands, notwithstanding coverture, or of their appointees, should from time to time be sufficient discharges to her exors. J. married, & a settlement was made on her marriage, in which was contained a covenant by the husband to settle future acquired property of the wife. Testatrix afterwards died, & her exors. paid J.'s share into ct. J. then petitioned by a next friend to have it paid to her on her separate receipt :—*Held :* the true construction of the direction in the will was that during coverture, the share of J. was not alienable by her ; such share was not therefore included in the covenant, & the fund must be retained in ct. & the dividends only paid to J. during her coverture.—*Re* SAREL (1864), 4 New Rep. 321 ; 10 L. T. 691 ; 10 Jur. N. S. 876.

Annotations :—**Consd.** *Re* Gaskell's Trusts (1865), 12 L. T. 763 ; *Re* Ellis's Trusts (1874), 22 W. R. 448 ; *Re* Bown, O'Halloran *v.* King (1884), 27 Ch. D. 411.

940. ——.]—An agreement by husband & wife, in an ante-nuptial settlement for the settlement by the husband & wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. If the wife is a minor, & the covenant is for her benefit, it is voidable only & not void, & is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property ; for she may, after attaining twenty-one, & during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use ; but, inasmuch as a contract by a married woman, while under coverture, affecting her separate property binds only her then existing separate property, & not separate property which she may thereafter acquire, the wife in electing to confirm the covenant, thereby binds only that separate property to which she is entitled at the date of the confirmation, & not that to which she may subsequently become entitled during the coverture. *Semble :* the doctrine of election or compensation does not apply in the case of a married woman entitled for her separate use with a restraint on anticipation.—SMITH *v.* LUCAS (1881), 18 Ch. D. 531 ; 45 L. T. 460 ; 30 W. R. 451.

Annotations :—**Folld.** *Re* Wheatley, Smith *v.* Spence (1884), 27 Ch. D. 606. **Consd.** *Re* Vardon's Trusts (1885), 31 Ch. D. 275 ; Viditz *v.* O'Hagan, [1899] 2 Ch. 569. **Refd.** Cahill *v.* Cahill (1883), 8 App. Cas. 420 ; Burnaby *v.* Equitable Reversionary Interest Soc. (1885), 28 Ch. D. 416 ; *Re* Queade's Trusts (1885), 54 L. J. Ch. 786 ; Haywood *v.* Tidy (1890), 63 L. T. 679. **Mentd.** Wilder *v.* Pigott (1882), 22 Ch. D. 263 ; Cooke *v.* Cooke (1887), 38 Ch. D. 202 ; Duncan *v.* Dixon (1890), 44 Ch. D. 211 ; Carter *v.* Silber, Carter *v.* Hasbuck, [1892] 2 Ch. 278 ; Carter *v.* Silber (1892), 66 L. T. 473 ; Greenhill *v.* North British & Mercantile Insce., [1893] 3 Ch. 474 ; Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482 ; *Re* Hodson, Williams *v.* Knight, [1894] 2 Ch. 421 ; Harle *v.* Jarman, [1895] 2 Ch. 419 ; Pullan *v.* Koe, [1913] 1 Ch. 9 ; *Re* Lind, Industrials Finance Syndicate *v.* Lind, [1915] 2 Ch. 345.

941. ——.]—A restraint on anticipation is equivalent to a restraint on alienation, & accordingly the shares of married women in residuary real & personal estate given to them by will for their separate use without power of anticipation, are not bound by covenants for settlement of after-acquired property contained in their respective marriage settlements ; & the capital of the personal estate is not payable to them on their separate receipt.

It [the conveyance pursuant to the covenants] will result in conferring interests on other persons by an act *inter vivos* when testator has declared by a clause which the law holds to be valid that the ladies shall not anticipate which I understand to be the same thing as that they shall not alienate (CHITTY, J.).—*Re* CURREY, GIBSON *v.* WAY (1886), 32 Ch. D. 361 ; 55 L. J. Ch. 906 ; 54 L. T. 665 ; 34 W. R. 511 *subsequent proceedings* (1887), 56 L. J. Ch. 389.

Annotation :—**Distd.** *Re* Bankes Reynolds *v.* Ellis, [1902] 2 Ch. 333.

See, generally, SETTLEMENTS.

(e) Disentailing Assurance.

942. Equitable estate tail — Enlarged into fee simple—Valid.]—COOPER *v.* MACDONALD, No. 946, *post.*

See, further, REAL PROPERTY.

(f) Appointment of Attorney to Receive Income.

943. Validity.]—Where a next friend of a married woman institutes, without her consent, a useless suit, he will be ordered to pay the costs. Where a married woman, who was entitled to the income of property held on trust for her separate use, with a restraint on anticipation, joined with her husband in a power of attorney to receive & to sue for any moneys due to them or either of them :—*Held :* the trustee was not justified in paying the attorney the wife's separate income. Neither would the power entitle the attorney to institute an administration suit in the name of the wife by himself as next friend.—KENRICK *v.* WOOD (1869), L. R. 9 Eq. 333 ; 39 L. J. Ch. 92 ; 19 W. R. 57.

Annotation :—**Apld.** Stanley *v.* Stanley (1878), 47 L. J. Ch. 256.

944. ——.]—A married woman restrained from anticipation may appoint an attorney to receive the growing payments, but only on her behalf & for her use.

Form of order directing payment of dividends

Sect. 1.—Restraint on anticipation or alienation: Sub-sect. 5, B. (f) & (g), C. (a) & (b) i. & ii.]

to a married woman entitled for her separate use.—STEWART *v.* FLETCHER (1888), 38 Ch. D. 627; 57 L. J. Ch. 765; 36 W. R. 713.

(g) Disposition by Will.

945. Not affected by restraint—Restraint affecting income only—Entail barred.]—By marriage settlement personal property was assigned to trustees upon trust to pay the income to the wife for her separate use for life without power of anticipation, & after her decease, in case her husband should survive, to pay so much of the income as she should by deed or will appoint for his wife, & subject thereto for the children of the marriage; & in case there should be no children, then upon trust in case the wife should survive her husband, for her, her exors., administrators & assigns, for her sole & separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint.

The wife made a will in exercise of the power during coverture, & survived her husband without having had issue of the marriage:—*Held:* upon demurrer, the will, made during coverture, & not republished after her husband's death, was a good disposition of all the property.—BISHOP *v.* WALL (1876), 3 Ch. D. 194; 45 L. J. Ch. 773; 25 W. R. 93.

946. ——.]—A married woman, under the limitations of a will made in 1846, was equitable tenant in tail to her separate use of certain freehold estates. By a clause in the same will she was also restrained from alienation of the rents & profits. Her husband became bkpt., & after his order of discharge joined with his wife in barring the equitable entail & limiting the estate in fee to the separate use of the wife. The wife died, having by her will devised the estate for the benefit of her children, & the husband's assignees claimed the husband's estate by curtesy:—*Held:* the restraint on anticipation did not prevent the wife from barring the entail & acquiring the equitable fee; & the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate.—COOPER *v.* MACDONALD (1877), 7 Ch. D. 288; 47 L. J. Ch. 373; 38 L. T. 191; 26 W. R. 377, C. A.

Annotations:—**Refd.** *Re* Jakeman's Trusts (1883), 23 Ch. D. 344; *Re* Lambert's Estate, Stanton *v.* Lambert (1888), 39 Ch. D. 626; Bates *v.* Kesterton, [1896] 1 Ch. 159. **Mentd.** Eager *v.* Furnivall (1881), 17 Ch. D. 115; Hope *v.* Hope, [1892] 2 Ch. 336.

947. ——.]—The property is given upon trust for the wife for her separate use but so that she should not have power to dispose of the same or the income thereof, or of any part thereof, by anticipation, otherwise than by deed or writing executed by her & attested in manner aforesaid. I am of opinion that that applies only to alienation *inter vivos* & that she is restrained from anticipation, which could only be during her lifetime, except by deed or writing in manner thereinbefore mentioned. That, to my mind, can have no application to a testamentary disposition, because such a disposition would have no effect whatever until after her death (PEARSON, J.).—*Re* HERNANDO, HERNANDO *v.* SAWTELL (1884), 27 Ch. D. 284; 53 L. J. Ch. 865; 51 L. T. 117; 33 W. R. 252.

Annotations:—**Mentd.** *Re* Mégret, Tweedie *v.* Maunder (1901), 70 L. J. Ch. 451; *Re* Mackenzie, Mackenzie *v.* Edwards-Moss, [1911] 1 Ch. 578.

948. ——.]—*Re* CURREY, GIBSON *v.* WAY (No. 2), No. 1033, *post.*

949. Annuity to married woman—Death before annuity purchased—Bequest by woman to husband.]—Testator, who died in Aug. 1885, bequeathed numerous legacies & annuities including an annuity of £200 to a husband & wife during their joint lives, &, after the decease of either of them, an annuity of £100 to the survivor during his or her life, the wife's annuity to be for her separate use & without power of anticipation. In Nov. 1885, testator's estate was insufficient for payment in full of the legacies & annuities bequeathed by his will, & an administration action was commenced in which judgment for the administration of his estate was obtained on June 23, 1886. Subsequently, beneficiaries who were *sui juris* having agreed to an abatement *pro rata* of their legacies & annuities, an order was made in the action that the trustee of the will should purchase in the names of himself & the wife an annuity of £80 on the life of the wife, & also such an annuity on the life of the wife as 225 of the 11,223 parts into which the ultimate residue of testator's estate was directed to be divided, would suffice to purchase. After that order had been passed & entered, but before the annuities had been purchased, the wife died leaving her husband her sole exor. & legatee; & the moneys to be expended on the purchase of the annuities were carried to a separate account. On a petition by the husband for payment out to him of the moneys:—*Held:* notwithstanding the restraint on anticipation imposed on the wife with respect to her annuity, the husband was entitled to have the moneys paid out to him.—*Re* ROSS, ASHTON *v.* ROSS, [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578; 48 W. R. 264.

Annotation:—**Refd.** *Re* Dompster, Borthwick *v.* Lovell, [1915] 1 Ch. 795.

950. Direction to pay debts—Liability of property subject to restraint.]—A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity which was subject to a restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her legal personal representatives.—SPRANGE *v.* LEE, [1908] 1 Ch. 424; 98 L. T. 400; *sub nom.* SPRANGE *v.* LEE, LEE *v.* SPRANGE, 77 L. J. Ch. 274.

C. On Availability of Property to Creditors.

(a) In General.

951. General rule—Not available.]—ARNOLD *v.* WOODHAMS, No. 916, *ante.*

PART VI. SECT. 1, SUB-SECT. 5.—B. (g).

946 i. *Not affected by restraint.*]—Where a restraint on alienation is imposed in connection with the property of a married woman, no conveyance or contract can prevail to deprive her of such property, but the restraint does not extend beyond such transactions as would have effect of transmitting that property in her lifetime. It does not, therefore, apply to the provisions of her will.—BORDEN *v.* JAMES (1894), 40 N. S. R. 48.—**CAN.**

PART VI. SECT. 1, SUB-SECT. 5.—C. (a).

951 i. *General rule—Not available.*]—A marriage settlement & deed of donation properly vest goods therein mentioned in the wife, & they are not liable to seizure for her husband's debts.—RYLAND *v.* ALNUTT (1865), 11 Gr. 135.—**CAN.**

951 ii. -.]—Land was conveyed to a married woman, for life, for her separate use; it was managed under her directions, & the labour paid for by the produce of the land, the husband not interfering except as her agent:—*Held:* the crop, when severed, did not become the property of the husband, & was not liable to seizure under an execution against him.—DOW *v.* DIBBLEE (1867), 1 Han. 55.—**CAN.**

951 iii. —— ——.]—A woman's title before marriage *primâ facie* sufficient,

952. —— ——.]—An order giving leave to enter final judgment against a married woman in respect of her separate estate by virtue of the Married Women's Property Act, 1882 (c. 75), ss. 1, 19, should state that execution is to be limited to such separate estate as deft. is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself.—BURSILL *v.* TANNER (1884), 13 Q. B. D. 691; 50 L. T. 589; 32 W. R. 827.

Annotations:—**Follid.** Hartland *v.* Smithies (1884), 1 T. L. R. 141. **Consd.** Turnbull *v.* Forman (1885), 15 Q. B. D. 231. **Reid.** Smith *v.* Whitlock (1886), 55 L. J. Q. B. 286.

953. —— ——.]—Where judgment had been signed against a married woman not being limited to her separate estate, the ct., even though execution may have been issued on such a judgment, has still power to vary it, & order it to be limited to such separate estate of the married woman as she may not be restrained from anticipating.—HARTLAND *v.* SMITHIES (1884), 1 T. L. R. 141.

954. —— ——.]—MEAGER *v.* PELLEW, No. 998, *post*.

955. —— ——.]—DRAYCOTT *v.* HARRISON, No. 999, *post*.

956. —— ——.]—(1) An order with costs made against a married woman, suing or sued under Married Women's Property Act, 1882 (c. 75), in respect of her separate property, must contain a restriction in the words of sect. 1 (2), that the order is "with costs payable out of her separate property, & not otherwise" & a proviso limiting execution to her separate property not subject to any restriction against anticipation.

(2) Money in the hands of a trustee for a married woman in respect of her separate property subject to a restraint on anticipation, having accrued due subsequently to a judgment against her, held not to be liable to attachment by the judgment creditor.—GALMOYE *v.* COWAN & BROWN (1889), 58 L. J. Ch. 769.

957. —— ——.]—SOFTLAW *v.* WELCH, No. 971, *post*.

(b) Obligations Incurred before Marriage.

i. *Before Married Women's Property Act*, 1882.

958. Under Married Women's Property Act, 1870 (c. 93), s. 12.]—Above sect. extends to property settled to the separate use of a married woman without power of anticipation. After the passing of above Act, & on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage. The judgment creditors subsequently obtained a charging order on the wife's interest in a fund in ct. to the income of which the wife was entitled, for her separate use, without power of anticipation:—*Held:* the charging order constituted a valid incumbrance on the fund.—SANGER *v.* SANGER (1871), L. R. 11 Eq. 470; 40 L. J. Ch. 372; 24 L. T. 649; 19 W. R. 792.

Annotations:—**Follid.** *Re* Hedgely, Small *v.* Hedgely (1886), 34 Ch. D. 379. **Apprvd.** Axford *v.* Reid (1889), 22 Q. B. D. 548.

959. ——.]—In an action against a married woman & her husband for a debt contracted by the wife previously to her marriage, judgment was entered against the wife for principal, interest & costs, but in favour of the husband with costs under above Act, & the Amendment Act, 1874. The wife's property having been settled on her marriage for her separate use without power of anticipation, pltfs. commenced an action in the Ch. Div. for the purpose of enforcing the judgment obtained by them against the wife, & further, to be allowed to add to this the costs they had had to pay the husband:—*Held:* notwithstanding the restraint against anticipation, pltfs. were entitled to recover against the separate estate of the wife the amount of their judgment debt & costs, as well as the costs paid to the husband, which might be added to their original debt.—LONDON & PROVINCIAL BANK *v.* BOGLE (1878), 7 Ch. D. 773; 47 L. J. Ch. 301; 37 L. T. 780; 26 W. R. 573.

Annotations:—**Consd.** Perks *v.* Mylrea, [1884] W. N. 64. **Follid.** *Re* Hedgely, Small *v.* Hedgely (1886), 34 Ch. D. 379. **Apld.** Axford *v.* Reid (1889), 22 Q. B. D. 548.

960. ——.]—The liability under Debts Recovery Act, 1830 (c. 47), of a devisee of land who alienates the land, to the unpaid debts of testator, is such that, on the alienation the debts become his own debts to the extent of the value of the land alienated. Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of Married Women's Property Act, 1870 (c. 93), the first trust being for herself absolutely until the marriage, & after its solemnisation on trust for herself for her life, without power of anticipation, with remainder on trusts, for the issue of the marriage:—*Held:* testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency to the extent of the value of the devised land; her liability to satisfy the debts of testator, which arose on her alienation of the land by the settlement being a debt "contracted by her before marriage within Married Women's Property Act, 1870 (c. 93), s. 12.—*Re* HEDGELY, SMALL *v.* HEDGELY (1886), 34 Ch. D. 379; 56 L. J. Ch. 360; 56 L. T. 19; 35 W. R. 472.

Annotations:—**Apld.** Axford *v.* Reid (1889), 58 L. J. Q. B. 230; *Re* Atkinson, Proctor *v.* Atkinson, [1908] 2 Ch. 307.

961. ——.]—Above sect. which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled to the separate use of a married woman without power of anticipation. A husband & wife were sued in respect of debts of the wife contracted before their marriage, which took place after the coming into operation of above Act, & before the coming into operation of Married Women's Property Act, 1882, & judgment was recovered against them. The wife was possessed of property which upon her marriage was settled to her separate use without power of anticipation:—*Held:* the wife's property was liable to satisfy the judgment.—AXFORD *v.* REID (1889), 22 Q. B. D. 548; 58 L. J. Q. B. 230; 60 L. T. 726; 53 J. P. 611; 37 W. R. 291, C. A.

Annotations:—**Consd.** Birmingham Excelsior Money Soc. *v.* Lane, [1904] 1 K. B. 35; Public Trustee *v.* Wolf, [1923] A. C. 544. **Refd.** *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717; *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56.

ii. *Since Married Women's Property Act*, 1882.

962. "Debt contracted before marriage"—Whether judgment debt included—Married Women's Property Act, 1882 (c. 75), ss. 13, 19—Settlement & after her second marriage the goods are protected against her second husband's creditors.—CORRIE *v.* CLEAVER (1870), 21 C. P. 186.—**CAN.**

951 iv. —— ——.]—BELL *v.* WETMORE (1880), 19 N. B. R. 534.—**CAN.**

PART VI. SECT. 1, SUB-SECT. 5. C. (b) ii.

1. *Property settled on feme sole.*]—A clause restraining alienation in a settlement, made upon a *feme sole* by another party of property settled to her separate estate, will not, on the clause becoming operative, by her marriage after the passing of Married Women's Property Act, 1882, protect such property from the claims of her antenuptial creditors.—KIRK *v.* MURPHY (1892), 30 L. R. Ir. 508.—**IR.**

Sect. 1.—*Restraint on anticipation or alienation: Sub-sect.* 5, *C.* (*b*) *ii.*, (*c*).]

on remarriage.]—Judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage, & married again ; & by settlement made by her on the second marriage property belonging to her was settled to her separate use without power of anticipation :—*Held :* the judgment debt was a " debt contracted before her marriage " within sect. 13 of above Act, so that deft. continued to be liable for it after her second marriage ; & also it was a " debt contracted before marriage " within sect. 19 of the Act, so that the restriction upon anticipation contained in the settlement had no validity against it.—JAY *v.* ROBINSON (1890), 25 Q. B. D. 467 ; 59 L. J. Q. B. 367 ; 63 L. T. 174 ; 38 W. R. 550 ; 6 T. L. R. 340, C. A.

Annotations :—**Consd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422. **Refd.** Rothschild *v.* Fisher, [1920] 2 K. B. 243.

963. Action instituted before but judgment after marriage.]—On Dec. 19, 1919, pltf. recovered judgment for £1,114 9*s.* 8*d.* & costs against deft. as one of the guarantors under a deed dated Sept. 23, 1916, as varied by a deed dated Dec. 5, 1916. Subsequently to the commencement of the action but before the date of the judgment, deft. married, & by an ante-nuptial settlement settled six debentures of £500 each to which she was entitled upon the usual trusts for herself for life for her separate use without power of anticipation & after her death for the benefit of her husband & the issue of the marriage. The debentures so settled were subject to a charge given by deft. to her solr. for his costs. On Feb. 5, 1920, pltf. obtained an order appointing him receiver of any interests deft. might have in the debentures, whether under the settlement or not, but without prejudice to the rights of any prior encumbrancers : —*Held :* the judgment did not have the effect of merging " the debt contracted by her before marriage " in the judgment debts so as to take it out of the operation of the proviso to sect. 19 of above Act, but pltf. could not split up into different parts his judgment debt which included both interest which had accrued due before & interest which had accrued after the date of the marriage, therefore the case was one in which a receiver ought not to be appointed.—ROTHSCHILD *v.* FISHER, [1920] 2 K. B. 243 ; 89 L. J. K. B. 521 ; 123 L. T. 188, C. A.

964. Settlement of own property — Subject to restraint—Validity against creditors—Married Women's Property Act, 1882 (c. 75), s. 19.]—JAY *v.* ROBINSON, No. 962, *ante*.

965. —— —— —— ——.]—A judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced by way of equitable execution against her separate property subject to a restriction against anticipation, where the restriction is not contained in a settlement, or agreement for a settlement, of her own property, made or entered into by herself.—BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* LANE, [1904] 1 K. B. 35 ; 89 L. T. 656 ; *sub nom.* BIRMINGHAM EXCELSIOR MONEY SOCIETY *v.* HAYWOOD, 73 L. J. K. B. 28 ; 52 W. R. 84 ; 20 T. L. R. 47 ; 48 Sol. Jo. 50, C. A.

Compare No. 977, *post*.

(*c*) *Obligations Incurred during Coverture.*

See Married Women's Property Acts, 1882 (c. 75), s. 19; 1893 (c. 63), s. 1.

966. Discoverture before judgment — Widow engaged in trade—Settlement of property before re-marriage.]—(1) Although it is proper that a marriage settlement which settles property to the separate use of the wife should contain a restraint upon anticipation, & such provision is always to be inserted in settlements made under the direction of the ct., there is nothing to prevent persons competent to deal with their property from omitting such a restraint ; & where it has been omitted, the ct. will not construe the instrument as though the provision had been unintentionally left out, but will leave the parties to their remedy by bill for its rectification.

(2) A widow engaged in trade settled her property, in contemplation of marriage, upon herself for life for her own absolute use & benefit, free from all marital control & liability. She continued her business & became, in course of it, indebted to pltf., who instituted this suit to obtain payment out of her separate estate :—*Held :* pltf. was entitled to be paid out of the whole of the lady's interest.—SYMONDS *v.* WILKES (1865), 12 L. T. 598 ; 11 Jur. N. S. 659 ; 13 W. R. 1026, L. JJ.

967. —— **Rendering restraint inoperative.**]—A married woman having property settled on her for her separate use without power of anticipation or alienation made, during her coverture, together with her mother & husband, a joint & several promissory note. Before it became due her husband died, after which she in no way acknowledged or ratified the contract. On action brought against her on the note when discovert :—*Held :* the note being when made *nudum pactum* both at law & in equity did not become binding on her after her husband's death ; & her separate property could not be reached in the action.—ROBERTS *v.* WATKINS & HOWELLS (1877), 46 L. J. Q. B. 552 ; 36 L. T. 799 ; 41 J. P. 693.

Annotation :—**Apprvd.** Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454.

968. —— —— ——.]—The general engagements of a married woman entitled to separate estate can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, & not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation, although at the date of the judgment the restraint had become inoperative by the death of the husband.—PIKE *v.* FITZGIBBON, MARTIN *v.* FITZGIBBON (1881), 17 Ch. D. 454 ; 50 L. J. Ch. 394 ; 44 L. T. 562 ; 29 W. R. 551, C. A. ; *varying* (1880), 14 Ch. D. 837.

Annotations :—**Consd.** Flower *v.* Buller (1880), 15 Ch. D. *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532. **Distd.** *Re* Dixon, Dixon *v.* Smith (1887), 35 Ch. D. 4. **Consd.** Braunstein *v.* Lewis (1891), 7 T. L. R. 246 ; Cox *v.* Bennett, [1891] 1 Ch. 617 ; Pelton *v.* Harrison, [1891] 2 Q. B. 422 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** Durrant *v.* Ricketts (1881), 8 Q. B. D. 177 ; McQueen *v.* Turner (1881), 30 W. R. 80 ; Robinson *v.* Pickering (1881), 16 Ch. D. 371 ; Smith *v.* Lucas (1881), 18 Ch. D. 531 ; King *v.* Lucas (1883), 23 Ch. D. 712 ; Penley *v.* Anstruther (1883), 52 L. J. Ch. 367 ; Bursill *v.* Tanner (1884), 13 Q. B. D. 691 ; Meager *v.* Pellew (1885), 14 Q. B. D. 973 ; Turnbull *v.* Forman (1885), 15 Q. B. D. 234 ; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482 ; Haywood *v.* Tidy (1890), 63 L. T. 679 ; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

969. —— —— ——.]—Judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee, & for which the judge at

the trial had directed judgment to be entered for her :—*Held :* the money could be attached.

The judgment is that pltf. do recover a sum of money against deft., but that execution is to be limited to her separate estate not subject to a restraint upon anticipation. Suppose her husband were to die, the restraint would be gone, the judgment would bind her, & execution could be issued upon it (LINDLEY, L.J.).—HOLTBY *v.* HODGSON (1889), 24 Q. B. D. 103 ; 59 L. J. Q. B. 46 ; 62 L. T. 145 ; 38 W. R. 68 ; *sub nom. Re* HOLTBY, 6 T. L. R. 24, C. A.

Annotations :—**Apld.** Pelton *v.* Harrison (2), [1892] 1 Q. B. 118. **Dbtd.** *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328. **Consd.** Softlaw *v.* Welch, [1899] 2 Q. B. 419. **Refd.** Aylesford *v.* G. W. Ry., [1892] 2 Q. B. 626 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559 ; *Re* Lumley, Hood Barrs *v.* Cathcart (1894), 7 R. 400 ; Bolitho *v.* Gidley, [1905] A. C. 98 ; Deighton *v.* Cockle, [1912] 1 K. B. 206 ; Hambleton *v.* Brown, [1917] 2 K. B. 93.

970. —— —— ——.]—A judgment, in respect of a contractual liability incurred by a woman during coverture, obtained against her after the death of her husband as against her separate property not subject to any restriction against anticipation, cannot, though she is *discovert*, be enforced against property which during coverture was her separate estate without power of anticipation.—PELTON BROTHERS *v.* HARRISON, [1891] 2 Q. B. 422 ; 60 L. J. Q. B. 742 ; 65 L. T. 514 ; 56 J. P. 37 ; 39 W. R. 689 ; 7 T. L. R. 686, C. A. ; *subsequent proceedings*, [1892] 1 Q. B. 118, C. A.

Annotations :—**Apld.** Hill *v.* Ailesbury (1894), 10 T. L. R. 487 ; *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328 ; Softlaw *v.* Welch, [1899] 2 Q. B. 419. **Consd.** *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717 ; Brown *v.* Dimbleby, [1904] 1 K. B. 28. **Refd.** Bird *v.* Barstow (1891), 61 L. J. Q. B. 1 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559 ; *Re* Lumley, Hood Barrs *v.* Cathcart (1894), 70 L. T. 622.

971. —— —— ——.]—A married woman entered into a contract before the passing of Married Women's Property Act, 1893 (c. 63), & was sued upon it after the death of her husband :—*Held :* the form of the judgment against her must limit the execution to such property as during her coverture was the separate property not subject to any restriction against anticipation.—SOFTLAW *v.* WELCH, [1899] 2 Q. B. 419 ; 68 L. J. Q. B. 940 ; 81 L. T. 64 ; 47 W. R. 626 ; 15 T. L. R. 479 ; 43 Sol. Jo. 655, C. A.

Annotation :—**Consd.** Brown *v.* Dimbleby, [1904] 1 K. B. 28.

972. —— —— **Post-nuptial settlement of own property—Before Married Women's Property Act, 1882 (c. 75).**]—By a post-nuptial settlement, made before the above Act, property devised by will to a married woman for her separate use without restraint against anticipation was limited to her for life for her separate use without power of anticipation, remainder to the husband for life, remainder to the children. The wife, after the Act & during coverture, made a promissory note in favour of pltfs., & after the death of the husband pltfs. obtained judgment upon the note against the widow & an order for the appointment of a receiver of the rents & profits of the property in settlement :—*Held :* upon the true construction of sects. 1, 5 & 19 of the Act, the property in settlement was not liable to satisfy the judgment, & the order appointing the receiver must be discharged.—BECKETT *v.* TASKER (1887), 19 Q. B. D. 7 ; 56 L. T. 636 ; 36 W. R. 158, D. C.

Annotations :—**Consd.** Braumstein *v.* Lewis (1891), 7 T. L. R. 246. **Apld.** *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328. **Refd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422 ; *Re* Lumley, Hood Barrs *v.* Cathcart (1894), 7 R. 400 ; Softlaw *v.* Welch, [1899] 2 Q. B. 419.

973. —— —— **Married Women's Property Act, 1893 (c. 63), s. 1—Income accrued due since discoverture.**]—A married woman, who was possessed of separate property the income of which she was restrained from anticipating, entered into a contract, & was subsequently divorced. Judgment having then been obtained against her, it was sought to enforce it by means of a garnishee order attaching income which had accrued due to her from this property subsequently to the divorce :—*Held :* this income was protected by the proviso to the above sect., & could not be attached.—BARNETT *v.* HOWARD, [1900] 2 Q. B. 784 ; 69 L. J. Q. B. 955 ; 83 L. T. 301 ; 16 T. L. R. 558, C. A.

Annotations :—**Folld.** Brown *v.* Dimbleby, 1904] 1 K. B. 28. **Apld.** Wood *v.* Lewis, [1914] 3 K. B. 73. **Refd.** Studley *v.* Studley, [1913] P. 119.

974. —— —— —— ——.]—A married woman, who was possessed of separate property with a restraint against anticipation, made a promissory note jointly with her husband. After the death of the husband an action was brought against the widow on the promissory note, & judgment was obtained against her. On an application by pltf. for the appointment by way of equitable execution of a receiver of the income due to the widow from the aforesaid property :—*Held :* although in consequence of her having become discovert the restraint against anticipation had ceased, still the property was protected by the above sect. & an order for a receiver could not be made.—BROWN *v.* DIMBLEBY, [1904] 1 K. B. 28 ; 73 L. J. K. B. 35 ; 89 L. T. 424 ; 52 W. R. 53, C. A.

Annotations :—**Consd.** Wood *v.* Lewis, [1914] 3 K. B. 73. **Refd.** Studley *v.* Studley, [1913] P. 119.

Compare Sub-sect. 4, B., *ante*.

975. Charge on expectancy under will—Enforcement after death of donor.]—A married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person. Such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman.—FLOWER *v.* BULLER (1880), 15 Ch. D. 665 ; 49 L. J. Ch. 784 ; 43 L. T. 311 ; 28 W. R. 948.

Annotation :—**Refd.** Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454.

976. Post-nuptial settlement of own property—Subject to restraint.]—In an action against a husband & wife upon a bill of exchange indorsed by the wife, it appeared that, at the time of her indorsing the bill, the wife was entitled to a life interest in certain real & personal estate for her separate use, free from the control of her husband, but over which she & her husband had a joint power of appointment. After action brought, but before issue joined, the husband & wife executed a joint appointment to the wife for her separate use without power of anticipation :—*Held :* a judgment against the husband & wife personally must be set aside, & there could not be judgment against the wife's separate estate, as she was not shown to have, at the time of the trial of the action, any separate estate that she had the power of dealing with.—BARBER *v.* GREGSON (1880), 49 L. J. Q. B. 731 : 43 L. T. 428, C. A.

977. Married Women's Property Act, 1882 (c. 75), s. 19—Retrospective effect of Act.]—The above sect., so far as it affects the validity of a settlement or an agreement for a settlement as against the creditors of a married woman, is not retrospective. Therefore execution cannot issue against property settled before the commencement of the Act to the separate use of a married woman without power of anticipation.—SMITH *v.* WHITLOCK (1886), 55 L. J. Q. B. 286 ; 34 W. R. 414 ; 2 T. L. R. 411, D. C.

Sect. 1.—Restraint on anticipation or alienation: Sub-sect. 5, C. (c), (d), (e) & (f); sub-sect. 6, A.]

978. —-]—BECKETT *v.* TASKER, No. 972, *ante.*

979. — — —— **Settlement made after debt contracted.**]—A woman at the time of her marriage in Dec. 1882, being then an infant, was entitled to a sum of money absolutely, to a sum for her separate use, & to certain freeholds. After her marriage, & while still an infant, she contracted a debt for which judgment was recovered against her separate estate. After this debt was contracted, & before the woman attained her majority, a post-nuptial settlement of all the property was made in 1884, under Infants' Settlements Act, 1855 (c. 43), to the wife for her life for her sole & separate use with a restraint on anticipation, & after her death to her husband & children. This settlement was approved by the Ch. Div. of the High Ct. The judgment creditor applied to have a receiver appointed of the property, upon the ground that such settlement was void as against creditors under the last clause of the above sect. :—*Held:* the settlement though made after the debt was contracted, was valid as against creditors by virtue of the first part of the above sect., & the judgment creditor was not entitled to have a receiver appointed.—HEMINGWAY *v.* BRAITHWAITE (1889), 61 L. T. 224.

980. —— —— ——.] — HILL *v.* AILESBURY (LADY) (1894), 10 T. L. R. 487.

981. Married woman trading separately — Liability on bankruptcy.]—*Re* WHEELER'S SETTLEMENT TRUSTS, BRIGGS *v.* RYAN, No. 882, *ante.*

See, further, Part IV., Sect. 6, *ante.*

982. Direction in will by married woman—For payment of debts.] — SPRANGE *v.* LEE, No. 950, *ante.*

(d) Obligations Resulting from Breach of Trust.

983. Sale in fraud of settlement — Woman having restrained & unrestrained property.]—A woman on her marriage, settled a necklace upon trust for herself for life, with remainder to her eldest son. She also settled other property to her separate use for life, as to part of such property with, & as to other part without, restraint upon anticipation. She afterwards, in fraud of the settlement, sold the necklace, & appropriated the money to her own use :—*Held:* the property settled to her separate use, with restraint upon anticipation, was not chargeable with the value of the necklace, but that the property settled without such restraint was so chargeable.—CLIVE *v.* CAREW (1859), 1 John. & H. 199; 28 L. J. Ch. 685; 33 L. T. O. S. 161; 5 Jur. N. S. 487; 7 W. R. 433; 70 E. R. 719.

Annotations:—**Consd.** Pemberton *v.* M'Gill (1860), 1 Drew. & Sm. 266. **Apld.** Arnold *v.* Woodhams (1873), 42 L. J. Ch. 578. **Expld.** Wainford *v.* Heyl (1875), L. R. 20 Eq. 321. **Refd.** Thomas *v.* Price (1877), 46 L. J. Ch. 761; Stanley *v.* Stanley (1878), 47 L. J. Ch. 256; Sawyer *v.* Sawyer (1885), 28 Ch. D. 595; *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532.

984. Devastavit by executor — Income accrued due liable.]—Where an annuity was given to an extrix. who was a married woman, to her separate use without power of anticipation, & such extrix. had misappropriated assets of the testatrix, upon a suit for the administration of the testatrix's estate :—*Held:* in taking the accounts, payments of the annuity which were in arrear were liable to be applied to make good the extrix.'s misappropriations; but the future payments, being subject to the restraint on anticipation, were not so liable. —PEMBERTON *v.* M'GILL (1860), 1 Drew. & Sm. 266; 29 L. J. Ch. 499; 3 L. T. 207; 8 W. R. 290; 62 E. R. 380.

Annotations:—**Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Hood Barrs *v.* Heriot, [1896] A. C. 174. **Refd.** Stanley *v.* Stanley (1878), 47 L. J. Ch. 256; Sawyer *v.* Sawyer (1885), 28 Ch. D. 595.

Breach by trustee — Instigated by married woman.]—*See* TRUSTS & TRUSTEES.

(e) Costs.

See Sect. 2, sub-sect. 2, *post.*

(f) Income Accrued or Accruing Due.

985. Liability for devastavit — Arrears of annuity.]—PEMBERTON *v.* M'GILL, No. 984, *ante.*

986. Liability to execution — Income accrued before sequestration order.]—A husband having obtained a decree *nisi* for divorce, an order was made for the wife to give up his children to him. This order was not served upon her personally, but it appeared that she knew of the order & kept out of the way to avoid service. The children were not delivered up, & the father could not discover where they were. A further order was thereupon made for a sequestration to issue against the estate of the wife, & directing her mother, sister, & brother-in-law, who were shown to be in communication with her, to attend to be examined as to their knowledge of the whereabouts of the wife & children. The wife was entitled under her marriage settlement to an income for her separate use with a restraint on anticipation :—*Held:* (1) the sequestration was properly issued without personal service of the previous order; (2) it was no objection to the form of the writ of sequestration that it was in general terms without expressly defining the property of the wife which was subject to sequestration; (3) the sequestration could not during the coverture be enforced against future income, as to which the wife was restrained from anticipation, but that it applied to arrears which were due when the order for sequestration was made.—HYDE *v.* HYDE (1888), 13 P. D. 166; 57 L. J. P. 89; 59 L. T. 529; 36 W. R. 708; 4 T. L. R. 586, C. A.; *subsequent proceedings*, 59 L. T.

Annotations:—*As to* (1) **Apprvd.** Kistler *v.* Tettmar, [1905] 1 K. B. 39. **Consd.** *Re* Tuck, Murch *v.* Loosemore, [1906] 1 Ch. 692. **Refd.** Favard *v.* Favard (1896), 75 L. T. 664; *Re* Suarez, Suarez *v.* Suarez, [1918] 1 Ch. 176. *As to* (3) **Consd.** Cox *v.* Bennett, [1891] 1 Ch. 617; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788. **Refd.** Michell *v.* Michell, [1891] P. 208; *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135; Bolitho *v.* Gidley, [1905] A. C. 98.

987. —— Income accrued before judgment—But not received in fact.]—A married woman was entitled as tenant for life to the income of real estate, with a restraint on anticipation; & on Sept. 29, 1894, certain rent became due to her. Creditors who had obtained judgment against the married woman on Oct. 1, took out a summons on the following day asking for the appointment of a receiver of the rent by way of equitable execution. The rent had not come to the hands of the married woman, being either in the possession of her trustees, or remaining unpaid by the tenants of the property. On Nov. 1, the summons came before the Div. Ct. who decided that the restraint on anticipation attached to the overdue rent, & therefore refused to appoint a receiver. The judgment creditors appealed :—*Held:* the judgment creditors were not entitled to equitable execution over rents of property of which the married woman was tenant for life without power of anticipation, even though such rents were

due & payable to her before the date of the judgment sought to be enforced.—PILLERS & PERSHOUSE *v.* EDWARDS (1894), 71 L. T. 788; 11 T. L. R. 92; 39 Sol. Jo. 96; 14 R. 290, C. A.

Annotation:—**Refd.** Hood Barrs *v.* Heriot, [1896] A. C. 174.

988. —— ——.]—HOOD BARRS *v.* HERIOT, No. 833, *ante*.

989. —— — **Judgment purposely delayed.**]—Pltf. obtained leave, under R. S. C., 1883, Ord. 14, to enter final judgment for a debt against a married woman possessed of separate estate with a restraint on anticipation. He delayed entering judgment for three months when he knew that arrears had just become due, & then entered judgment & obtained an order for a receiver:—*Held:* an order for a receiver ought not to be made under such circumstances.—COLYER *v.* ISAACS (1897), 77 L. T. 198; 13 T. L. R. 575, C. A.

990. —— ——.]—A grantor by deed covenanted to pay to a trustee upon trust for a married woman during her lifetime the quarterly sum of £250, on the usual quarter days, such sums to be for her separate use without power of anticipation. The married woman subsequently in 1909, accepted a bill of exchange, & on Dec. 29, 1913, judgment was recovered against her for the amount of the bill. On Dec. 24, 1913, the grantor under the deed had paid to the trustee the quarterly sum due on the following day:—*Held:* on the authority of *Barnett* v. *Howard*, No. 973, *ante*, as at the date of the contract the married woman was restrained from anticipating the quarterly sum, it could not be attached to answer the judgment debt.—WOOD *v.* LEWIS, [1914] 3 K. B. 73; 83 L. J. K. B. 1046; 110 L. T. 994, C. A.

991. —— **Income accrued after judgment.**]—Judgment having been signed in an action against defts., a man & his wife, it was sought to attach in execution moneys in the hands of trustees, forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband & wife jointly during the coverture:—*Held:* the moneys in question could not be attached in execution.—CHAPMAN *v.* BIGGS (1883), 11 Q. B. D. 27; 48 L. T. 704; 47 J. P. 485, D. C.

Annotations:—**Folld.** Galmoye *v.* Cowan & Brown (1889), 58 L. J. Ch. 769. **Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135.

992. —— ——.]—GALMOYE *v.* COWAN & BROWN, No. 956, *ante*.

993. —— —— **Effect of Married Women's Property Act, 1893 (c. 63).**]—A judgment cannot be enforced under Married Women's Property Act, 1882 (c. 75), by any kind of process against arrears of the income of the separate estate of a married woman restrained from anticipation, accruing due after the date of the judgment.

Semble: Married Women's Property Act, 1893 (c. 63), does not alter the effect of a married woman's contracts on property restrained from anticipation.—HOOD BARRS *v.* CATHCART, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602; 70 L. T. 865; 42 W. R. 628; 10 T. L. R. 541; 38 Sol. Jo. 562; 9 R. 802, C. A.

Annotations: **Folld.** *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135. **Expld. & Apld.** Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788. **Consd.** Hood Barrs *v.* Heriot, [1896] A. C. 174. **Apprvd.** Whiteley *v.* Edwards, [1896] 2 Q. B. 48. **Refd.** *Re* Sampson, Sampson *v.* Sampson, [1896] 1 Ch. 630; Bolitho *v.* Gidley, [1905] A. C. 98.

994. —— ——.]—*Re* LUMLEY, *Ex p.* HOOD BARRS, No. 801, *ante*.

995. —— ——.]—Where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882 (c. 75), does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment: & the decision of the Ct. of Appeal to that effect in *Hood Barrs* v. *Cathcart*, No. 993, *ante*, is not affected by the judgment of the House of Lords in *Hood Barrs* v. *Heriot*, No. 833, *ante*.—WHITELEY *v.* EDWARDS, [1896] 2 Q. B. 48; 65 L. J. Q. B. 457; 74 L. T. 720; 44 W. R. 530; 12 T. L. R. 429, C. A.

Annotations:—**Consd.** *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690. **Apprvd.** Bolitho *v.* Gidley, [1905] A. C. 98.

996. —— ——.]—COLYER *v.* ISAACS, No. 989, *ante*.

997. —— ——.]—When judgment is obtained against a married woman payable out of separate estate held in trust for her without power of anticipation, income accrued due after the date of the judgment cannot be attached in the hands of the trustees to answer the judgment.—BOLITHO & CO., LTD. *v.* GIDLEY, [1905] A. C. 98; 74 L. J. K. B. 430; 92 L. T. 369; 53 W. R. 498, H. L.

Compare Nos. 952, 953, *ante*, No. 1469, *post*.

998. Liability to committal—Receipt of income after judgment—Application of Debtors Act, 1869 (c. 62), s. 5.]—Upon a judgment summons issued under above sect. against a married woman who has only a separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shown that, since the date of the judgment, she has received some of her separate income.

Qu.: whether above sect. applies at all if in the judgment execution is limited to separate estate which she is not restrained from anticipating.—MEAGER *v.* PELLEW (1885), 14 Q. B. D. 973; 53 L. T. 67; *sub nom. Re* PELLEW, *Ex p.* MEAGER, 33 W. R. 573, C. A.

999. —— —— ——.]—Judgment for a debt & costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint upon anticipation, unless by reason of Married Women's Property Act, 1882 (c. 75), such property should be liable to execution notwithstanding such restraint. Upon an application for an order of committal against her under above sect., the only evidence of her ability to pay was that since the date of the judgment she had received sufficient income of separate property subject to a restraint upon anticipation:—*Held:* no order could be made against her upon that evidence, because sect. 5 did not apply to the judgment.—DRAYCOTT *v.* HARRISON (1886), 17 Q. B. D. 147; *sub nom.* DARRACOTT *v.* HARRISON, 34 W. R. 546, D. C.

Annotations:—**Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** Scott *v.* Morley (1887), 20 Q. B. D. 120; *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135.

SUB-SECT. 6.—REMOVAL OF RESTRAINT.

A. By Spinster or Widow.

Right of single woman to property free from restraint.]—*See* Nos. 872, 877, 880, *ante*.

PART VI. SECT. 1, SUB-SECT. 5.—C. (f).

991 j. *Liability to execution—Income after judgment.*]—Apart from Married Women's Property Act, 1893, a judgment against a married woman cannot be enforced against arrears of her separate estate accruing due subsequent to the date of the judgment, & subject to a restraint on anticipation.—LOWRY *v.* DERHAM, [1895] 2 I. R. 123.—**IR.**

Sect. 1.—*Restraint on anticipation or alienation: Sub-sect.* 6, *A. & B. Sect.* 2: *Sub-sect.* 1, *A.*

Right of single woman to alienate.]—*See* Nos. 873, 875, 876, *ante.*

1000. What operates as discharge—Conversion into money—Money in hands of beneficiary.]—Where personal property was bequeathed to a woman upon trust for her separate use, but without the intervention of any trustee, & she afterwards, being *discoverte & sui juris*, sold the stock, spent a portion of the proceeds, & invested the rest in shares of a joint stock bank & Canada bonds:—*Held:* by so doing she had determined the trust for her separate use.

When the property was in her hands as money is was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property she disposed of it finally & entirely (PAGE WOOD, V.-C.).—WRIGHT *v.* WRIGHT (1862), 2 John. & H. 647; 70 E. R. 1218.

1001. —— Ante-nuptial covenant to settle.]—*Re* WOOD, WOOD *v.* HOOPER, No. 875, *ante.*

1002. —— Declaration under seal.]—Pltf., being then a spinster entitled to a reversionary share under a will subject to a restraint upon anticipation in the event of her marriage, by a deed poll executed before her marriage declared that her said reversionary share should in the event of her marriage belong to her for her separate use, & that for the purposes & subject to the conditions therein mentioned she should have full power to dispose of or charge the said share by way of anticipation or otherwise as she might think fit, but that except as therein provided nothing therein contained should prejudice the continuance of the said restraint. The deed poll was immediately communicated to the trustees of the will. Three mtges. pursuant to the conditions contained in the deed poll were made by pltf. while a married woman. On a summons taken out for the purpose of determining the validity of these mtges. & whether pltf. had power to make any future mtges. for the purposes declared by the deed poll:—*Held:* the deed poll operated by way of direction to the trustees, & thus amounted to a complete & effectual transfer of pltf.'s share upon a new & modified trust, & for the purposes & subject to the conditions imposed by the deed poll she had power to deal with her share by way of anticipation during coverture. *Semble:* apart from its operation by way of direction, the declaration under seal would have been sufficient, as a release, to remove the protection attached to the original trust.—*Re* CHRIMES, LOCOVICH *v.* CHRIMES, [1917] 1 Ch. 30; 61 Sol. Jo. 56; *sub nom. Re* CHRIMES, LUCOVICH *v.* CHRIMES, 86 L. J. Ch. 217; 115 L. T. 706.

1003. —— Direction to trustees—Declaration of modified trust.]—*Re* CHRIMES, LOCOVICH *v.* CHRIMES, No. 1002, *ante.*

By Court.

See Sect. 2, *post.*

SECT. 2.—REMOVAL OF RESTRAINT BY THE COURT.

SUB-SECT. 1.—FOR BENEFIT OF MARRIED WOMEN.

A. Apart from Statute.

1004. Sanction of court—Legacy conditional on transferring restrained property.]—Testator gave a legacy to a married woman upon condition that she conveyed within twelve months an estate devised to her by another testator for her separate use with a clause against anticipation:—*Held:* the ct. had no power to interfere for the purpose of enabling the married woman to comply with the condition, though to have done so would have been greatly for her benefit.—ROBINSON *v.* WHEELWRIGHT (1856), 6 De G. M. & G. 535; 25 L. J. Ch. 385; 27 L. T. O. S. 73; 2 Jur. N. S. 554; 4 W. R. 427; 43 E. R. 1342, L. C. & L. JJ.

Annotations:—**Consd.** *Re* Grove, Public Trustee *v.* Dixon, [1919] 1 Ch. 249. **Refd.** Clive *v.* Carew (1859), 1 John. & H. 199; *Re* Vardon's Trusts (1884), 28 Ch. D. 124; *Re* Queade's Trusts (1885), 54 L. J. Ch. 786; *Re* Currey, Gibson *v.* Way (1886), 32 Ch. D. 361; *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532; *Re* Pollard's Settlmt., [1896] 1 Ch. 901; Bateman *v.* Faber, [1898] 1 Ch. 144; *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56. **Mentd.** Ledwards *v.* Hassell (1856), 2 Jur. N. S. 277. Pitt *v.* Pitt (1872), 26 L. T. 827; Wilder *v.* Piggott (1882), 22 Ch. D. 263; Harle *v.* Jarman, [1895] 2 Ch. 419.

1005. Restraint invalid by law of domicil.]—Testator bequeathed personal estate in trust for the separate use of a *feme covert*, & without power of anticipation. The legatee was, at the date of the will, domiciled abroad, & had continued so ever since. By the law of her domicil, the restraint against anticipation was disregarded, but this ct. nevertheless, refused to give effect to a beneficial arrangement made by her anticipating her income.—PEILLON *v.* BROOKING (1858), 25 Beav. 218; 53 E. R. 620.

Breach of trust by married woman.]—*See* Part X., Sect. 3, *post*, & *generally*, TRUSTS & TRUSTEES.

B. Under Statute.

(a) Extent of Power.

See Conveyancing Act, 1881 (c. 41), s. 39, &, *now*, Law of Property Act, 1925 (c. 20), s. 169.

1006. No general power—Limitation to particular dispositions.]—*Re* WARREN'S SETTLEMENT, No. 1031, *post.*

1007. Power to annul marriage settlement—By which restraint imposed—After decree nisi—Consent of woman.]—(1) *Held:* the power of altering marriage settlements given to the ct. by Matrimonial Causes Act, 1859 (c. 61), s. 5, & Matrimonial Causes Act, 1878 (c. 19), s. 3, is limited to such alterations as are for the personal benefit of the husband, wife or children of the marriage. Where, therefore, a petitioner dies after obtaining a decree absolute for dissolution of the marriage & after presenting a petition for variation of the marriage settlement, & there are no children of the marriage, the petition for variation abates by the death of petitioner, & the proceedings cannot be continued by his personal representatives for the benefit of his estate.

(2) On a decree *nisi* for divorce being made on the petition of the husband, terms were arranged that petitioner should secure resp. £120 a year for life, & that she should consent to their marriage settlement being annulled:—*Held:* as resp. was by the marriage settlement restrained from anticipation, this agreement was not binding on her, & the objection could not be remedied under the powers given to the ct. by Conveyancing Act, 1881 (c. 41), s. 39.

The first difficulty is that the sect. gives power to the ct. to free a married woman from a restraint on anticipation, & here we have not any married woman. But if she were a married woman, how could we say that it is for her benefit to make this agreement binding on her, when its effect is to give her £120 a year instead of £350 a year? (LINDLEY, L.J.).—THOMSON *v.* THOMSON, [1896] P. 263; 65 L. J. P. 80; 74 L. T. 801; 45 W. R. 134; 12 T. L. R. 464; 40 Sol. Jo. 583, C. A.

(*b*) *Application for Removal.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

1008. Whether by summons or petition.]—An application to the ct. to bind a married woman's interest in property as to which she is restrained from anticipation must be made by summons in chambers & not by petition.—*Re* LILLWALL'S SETTLEMENT TRUSTS (1882), 30 W. R. 243.

1009. ——.]—LATHAM *v.* LATHAM, [1889] W. N. 171.

1010. Separate examination of woman—Necessity for—Dispensed with in special circumstances.]—A married woman was entitled to the income of a fund in ct. for her life, for her separate use without power of anticipation, with remainder in trust for her children, & in default of issue, in trust for such persons as she should, whether covert or sole, by will appoint, &, in default of appointment, to herself absolutely. She having had no children, & being past the age of childbearing, & having contracted a number of debts, for payment of which the creditors were pressing her & causing her great annoyance, she with her husband applied to the ct. to exercise its power under sect. 39 of Conveyancing Act, 1881 (c. 41), to remove the restraint on anticipation, & to order part of the fund to be paid out to her to enable her to pay her debts:—*Held:* whether she did or did not exercise her power of appointment, the fund would at her death be subject to the payment of her debts, & that under the circumstances the restraint on anticipation ought to be removed, & a portion of the fund paid out to appct.

The order was made upon the evidence of the married woman's consent afforded by an affidavit made by her in support of the application, & a letter written by her to her solrs., strongly urging them to obtain the money for her. *Qu.:* whether such an order ought in general to be made without ascertaining the consent of the married woman by a separate examination in the ordinary way.—HODGES *v.* HODGES (1882), 20 Ch. D. 749; 51 L. J. Ch. 549; 46 L. T. 366; 30 W. R. 483.

Annotations:— **Refd.** *Re* Pollard's Settlmt., [1896] 2 Ch. 552. **Mentd.** *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* De Burgh Lawson, De Burgh Lawson *v.* De Burgh Lawson (1889), 41 Ch. D. 568.

1011. —— —— ——.]—HARRIS *v.* HARFORD, [1888] W. N. 190.

1012. —— ——.]—MUSGRAVE *v.* SANDEMAN, No. 1030, *post*.

See, further, PRACTICE.

(*c*) *When Exercised.*

i. *In General.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

1013. Discretionary power.]—The power which Conveyancing Act, 1881 (c. 41), s. 39, gives to the ct. of dispensing with a restraint on anticipation is a discretionary power, to be exercised with great caution, & only where a strong case is made for it, & is not necessarily to be exercised because it will be for the benefit of the married woman. A fund was settled on a married woman for life for her separate use with a restraint on anticipation, remainder to her children & issue as she should appoint, & in default of appointment to the children equally, with cross limitations in the event of any dying under twenty-one without issue. She, being in straitened circumstances, arranged with her eldest son that his fifth share in a part of the trust funds should be applied in a specified way for her benefit. With a view to this she released her power of appointment over the trust funds, & then applied to the ct. to have the fifth share of the son in the agreed part of the funds together with her life interest therein sold, & the proceeds applied as above:—*Held:* the ct. would not in the exercise of its discretion dispense with the restraint on anticipation in order to give effect to a release executed by the donee of the power for her own benefit.—*Re* LITTLE, HARRISON *v.* HARRISON (1889), 40 Ch. D. 418; 58 L. J. Ch. 233; 37 W. R. 289; *sub nom. Re* LITTLE, *Re* HARRISON, HARRISON *v.* HARRISON, 60 L. T. 246, C. A.

Annotations:—**Mentd.** *Re* Radcliffe, Radcliffe *v.* Bewes, [1892] 1 Ch. 227; *Re* A., [1904] 2 Ch. 328; *Re* Evered, Molineux *v.* Evered, [1910] 2 Ch. 147.

1014. Benefit to woman—Or to husband & family—Necessity for.]—The ct. will not exercise the power given by Conveyancing Act, 1881 (c. 41), s. 39, removing the restraint of anticipation imposed upon a married woman interested in settled property, unless it would manifestly be for her benefit to do so, or for the benefit of her husband & family.—*Re* WOOD, WOOD *v.* KIMBER (1885), 1 T. L. R. 192, C. A.

1015. —— Not necessarily conclusive.]—*Re* LITTLE, HARRISON *v.* HARRISON, No. 1013, *ante*.

1016. —— Not necessarily pecuniary.]—*Re* POLLARD'S SETTLEMENT, No. 1026, *post*.

1017. —— Exercise of discretion—On merits of each case.]—*Re* GIORGI, GIORGI *v.* WOOD, No. 1024, *post*.

1018. Discrimination in exercise—Necessity for.]—A married woman was, under the will of testator, entitled to the income of a share of his residuary estate for her life for her separate use without power of anticipation. The will contained a proviso for forfeiture in the event of such person charging, alienating, or assigning such income or any part thereof by any act of theirs, or by bkpcy., or other act or operation of law. There was a gift over of the income in the event of forfeiture. She applied to the ct., under sect. 39 of Conveyancing Act, 1881 (c. 41), that, notwithstanding the restraint on anticipation, she might be at liberty to bind her life interest under the will for the purpose of raising a loan:—*Held:* the application must be refused, as it might involve a forfeiture of her life interest.

The power given by sect. 39 of the Act ought not to be used indiscriminately.—*Re* JORDAN, KINO *v.* PICARD (1886), 55 L. J. Ch. 330; 54 L. T. 127; 34 W. R. 270.

ii. *Payment of Debts.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

1019. Wife's debts—Inception of debt material.]—*Re* GIORGI, GIORGI *v.* WOOD, No. 1024, *post*.

1020. —— Woman past child bearing—Power of appointment in default of children.]—HODGES *v.* HODGES, No. 1010, *ante*.

1021. —— —— ——.]—LATHAM *v.* LATHAM, [1889] W. N. 171.

Compare No. 1031, *post*.

PART VI. SECT. 2, SUB-SECT. 1.—B. (c) ii.

m. *For discharge of mortgage.*]—By a voluntary deed lands were settled on A. the settlor for life; remainder to B., a married woman for life, with a clause against anticipation; remainder to C., B.'s husband, for life; remainder as B. should appoint. A., B., & C., joined in a mtge., with a power of sale, to secure advances by a bank to them. The bank sold, under their power, for the full value. It appearing that there were no other means of paying off the mtge., that the lands were in danger of eviction for non-payment of head-rent, & that they

Sect. 2.—*Removal of restraint by the court: Sub-sect.* 1, *B.* (*c*) *ii.* & *iii.*]

1022. Removal involving forfeiture.]—*Re* JORDAN, KINO *v.* PICARD, No. 1018, *ante.*

1023. —— Due to extravagance.]—The ct. will not make an order under Conveyancing Act, 1881 (c. 41), s. 39, in a case where it is sought to remove the restraint on anticipation merely for the purpose of raising money for the payment of debts incurred through the extravagance of the married woman or her husband.—*Re* POLLARD'S SETTLEMENT, [1896] 2 Ch. 552; 65 L. J. Ch. 796; 75 L. T. 116; 45 W. R. 18; *sub nom. Re* P.'S SETTLEMENT, 12 T. L. R. 543, C. A.

1024. —— ——.]—This is an appeal from the decision of a judge upon a matter of discretion under sect. 39 of Conveyancing Act, 1881 (c. 41). . . . I do not think that this ct. ought to lay down any principle as to the way in which the discretion should be exercised, though one element in coming to a conclusion is the inception of the debts (COLLINS, L.J.).

The sect. [39 of Conveyancing Act, 1881 (c. 41)], requires for its exercise that the ct. should be satisfied that it would be for the benefit of the married woman, & subject to that the Legislature has left it to the ct. to decide. The Legislature not having laid down any rules, it is not for the ct. to do so. Each case must be decided on its own merits. The debts in this case have been incurred by gross extravagance, & the ct. ought not to lay down that where a person incurs debts through extravagant living he or she can come to the ct. for assistance in paying off those debts (STIRLING, L.J.).—*Re* GIORGI, GIORGI *v.* WOOD (1901), 45 Sol. Jo. 615, C. A.

1025. —— Life interest bound.]—Upon the application of a married woman, the ct. made an order, under Conveyancing Act, 1881 (c. 41), s. 39, binding her life interest under her marriage settlement, notwithstanding restraint on anticipation, by approving a scheme for discharging her debts & liabilities, the ct. being of opinion that the scheme was for the benefit of the married woman, within the sect.—*Re* WILSON-STEWART, KEOWN-BOYD *v.* GILMOUR (1896), 75 L. T. 381, C. A.

1026. —— Due to moneylender.]—(1) I desire to state as a rule that I cannot relieve married women from the restraint on anticipation in cases where they have gone to moneylenders. . . . No case here has been established which would justify me in exercising my discretion by acceding to the application (CHITTY, J.).

(2) There is another point in this case, a prosecution has been instituted against the lady for stealing furniture, & it is further asked that the restraint should be removed, so as to enable her to defend herself. . . . It is undoubtedly for the benefit of the married woman to defend herself under such circumstances . . . & I will listen to an application in chambers in the event of her being committed for trial (CHITTY, J.).—*Re* POLLARD'S SETTLEMENT, [1896] 1 Ch. 901; 65 L. J. Ch. 496; 74 L. T. 374; 44 W. R. 474; *sub nom. Re* P.'S SETTLEMENT, 12 T. L. R. 322; 40 Sol. Jo. 416; *affd. sub nom. Re* POLLARD'S SETTLEMENT, [1896] 2 Ch. 552, C. A.

1027. Husband's debts—Responsibility undertaken by wife—Actions against wife.]—A wife living with her husband was entitled to an income of £1,700 for her separate use without power of anticipation. Her husband was without any means, & had been adjudged bkpt. The wife had given acceptances to many of her husband's creditors, & was harassed with actions, & a county ct. order for attachment in event of non-payment had been made against her. She was also suffering in health from the anxiety produced by pecuniary embarrassment:—*Held:* the case was one in which the ct. would, in the exercise of its discretion under Conveyancing Act, 1881 (c. 41), s. 39, make an order relieving part of the wife's income from the restraint on anticipation, in order that a sum might be raised to satisfy creditors.—*Re* C.'S SETTLEMENT (1887), 56 L. J. Ch. 556; 56 L. T. 299.

Annotation:—**Refd.** *Re* P.'s Settlmt. (1896), 12 T. L. R. 322.

1028. —— —— Reduction of income.]—In the present case, if I were to grant the application, the income would be reduced from £350 to £170 a year, & though I am sure the parties have every intention of being economical, I must decline to bring about this reduction. The object of the restraint on anticipation is to protect the wife from the husband, & if I yield in the present case, I shall be going in the teeth of the rule (KEKEWICH, J.).—*Re* A., B. *v.* C. (1893), 37 Sol. Jo. 650.

iii. *Other Cases.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

1029. Benefit of husband.]—The effect of Conveyancing Act, 1881 (c. 41), s. 39, observed upon.

I have had several applications before me where it has appeared that the removal of the restraint on anticipation was for the benefit of the husband. I do not put that construction on the section, & I shall require very strong grounds to be presented to me before acceding to such an application (HALL, V.-C.).—TAMPLIN *v.* MILLER (1882), 30 W. R. 422.

See, also, Nos. 1025, 1027, 1028, *ante.*

1030. Compromise of action—Lump sum in discharge of annuity.]—By indenture M. covenanted to pay to trustees an annuity of £400, in trust for H., a spinster, until her death or marriage, & in case she married with M.'s consent, then to pay the like annuity to the trustees for H. for life for her separate use without power of anticipation. H. married with M.'s consent. M. having died, his exor. & residuary legatee brought an action against H. & her husband claiming that the deed did not bind M.'s estate. Terms of compromise having been arranged under which H. was to receive a lump sum in discharge of the deed of covenant, the ct. was asked to sanction the arrangement on behalf of H. under Conveyancing Act, 1881 (c. 41), s. 39. The ct. considering the terms of compromise to be for H.'s benefit, sanctioned the arrangement, but directed that H. should attend to give her consent by separate examination before the judge in the ordinary way.—MUSGRAVE *v.* SANDEMAN (1883), 48 L. T. 215.

See, also, No. 919, *ante.*

1031. Reasons of health—Improbability of issue—Diminution of income involved.]—Property comprised in a marriage settlement was limited on trust for the wife for life for her separate use, without power of anticipation, remainder to her husband for life, remainder to the children of the

were sold for full value, the ct. on the application of B. & C. made an order dispensing with the restraint on anticipation.—*Re* SEGRAVE'S TRUST (1886), 17 L. R. Ir. 373.—**IR.**

PART VI. SECT. 2, SUB-SECT. 1.—B. (c) iii.

n. *For sale of life interest.*]—The judge being satisfied that it would be for the advantage of the married woman, made an order, on summons in Chambers, accepting an advantageous offer for the sale of her life interest in a fund, under Conveyancing & Law of

marriage, with an ultimate remainder to the husband. The wife was now fifty years old & the husband fifty-three, they had been married twenty-eight years, & there was no issue of the marriage, & there was evidence that it was almost, if not entirely, impossible that there could be any. Both husband & wife were in a delicate state of health, & the income of the property was so small that they could not afford the comforts which in consequence of the wife's health it was important she should have. They now applied to the ct., under sect. 39 of Conveyancing Act, 1881 (c. 41), to remove the restraint on anticipation, & to make such an order binding the interest of the wife as would enable the capital of the trust fund to be applied for the benefit of the husband & wife :—*Held :* the application must be refused as the ct. could not assume that the wife was past childbearing.

Sect. 39 of the Act does not give the ct. a general power of removing the restraint on anticipation, but only to bind the interest of a married woman restrained from anticipation who has disposed of her property, where the ct. is of opinion that that disposition is beneficial to her.—*Re* WARREN'S SETTLEMENT (1883), 52 L. J. Ch. 928 ; 49 L. T. 696, C. A.

1032. Mortgage of life interest.]—Order enabling a married woman to mortgage a life interest as to which she was restrained from anticipation made without requiring the trustees to be served.—*Re* LITTLE'S WILL, *Re* HARRISON (1887), 36 Ch. D. 701 ; 56 L. J. Ch. 872 ; 57 L. T. 583 ; *sub nom. Re* LITTLE'S WILL, HARRISON *v.* HARRISON, 5 T. L. R. 236, C. A.

1033. To facilitate dealings with land—Tenants in common.]—Two married women were tenants in common in equal shares of property for their separate use without power of anticipation. The property consisted for the most part of houses of which desirable leases could not be granted because of the restraint on anticipation. A summons was accordingly taken out for an order under Conveyancing Act, 1881 (c. 41), s. 39, enabling the married women to bind their interests in the property, & for a partition, & its resettlement in moieties upon the married women for their lives for their separate use without power of anticipation, with remainders for their husbands for their lives, & ultimate remainders for the issue of the marriages :—*Held :* under the circumstances an order binding the interests of the married women would be for their benefit within sect. 39.—*Re* CURREY, GIBSON *v.* WAY (No. 2) (1887), 56 L. J. Ch. 389 ; 56 L. T. 80 ; 35 W. R. 326.

Annotation :—**Consd.** *Re* Blundell, [1901] 2 Ch. 221.

1034. Release of limited power of appointment — To obtain control of fund—Arrangement prejudicial to issue.]—*Re* LITTLE, HARRISON *v.* HARRISON, No. 1013, *ante.*

1035. Payment of premiums on husband's life policy—Keeping down interest on mortgages—Rate of interest reduced by mortgagees.]—Restraint on anticipation of property settled on a married woman for life, with remainder to her husband for life, was, under the circumstances, removed till further order, to the extent of allowing the income to be applied in payment of premiums on policies on the husband's life, & towards keeping down interest on mtges. in which she had purported to join with her husband, on the mtgee. undertaking to reduce the rate of interest, & not to enforce payment of the principal without leave of the ct.—*Re* MILNER'S SETTLEMENT, [1891] 3 Ch. 547 ; 40 W. R. 76 ; *sub nom. Re* MILNER'S SETTLEMENT, MILNER *v.* MILNER, 61 L. J. Ch. 84 ; 65 L. T. 310.

Annotation :—**Distd.** *Re* A., B. *v.* C. (1893), 37 Sol. Jo. 650.

1036. Payment of purchase-money to mortgagees—Jointure having priority to mortgages.]—A restraint on anticipation was released by the ct. in order to enable a jointress to consent to the payment off out of the purchase-money of certain mtges. to which her jointure had priority.—*Re* AILESBURY (MARQUIS) & IVEAGH (LORD), [1893] 2 Ch. 345 ; 9 T. L. R. 324 ; 37 Sol. Jo. 326 ; 3 R. 440 ; *sub nom. Re* AILESBURY (MARQUIS) & IVEAGH (LORD), RIDDELL *v.* RIDDELL, 62 L. J. Ch. 713 ; 41 W. R. 644.

Annotations :—**Mentd.** *Re* Stamford, Payne *v.* Stamford, [1896] 1 Ch. 288 ; *Re* Du Cane, & Nettlefold's Contract, [1898] 2 Ch. 96 ; A.-G. *v.* Owen, A.-G. *v.* Coulson (1899), 68 L. J. Q. B. 779 ; *Re* Mundy & Roper's Contract, [1899] 1 Ch. 275 ; *Re* Spencer's S. E., [1903] 1 Ch. 75 ; *Re* Phillimore's Estate, Phillimore *v.* Milnes, [1904] 2 Ch. 460 ; *Re* Trafford's S. E., [1915] 1 Ch. 9 ; *Re* Cope & Wadland's Contract, [1919] 2 Ch. 376.

1037. Expense of defence—Pending criminal prosecution.]—*Re* POLLARD'S SETTLEMENT, No. 1026, *ante.*

1038. Agreement after decree nisi—Annulment of settlement—Reduction of income.]—THOMSON *v.* THOMSON, No. 1007, *ante.*

1039. Increase of income desired—Wider investment clause—Change to speculative securities.]—A married woman entitled absolutely, subject only to a restraint on anticipation of the income during coverture, to the capital of a fund in ct. standing to her separate account & invested in ct. securities, applied, under sect. 39 of Conveyancing Act, 1881 (c. 41), for the removal of the restraint in order that the fund might be paid out to the trustees of her marriage settlement with a view to reinvestment under the wide investment clause therein contained, so as to give her an increased income, the settlement trusts being for herself & her husband successively for life, subject, as to her life interest, to a restraint on anticipation during coverture, with ultimate trusts, in events which had happened, for her sole benefit :—*Held :* mere increase of income was not a sufficient "benefit" to the married woman to justify the ct. in removing the restraint so as to enable her to effect a change of investment from ct. securities into others of a speculative nature, even though sanctioned by the settlement ; & the application was therefore refused. *Semble :* a married woman's restraint on anticipation may be removed under sect. 39 of the Act on petition : it is not obligatory to proceed by summons under sect. 69 (3).—*Re* BLUNDELL, [1901] 2 Ch. 221 ; 70 L. J. Ch. 522 ; 84 L. T. 706 ; 45 Sol. Jo. 502, C. A.

1040. Conditional bequest—Other property to be settled by donees—Removal of restraint to permit

---

Property Act, 1881.—*Re* FLOOD'S TRUSTS (1883), 11 L. R. Ir. 355.—**IR.**

o. ***For continuance of investments.***]—Trust funds, to which a married woman was absolutely entitled, but subject to a restraint on anticipation, were invested upon mtges. of leasehold property, one of which, not being authorised by the trusts of the settlement, the trustees proposed to call in. The ct. being satisfied that it would be for the benefit of the married woman, made an order, on her application, permitting the investment to continue unchanged.—*Re* WRIGHT'S TRUSTS (1885), 15 L. R. Ir. 331.—**IR.**

p. ***For release of annuity.***]—Where a married woman was entitled to a life annuity, with restraint on anticipation, charged upon one-third share of the business & profits of a partnership, & it was proposed that the partnership should be converted into a co. with limited liability, the ct. sanctioned the removal of the restraint on anticipation for the purpose of enabling the married woman to release her annuity, on being satisfied that the offer in lieu thereof of an

Sect. 2.—Removal of restraint by the court: Sub-sect. 1, B. (c) iii., (d); sub-sect. 2, A. & B. (a).]

compliance.]—Testator died in 1918, & by his will made in 1911 gave his residuary estate upon trust for his son & five daughters equally, & settled the share of each daughter upon usual trusts for her & her issue, the daughter taking a life interest restrained from anticipation & no life interest or power of appointment being given to a husband, with a gift over in default of issue to the son & other daughters; & testator declared that the bequest to each daughter was upon the condition that she within three months after his death settled her interest under her mother's marriage settlement upon similar trusts, & that upon her failing to do so her share in his residuary estate should "therefrom cease" & go over to the son & other daughters.

Three of the daughters had married with testator's concurrence before the date of his will, & each of them on her marriage had settled her interest under her mother's marriage settlement upon trusts for herself & her husband respectively for life, she being restrained from anticipation, with power for them jointly or for the survivor to appoint to their issue, & default of appointment upon usual trusts for their children with a gift over in default of issue for her statutory next of kin.

Testator was a party to two of these settlements. On the question whether the married daughters were bound by the condition:—*Held:* the condition was a condition subsequent, & the married daughters, having on their marriage in testator's lifetime with his concurrence settled their interests under their mother's marriage settlement, were exempt from the performance of the condition. But the ct. removed the restraint on their life interests under their marriage settlements so that they might, if so advised, assign to trustees any interest they had at testator's death in their mother's marriage settlement.—*Re* GROVE, PUBLIC TRUSTEE *v.* DIXON, [1919] 1 Ch. 249; 88 L. J. Ch. 96; 120 L. T. 382; 63 Sol. Jo. 213.

Compare No. 1004, *ante*.

(*d*) *Effect of Removal.*

See, now, Law of Property Act, 1925 (c. 20), s. 169.

1041. Estate bound by order of court—Disposition by woman ineffectual.]—PAGET *v.* PAGET, No. 1236, *post*.

SUB-SECT. 2.—FOR PAYMENT OF COSTS.

A. Before Married Women's Property Act, 1893.

1042. Liability of property to costs.]—MOORE *v.* MOORE, No. 921, *ante*.

1043. ——.]—A dividend of a fund in ct., the income of which had been ordered to be paid to the separate use of a married woman, who was entitled to the same for life for her separate use without power of anticipation, fell due four days before the issue of a writ of sequestration for costs ordered by the Ct. for Matrimonial Causes to be paid by the married woman. Notice of the issue of the writ having been given at the Paymaster-General's office payment of the dividend had been refused:—*Held:* the sequestrators were entitled to take so much as necessary of the dividend in satisfaction of their demand.—CLAYDON *v.* FINCH (1873), L. R. 15 Eq. 266; 42 L. J. Ch. 416; 28 L. T. 101.

Annotations:—**Consd.** *Re* Slade, Slade *v.* Hulme (1881), 18 Ch. D. 653. **Refd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532 Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Hood Barrs *v.* Cathcart (No. 1) (1894), 70 L. T 862 Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788 Craig *v.* Craig, [1896] P. 171.

1044. —— Power of court before 1893.]—GORDON *v.* GORDON, No. 1071, *post*.

1045. —— Solicitors Act, 1860 (c. 127), s. 28—Successful defence.]—A suit was instituted by a husband against his wife to set aside a post-nuptial settlement, whereby he had assigned certain property to trustees upon trust to pay an annuity to his wife for her separate use, without power of anticipation. The wife retained a solr., who successfully conducted her defence, & the bill was dismissed with costs. The husband was unable to pay the costs, & thereupon the solr. presented a petition, under above Act, for the purpose of charging the annuity with the taxed costs of the suit. Upon that petition an order was made charging the property comprised in the settlement with costs. Subsequently upon the application of a mtgee. of the property, in whose absence the order had been made, the petition was reheard:—*Held:* the order must be varied by limiting the charge to the annuity, & no order as to the costs of rehearing could be made except that the mtgee. was entitled to add his to his security.—*Re* KEANE, LUMLEY *v.* DESBOROUGH (1871), L. R. 12 Eq. 115; 40 L. J. Ch. 617; 24 L. T. 780; 19 W. R. 1025.

Annotations:—**Refd.** Bulley *v.* Bulley (1878), 8 Ch. D. 479 Charlton *v.* Charlton (1883), 52 J. 971; Greer *v.* Young (1883), 24 Ch. D. 545; *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532; Michell *v.* Michell (1891), 60 L. J. P. 46.

1046. —— Conveyancing Act, 1881 (c. 41), s. 39—Power of court.]—In an action for rectification of certain instruments on the ground of mistake, pltf. had undertaken to pay the costs of all parties. Pltf. had a life interest in some property passing under a settlement, but with a restraint on anticipation. Upon the application of deft., & with the consent of pltf., the ct. made an order under the above sect., binding such life interest of pltf. & charging thereon the costs of all parties.—SEDGWICK *v.* THOMAS (1883), 48 L. T. 100.

1047. Proceedings instituted without next friend—Against trustees of will—Under which plaintiff entitled—Costs retained by trustees out of income.]—A married woman who, under a will, was entitled to income for her separate use, with a restraint on anticipation, instituted, without a next friend, against the trustees proceedings in the course of which she took out a summons which was refused:—*Held:* the restraint on anticipation did not prevent the ct. from giving the trustees liberty to retain their costs of the proceedings out of the married woman's income.—*Re* ANDREWS, EDWARDS *v.* DEWAR (1885), 30 Ch. D. 159; 54 L. J. Ch. 1049; 53 L. T. 422; 34 W. R. 62.

Annotations:—**Dbtd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532. **Refd.** *Re* Prynne (1885), 53 L. T. 465; Michell *v.* Michell, [1891] P. 166; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; *Re* Lumley, Hood Barrs *v.* Cathcart (1894), 7 R. 400.

absolute allotment of perpetual preference shares in the co., producing an income equal to the annuity, to be settled in trust for her during her life, with restraint on anticipation, & with a power of appointment after her decease, was to her advantage & that her husband & children.—*Re* MIL- (1890), 25 I R. Ir. 107.—**IR.**

q. *To complete purchase of estate.*]—An estate having been purchased in ct. by trustees of a marriage settlement, & the trustees requiring to raise a loan by way of mtge. on the estate for the completion of the purchase, the proposed lender required that an order should be obtained dispensing with the restraint on anticipation, contained in the said marriage settlement. The ct. being satisfied that the removal of such restraint on anticipation would be for the benefit of the married woman, granted an order dispensing with the same.—*Re* TENNANT'S ESTATE (1890), 25 L. R. Ir. 522.—**IR.**

1048. Order for payment of costs—Out of income accrued at date of order.]—Where costs are ordered to be paid by a married woman, suing under Married Women's Property Act, 1882 (c. 75), without a next friend, payment of them can be enforced against any separate property to which she is entitled free from restraint on alienation at the time when the order to pay costs is made, & not only against separate property which she is so entitled at the time when she commences the proceedings.

Where a married woman entitled under a will to income given to her separate use, with a restraint on anticipation, without fixing any days of payment, was ordered to pay to the trustees the costs of certain proceedings taken by her without a next friend:—*Held:* the trustees ought to be allowed to retain these costs out of a balance of income which was in their hands at the time when the order to pay costs was made, though it was not in hand at the time when she commenced the proceedings, the restraint on anticipation having ceased as to any sums forming part of the income so soon as they came to the hands of the trustees, & this was not altered by the fact that by an order made in a suit for administering the estate she was prevented from calling for payment of these sums till a later period. The decision in *Re Glanvill, Ellis* v. *Johnson*, No. 1051, *post*, that only such estate is liable as the married woman is entitled to when she commences the proceedings does not apply where the proceedings are taken under Married Women's Property Act, 1882 (c. 75), without a next friend.—COX *v.* BENNETT, [1891] 1 Ch. 617; 60 L. J. Ch. 651; 64 L. T. 380; 39 W. R. 401; 7 T. L. R. 316, C. A.

Annotations:—**Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** Everett *v.* Paxton (1891), 65 L. T. 383; *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135; Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788; Hood Barrs *v.* Heriot, [1896] A. C. 174; *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690; Bolitho *v.* Gidley, [1905] A. C. 98.

1049. —— Liability of accrued income—At date of institution.]—COX *v.* BENNETT, No. 1048, *ante*.

1050. Proceedings instituted by next friend—Costs against next friend—Inability to pay—Retention of costs out of income.]—*Re* GLANVILL, ELLIS *v.* JOHNSON, No. 1051, *post*.

1051. Costs of successful appeal—Set off against costs payable by next friend.]—(1) A married woman, by her next friend, having brought in 1882 an action for administration of a trust fund, to the income of which she was entitled for her separate use without power of anticipation, the ct. on further consideration in 1884, held the action to have been unnecessary & improper, & the next friend was ordered to pay defts.' costs. Defts. being unable to find the next friend, an order was made giving the trustees liberty to retain the costs out of the income of the trust fund already due & to become due to the married woman:—*Held:* no such order could be made, for that the ct. has no jurisdiction to disregard the restraint on anticipation on the ground that it appears to the ct. to be just to do so; & no income which did not accrue due till after the act on which the claim against the separate estate depended, viz. the improper institution of the suit, could be attached to meet the costs. *Qu.:* whether, if pltf. had been suing under Married Women's Property Act, 1882 (c. 75), without a next friend, the order could have been supported. (2) The appeal being allowed with costs:—*Held:* the costs must be set off against the costs which the next friend had been ordered to pay, although the notice of appeal did not purport to be given through the next friend, for that so long as he remained on the record as next friend the proceedings on behalf of pltf. must be taken as carried on by him.

(3) *Semble:* the ct. could notwithstanding the restraint, touch any income in the hands of her trustees which has accrued prior to the act creating such liability.—*Re* GLANVILL, ELLIS *v.* JOHNSON (1886), 31 Ch. D. 532; 55 L. J. Ch. 325; 54 L. T. 411; 50 J. P. 662; 34 W. R. 309; 2 T. L. R. 305, C. A.

Annotations:—*As to* (1) **Distd.** Cox *v.* Bennett, [1891] 1 Ch. 617. **Refd.** Hyde *v.* Hyde (1888), 13 P. D. 166; Michell *v.* Michell, [1891] P. 208; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Hood Barrs *v.* Cathcart (No. 1) (1894), 70 L. T. 862; *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135.

1052. Judgment in matrimonial cause against wife—Sequestration for costs—Action by wife against trustee for accrued income—Payment into court.]—By marriage settlement in 1856 certain property was settled to the separate use of the wife for life, without power of anticipation, with divers remainders over. In 1866 the wife left her husband, & in 1868 he instituted a suit against her in the Divorce Ct. for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, & declined in any way to obey the judgment. In Mar. 1870, the husband procured from the Divorce Ct. a writ of sequestration against the separate property of the wife for the costs of the suit.

In Oct. 1869, certain instalments of dividends & interest on the settled property fell due, & were received by one of the trustees, who retained it in his hands. In Dec. 1869, a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends & interest in question, & for the removal of the trustee, but not asking for the general administration of the trust fund. The trustee, by his answer, admitted that he had in his hands the sum of £6,105 1*s.* 9*d.* being the greater part of the entire fund. A few days after filing his answer the trustee filed a bill in the Rolls Ct. for the administration of the trusts of the settlement. On motion by the wife, in the first of the two suits, that the trustee might be ordered to pay into ct. the entire sum admitted by him to be in his hands:—*Held:* regard being had principally to the restraint on anticipation contained in the settlement, the money ought to be paid into ct., notwithstanding the writ of sequestration, & notwithstanding that the wife's bill had not prayed the general administration of the trust fund; the question of costs being reserved to the hearing.—MILLER *v.* MILLER (1870), 18 W. R. 750.

B. Since Married Women's Property Act,

(a) In General.

See Married Women's Property Act, 1893 (c. 63), s.

Jurisdiction to order—Where "action or proceedings instituted" by married woman.]—*See* Nos. 1059, 1063–1066, 1075, 1076, 1236, *post*.

1053. —— Action pending at date of Act—Instituted before.]—The ct. has jurisdiction, under sect. 2 of Married Women's Property Act, 1893 (c. 63), to order payment of the costs of an unsuccessful action instituted by a married woman, which was commenced prior to & was pending at the date of the passing of that Act, out of property which is subject to a restraint on anticipation.—*Re* GODFREY, THORNE-GEORGE *v.* GODFREY (1895), 72 L. T. 8; 43 W. R. 244; 39 Sol. Jo. 200, C. A.

1054. —— Not exercised as of course.]—(1) Where an order is made against a married woman for

Sect. 2.—Removal of restraint by the court: Sub-sect. 2, B. (a) & (b).]

payment of costs out of her separate estate, the party obtaining the order is *primâ facie* entitled, under sect. 2 of Married Women's Property Act, 1893 (c. 63), to enforce payment by obtaining the appointment of a receiver of her property which is subject to a restraint on anticipation, & the onus is upon her to show why the appointment should not be made.

(2) The jurisdiction conferred by sect. 2 of above Act will not be exercised as a matter of course.—PAWLEY *v.* PAWLEY, [1905] 1 Ch. 593; 74 L. J. Ch. 344; 92 L. T. 457; 53 W. R. 375; 49 Sol. Jo. 383.

Annotation :—As to (1) **Refd.** Studley *v.* Studley, [1913] P. 119.

1055. Jurisdiction to alter order—Made before Act passed—Or new order thereon.]—In 1893, prior to Married Women's Property Act, 1893 (c. 63), orders for the payment of costs were made against a married woman tenant for life of real estate subject to a restraint on anticipation, execution being limited to her separate property not subject to restraint on anticipation. On Jan. 15, 1894, a writ of sequestration, with the same proviso as to restraint, to enforce payment of the costs was issued against such separate estate. On application for a second writ of sequestration or for a receiver of the rents of the separate estate in arrear on Mar. 25, 1894 :—*Held :* judgment could not be enforced against the arrears of rent, & sect. 2 of the Act did not give the ct. jurisdiction to alter an order for payment of costs made before that Act came into operation, or to make a new order therefor.—*Re* LUMLEY, *Ex p.* HOOD BARRS, [1894] 3 Ch. 135; *sub nom. Re* LUMLEY, HOOD BARRS *v.* CATHCART, 63 L. J. Ch. 897; 71 L. T. 7; 42 W. R. 633; 10 T. L. R. 544; 38 Sol. Jo. 563; 7 R. 400, C. A.

1056. Exercise of power—Onus on married woman to oppose.]—PAWLEY *v.* PAWLEY, No. 1054, *ante*.

1057. Notice of motion for application—Service on plaintiff's solicitor—Plaintiff's whereabouts unknown.]—BAGLEY *v.* MAPLE & CO., LTD. (1911), 27 T. L. R. 284.

See, generally, PRACTICE & PROCEDURE.

(*b*) "*Action or Proceeding Instituted.*"

1058. General rule—Proceeding must initiate litigation.]—Married Women's Property Act, 1893 (c. 63), s. 2, only contemplated the case of a married woman pltf. Although unsuccessful, she cannot be made to pay the costs of interlocutory proceedings taken, or appeals brought by her, in an action in which she is deft.

Wherever a married woman commences litigation as pltf., then if at any step in the action, or in any proceeding in the action, she is ordered to pay the costs, the ct. in such an action, or proceeding, or litigation can order the costs to be paid out of her separate estate which she is restrained from anticipating. The costs will be set off (DAVEY, L.J.).

The question which we have to consider is, what is the true construction of the words "in any . . . proceeding now or hereafter instituted by a woman or by a next friend on her behalf?" It is contended it will include appeals or applications of any kind, made by a married woman who is so sued, in which she is unsuccessful. It appears to me the language does not apply to such a case as that. The word "instituted" is important, & means some proceeding in which the woman is the actor at starting, & applies to such a case as an originating summons, petition, or originating motion, something which really commences proceedings, & I do not think the expression "proceedings" does include motions moved or appeals brought by a married woman deft. Where frivolous appeals are brought & the married woman is not pltf., I do not think the language is large enough to apply to such proceedings (LINDLEY, L.J.).—HOOD BARRS *v.* CATHCART, [1894] 3 Ch. 376; 63 L. J. Ch. 793; 71 L. T. 11; 10 T. L. R. 631; 38 Sol. Jo. 661; 7 R. 411, C. A.

Annotations :—**Distd.** *Re* Godfrey, Thorne-George *v.* Godfrey, (1895), 72 L. T. 8. **Apld.** Hollington *v.* Dear (1895), 39 Sol. Jo. 284. **Apprvd. & Apld.** Hood Barrs *v.* Heriot, [1897] A. C. 177. **Apld.** Dresel *v.* Ellis, [1905] 1 K. B. 574. **Consd.** Robinson *v.* R., [1921] 3 K. B. 183. **Refd.** Nunn *v.* Tyson, [1901] 2 K. B. 487; Crickitt *v.* Crickitt, [1902] P. 177; Gordon *v.* Gordon, [1904] P. 163.

1059. —— ——.]—An appeal by a woman from a judgment in an action in which she is deft. is not a "proceeding instituted" within Married Women's Property Act, 1893 (c. 63), s. 2, & an order cannot be made under that sect. for the payment of the costs of the opposite party out of her separate property which is subject to a restraint upon anticipation. The sect. applies only to an action or other litigation initiated by a woman.—HOOD BARRS *v.* HERIOT, [1897] A. C. 177; 66 L. J. Q. B. 356; 76 L. T. 299; 45 W. R. 507; 41 Sol. Jo. 347, H. L.

Annotations :—**Expld.** Nunn *v.* Tyson, [1901] 2 K. B. 487. **Consd.** Robinson *v.* R., [1921] 3 K. B. 183. **Refd.** Gordon *v.* Gordon, [1904] P. 163; Dresel *v.* Ellis, [1905] 1 K. B. 574.

1060. Proceedings by married woman—Married woman consenting to judgment.]—*Re* GODFREY, THORNE-GEORGE *v.* GODFREY, No. 1075, *post*.

1061. —— Counterclaim.]—HOOD BARRS *v.* CATHCART, No. 1076, *post*.

1062. —— Appeal.]—PAGET *v.* PAGET, No. 1236, *post*.

1063. —— Claim to goods taken in execution—Subsequent interpleader proceedings.]—A written claim made by a married woman to goods or chattels taken in execution under the process of the ct., & served by her on the sheriff or high bailiff of a county ct., is a "proceeding instituted" by her within sect. 2 of Married Women's Property Act, 1893 (c. 63). Where, therefore, in the subsequent interpleader proceedings she fails to establish her claim to the goods, the ct. has jurisdiction under that sect. to order payment of the execution creditor's costs of the interpleader proceedings out of property of claimant which is subject to a restraint on anticipation & to enforce payment by the appointment of a receiver.—NUNN & CO. *v.* TYSON, [1901] 2 K. B. 487; 70 L. J. K. B. 854; 85 L. T. 123; 50 W. R. 16; 17 T. L. R. 624; 45 Sol. Jo. 619, D. C.

Annotation :—**Refd.** Crickitt *v.* Crickitt (1902), 18 T. L. R. 584.

1064. —— Intervening in probate action—Independent interest in subject-matter.]—A summons by a married woman under R. C. S., 1883, Ord. 12, r. 23, & Probate Court Rules, 1862, r. 6, for leave to intervene in a pending probate action for the purpose of asserting her independent interest in the subject-matter, is a "proceeding instituted" by her within sect. 2 of Married Women's Property Act, 1893 (c. 63), & therefore the ct. has jurisdiction to order, if it thinks fit, the costs of the action, as from the date of the summons to intervene, to be paid out of her separate property, including property which is subject to a restraint on anticipation.

The fact that the married woman may have obtained an order giving her leave to intervene in the action "as pltf." followed by a delivery to

deft. of a pleading whereby she "adopts the pleadings of the pltf.," does not the less render her intervention a "proceeding instituted" by her within the sect.—CRICKITT *v.* CRICKITT, [1902] P. 177; 71 L. J. P. 65; 86 L. T. 635; 18 T. L. R. 584, C. A.

1065. —— Application for new trial.]—Where, in an action brought by a married woman, an application by her for a new trial was dismissed with costs:—*Held:* the ct. had jurisdiction under Married Women's Property Act, 1893 (c. 63), s. 2, to order payment of those costs out of her separate property subject to a restraint on anticipation.—DRESEL *v.* ELLIS, [1905] 1 K. B. 574; 74 L. J. K. B. 401; 92 L. T. 816; 53 W. R. 353, C. A.

Annotation:—**Refd.** Huntly *v.* Gaskell, [1905] 2 Ch. 656.

1066. —— Divorce proceedings—Costs of intervener.]—A wife, having presented a petition for dissolution of marriage on the ground of cruelty & adultery, in her particulars alleged that the adultery had been committed with R. An order was made on Oct. 10, 1911, giving R. leave to intervene & directing her to file an answer within fourteen days. The intervener filed an answer, & at the trial the jury found that there had been no misconduct between her & resp., & petitioner was ordered to pay her costs. Under her marriage settlement petitioner was entitled to the income of realty for her life without power of anticipation. Intervener issued a summons for the appointment of a receiver of the life estate. Immediately after the conclusion of the first proceedings petitioner presented a second petition for dissolution of marriage. This was undefended, & a decree *nisi* was pronounced on July 9, 1912. On July 22 an order was made by the judge that the trustees of petitioner's settlement should, notwithstanding the restraint on anticipation, pay half her income to intervener from the date of the summons up to decree absolute, towards satisfaction of her costs. On Mar. 18, 1913, the summons was ordered to stand over until the decree *nisi* had been made absolute. Petitioner appealed & intervener gave cross-notice of appeal:—*Held:* intervener was an "opposite party" within sect. 2 of Married Women's Property Act, 1893 (c. 63); the discretionary power of the ct. was not exhausted by the order of July 22, 1912; the property which the ct. could deal with under the sect. was the whole property which was subject to the restraint on anticipation, & not merely the portion of the property which for the time being was effectively restrained from anticipation, that was to say, during coverture; the matter must be remitted to the judge to be dealt with according to his discretion.—STUDLEY *v.* STUDLEY, [1913] P. 119; 82 L. J. P. 65; 108 L. T. 657; 57 Sol. Jo. 425, C. A.

Annotation:—**Consd.** Wood *v.* Lewis, [1914] 3 K. B. 73.

1067. Action by husband & wife—Wife real plaintiff.]—An action brought by husband & wife but in which the wife was the real pltf., having been dismissed with costs the ct. under sect. 2 of Married Women's Property Act, 1893 (c. 63), ordered payment of defts.' costs when taxed out of separate property of the wife which was subject to a restraint on anticipation.—HUNTLY (MARCHIONESS) *v.* GASKELL, [1905] 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 54 W. R. 164; 22 T. L. R. 20; 50 Sol. Jo. 26, C. A.

1068. Proceedings by married woman defendant—Petition for retaking account—After balance paid into court.]—HOLLINGTON *v.* DEAR (1895), 39 Sol. Jo. 284.

1069. —— Executor's probate action—Caveat entered by married woman.]—An exor.'s probate action, brought in consequence of a caveat entered by a married woman who was made deft. to the action, resulted in a verdict for pltf., with costs against deft. Upon an application by pltf. under Married Women's Property Act, 1893 (c. 63), s. 2, for an order for payment of the costs out of property to which deft. was entitled subject to a restraint on anticipation:—*Held:* the proceedings in the probate action were "instituted" within the meaning of the Act by the issue of the writ by pltf., & not by the entry of the caveat, or the appearance of the caveator in answer to the warning; & accordingly the order applied for could not be made.—MORAN *v.* PLACE, [1896] P. 214; 65 L. J. P. 83; 74 L. T. 661; 44 W. R. 593; 12 T. L. R. 407; 40 Sol. Jo. 514, C. A.

Annotations:—**Distd.** Nunn *v.* Tyson, [1901] 2 K. B. 487. **Consd.** Crickitt *v.* Crickitt, [1902] P. 177. **Refd.** *Re* Emery, Emery *v.* Emery, [1923] P. 184. **Mentd.** Salter *v.* Salter (1896), 65 L. J. P. 117.

1070. —— Appeal.]—HOOD BARRS *v.* HERIOT, No. 1059, *ante*.

1071. —— Application for custody of child—After divorce decree absolute—Applicant in contempt.]—The decree *nisi* for the dissolution of a marriage on the ground of the wife's adultery directed that the child of the marriage should remain in the custody of the husband until further order, & should not be removed out of the jurisdiction without the sanction of the ct. At that time the child was with the wife out of England, & on the same day an order was made *ex p.* in chambers that the child should be forthwith delivered up to the husband, & should remain in his custody until further order. After the decree *nisi* had been made absolute the wife, who had in the meantime married the co-resp., came to England with the child. She then took out a summons asking that the decree *nisi* & the *ex p.* order might be varied by entrusting the custody of the child to herself. Pending the hearing of this summons, the wife by her counsel gave an undertaking not to remove the child out of the jurisdiction without the consent of the ct. On Mar. 10, 1903, the President ordered that the summons be dismissed & that the wife should pay the husband's costs, those costs to be payable out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was further ordered that the child should be forthwith delivered up by the wife to the husband, & should remain in his custody until further order.

Immediately after this order was made it was found that the wife had sent the child out of England two or three days previously & had herself followed on the day on which the order was made. She had since remained out of the jurisdiction with the child. On Mar. 12 the President pronounced the wife in contempt for breach of her undertaking, & ordered her to be attached for her contempt, & another order was made the same day for her committal for her contempt in non-compliance with the *ex p.* order that the child be not removed out of the jurisdiction. On May 12 the wife gave notice of appeal from so much of the order of Mar. 10 as directed the payment of costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation. It was alleged that under the circumstances the ct. had no jurisdiction under sect. 2 of Married Women's Property Act, 1893 (c. 62), to make the order as to the payment of the costs:—*Held:* (1) notwithstanding her contempt, applt. was entitled to be heard; (2) the summons was not a "proceeding instituted by" the wife, within

Sect. 2.—*Removal of restraint by the court: Sub-sect.* 2, *B.* (*b*) & (*c*), *C.*; *sub-sect.* 3. *Sect.* 3: *Sub-sect.* 1.]

sect. 2 of Married Women's Property Act, 1893 (c. 63), but was a step in the divorce suit, & consequently there was no jurisdiction under that sect. to make an order for payment of costs out of the separate property subject to a restraint on anticipation.—GORDON *v.* GORDON, [1904] P. 163; 73 L. J. P. 41; 90 L. T. 597; 52 W. R. 389; 20 T. L. R. 272; 48 Sol. Jo. 297, C. A.

Annotations:—As to (2) **Refd.** Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612; *Re* Wingfield & Blow, [1904] 2 Ch. 665. *Generally*, **Mentd.** *Re* Wigand, R. *v.* Wigand (1913), 82 L. J. K. B. 735; Russell *v.* Russell, [1924] A. C. 687.

generally, PRACTICE.

(c) The Order for Payment.

1072. Time for making—May be subsequent to judgment—By which action dismissed.]—HOOD BARRS *v.* CATHCART, No. 1076, *post.*

1073. —— —— ——.]—MUIRHEAD *v.* DAY (1896), 12 T. L. R. 169.

1074. Form of order.]—DAVIES *v.* TREHARRIS BREWERY CO. (1894), 39 Sol. Jo. 59; 13 R. 219.

1075. Enforcement of order—Charge on beneficial interest—Trustees entitled to costs.]—A married woman, restrained from anticipating her property, brought an action charging wilful default against the trustees of instruments under which she was beneficially interested, but at the trial withdrew the charges & submitted to dismissal of the action:—*Held:* defts. were entitled to judgment for costs as between solr. & client, & pltf. should be at liberty to charge her beneficial interest for the purpose of raising the costs, notwithstanding the restraint.—*Re* GODFREY, THORNE-GEORGE *v.* GODFREY (1894), 63 L. J. Ch. 854; 71 L. T. 86; 13 R. 36; *subsequent proceedings* (1895), 72 L. T. 8, C. A.

1076. —— **Appointment of receiver.**]—(1) A counterclaim in an action against a married woman is a "proceeding instituted" within Married Women's Property Act, 1893 (c. 63), s. 2, & the counterclaim having been dismissed there is jurisdiction to order pltf.'s costs to be paid out of deft.'s life estate notwithstanding any restraint upon anticipation.

(2) Where an order has been made dismissing an application by deft., a married woman, with costs, the ct. or a judge has power in a subsequent order appointing a receiver to direct that these costs shall be paid out of property subject to a restraint on anticipation.—HOOD BARRS *v.* CATHCART, [1895] 1 Q. B. 873; 64 L. J. Q. B. 520; 72 L. T. 427; 43 W. R. 560; 11 T. L. R. 286; 39 Sol. Jo. 347; 13 R. 489, D. C.

Annotation:—As to (1) **Refd.** Crickitt *v.* Crickitt, [1902] P. 177.

1077. —— ——.]—NUNN & CO *v.* TYSON, No. 1063, *ante.*

1078. — ——.]—PAWLEY *v.* PAWLEY, No. 1054, *ante.*

1079. — ·.]—BAGLEY *v.* MAPLE & CO., LTD. (1911), 27 T. L. R. 284.

1080. —— **Against all of restrained property.**]—STUDLEY *v.* STUDLEY, No. 1066, *ante.*

C. Other Cases.

See cases *infra.*

SUB-SECT. 3.—FOR OTHER PURPOSES.

1081. Benefit of remainderman—Restraint lifted—Transfer of part of corpus—Reinvestment.]—A sum of stock was vested in trustees upon trust to pay the dividends to A., a married woman, for her life, for her separate use, without power of anticipation, &, after her decease, to pay the capital to B. On the petition of A. & B., the ct. ordered a transfer of a portion of the stock to B., & a sale of such other portion as would be sufficient to purchase a govt. annuity equal to the dividends of the two sums of stock, & that the sum thereby produced should be laid out in the purchase of such annuity, to be settled on A. for her separate use, without power of anticipation.—DODD *v.* WAKE (1852), 5 De G. & Sm. 226; 21 L. J. Ch. 356; 18 L. T. O. S. 345; 16 Jur. 776; 61 E. R. 1092.

1082. Advancement of child—Benefit under settlement—No provision for maintenance—Restraint removed in part.]—An only child being contingently entitled, under the settlement of her parents & a will, to the corpus of two funds, in which her mother had a life interest, & as to the settled fund without power of anticipation & her father contributing nothing, a petition was presented on her behalf for the application of one tenth of the corpus for her advancement, there being no clauses as to maintenance. A policy had been taken out to meet the contingency. Order made, with a declaration that it was so made, notwithstanding the clause against anticipation.—*Re* ROBINSON (1868), 19 L. T. 81; 16 W. R. 1106.

SECT. 3.—DISPOSITION OF WIFE'S PROPERTY.

NOTE.—*Cases Prior to Married Women's Property Acts have been omitted: see note on p.* 83.

SUB-SECT. 1.—IN GENERAL.

See Married Women's Property Act, 1882 (c. 75), ss. 1, 2, 5; Married Women's Property Act, 1907 (c. 18), ss. 1, 3.

1083. Sale under Settled Estates Act, 1877 (c. 18) Necessity for separate examination—Marriage after the Act.]—Notwithstanding sect. 50 of above

PART VI. SECT. 2, SUB-SECT. 2.—C.

r. *Order obtained after coverture.*]—An order for payment of costs obtained against a married woman during coverture cannot, after coverture has ceased, be enforced against property to which, during coverture, she was entitled for her separate use without power of anticipation.—MILLS *v.* ISAAC (1900), 19 N. Z. L. R. 313.—**N.Z.**

PART VI. SECT. 2, SUB-SECT. 3.

1082 i. *Advancement of child—Benefit under settlement—No provision for maintenance—Restraint removed in part.*]—Restraint on anticipation of personalty settled by a married woman on herself for life, with remainder to her husband for life, was removed so as to allow a sum of £500, which she & her husband had appointed to their son, the only child of the marriage, free from his contingent life interest, but subject to her life interest, to be raised by the trustees of the settlement, & expended in buying cattle & implements of husbandry for the purpose of starting the son as a practical farmer, & relieving the husband & wife of the expense of maintaining him.—*Re* SAWYER'S TRUSTS, [1896] 1 I. R. 40.—**IR.**

s. ——.]—Pltf., a married woman, applied to the ct., with the consent of her husband, to remove a restraint on anticipation of certain funds accruing to her under a marriage settlement, & in which she had a life interest. After her death her husband took a life interest, & the funds then went as she should by deed or will appoint, or in default to her children. Her husband released his life estate, & the reason for her application was to obtain money to start her sons as farmers:—*Held:* the application should be granted.—BROWN *v.* FULLERTON-SMITH (1911), 31 N. Z. L. R. 363.—**N.Z.**

PART VI. SECT. 3, SUB-SECT. 1.

t. *Conveyance by wife—Necessity for joinder of husband.*]—A deed of bargain & sale, purporting to convey the real estate of a *feme covert* in which the husband is not named as a party,

Act, that when a married woman consents to an application to the ct. under the Act, she is to be examined apart from her husband as to her consent, such an examination is not now necessary in the case of a woman who has married since the commencement of Married Women's Property Act, 1882.—RIDDELL *v.* ERRINGTON (1884), 26 Ch. D. 220; 54 L. J. Ch. 293; 50 L. T. 584; 32 W. R. 680.

Annotations—**Consd.** *Re* Smith's Estate, Clements *v.* Ward (1887), 35 Ch. D. 589. **Folld.** *Re* Robinson's S. E. (1894), 38 Sol. Jo. 325. **Apld.** *Re* Batt's S. E. & Settled Estates Act, 1877 (1897), 45 W. R. 614.

1084. —— —— ——.]—*Re* ROBINSON'S SETTLED ESTATE (1894), 38 Sol. Jo. 325.

1085. —— —— **Marriage before the Act—Property acquired since the Act.**]—In the case of a woman married before the commencement of Married Women's Property Act, 1882, sect. 1 of the Act applies only as to property acquired by her after the commencement of the Act.

Therefore if such a woman is a petitioner or a resp. to a petition under above Act relating to property, her interest in which was acquired before the commencement of the Act of 1882, she must be examined separately as provided by above Act, s. 50.—*Re* HARRIS' SETTLED ESTATES (1884), 28 Ch. D. 171; 54 L. J. Ch. 208; 51 L. T. 855; 33 W. R. 393.

Annotation:—**Apld.** *Re* Batt's S. E., [1897] 2 Ch. 65.

1086. —— —— —— ——.]—Where a woman married before the commencement of Married Women's Property Act, 1882, is a party to an application under above Act relating to property her interest in which was acquired after the commencement of the Act of 1882, she need not be examined separately as provided by above Act, s. 50.—*Re* BATT'S SETTLED ESTATES, [1897] 2 Ch. 65; 66 L. J. Ch. 635; 45 W. R. 614; 41 Sol. Jo. 508.

1087. —— —— —— **Property acquired before the Act.**]—*Re* HARRIS' SETTLED ESTATES, No. 1085, *ante*.

See, generally, SETTLEMENTS.

1088. Enlargement of base fee—Deed acknowledged not required.]—Since Married Women's Property Act, 1882 (c. 75), a married woman, married after that Act, may enlarge a base fee into a fee simple absolute by an indenture which is not "acknowledged" by her, & in which her husband does not concur.—*Re* DRUMMOND & DAVIES' CONTRACT, [1891] 1 Ch. 524; 60 L. J. Ch. 258; 64 L. T. 246; 39 W. R. 445; 7 T. L. R. 272.

1089. Married woman mortgagee—Conveyance as feme sole.]—A married woman, to whom, subsequently to Married Women's Property Act 1882 (c. 75), real estate is conveyed by way of mtge. to secure money belonging to her as her separate property, can convey to a purchaser from mtgor. without the concurrence of her husband, or acknowledgment of the deed of conveyance by her under Fines & Recoveries Act.—*Re* BROOKE & FREMLIN'S CONTRACT, [1898] 1 Ch. 647; 67 L. J. Ch. 272; 78 L. T. 416; 46 W. R. 442; 14 T. L. R. 324; 42 Sol. Jo. 431.

Annotation:—**Folld.** *Re* West & Hardy's Contract, [1904] 1 Ch. 145.

1090. —— —— **Transfer of mortgage.**]—Since Married Women's Property Act, 1882 (c. 75), when two or more persons, one of whom is a married woman, advance moneys by way of mtge. under a recital that the advance is made out of moneys belonging to them on a joint account, it is not necessary on a transfer of the mtge. either for the husband of the married woman to concur in the conveyance or for her to acknowledge it separately under Fines & Recoveries Act.—*Re* WEST & HARDY'S CONTRACT, [1904] 1 Ch. 145; 73 L. J. Ch. 91; 89 L. T. 579; 52 W. R. 188; 48 Sol. Jo. 100.

See, generally, MORTGAGE.

1091. Married woman trustee of realty for sale—Deed acknowledged—Concurrence of husband.]—Testator devised his real estate to trustees for sale who were married women one of them having married before & the other after Married Women's Property Act, 1882. Both of them also took beneficial interests in the proceeds of sale. Under the judgment in an action for the administration of testator's estate, part of the real estate was sold by the trustees, the purchaser paying his purchase money into ct.:—*Held*: the married women were "bare trustees" within Vendor & Purchaser Act, 1874 (c. 78), s. 6, the conveyance to the purchaser did not require the concurrence of the husbands or acknowledgment under Fines & Recoveries Act.—*Re* DOCWRA, DOCWRA *v.* FAITH (1885), 29 Ch. D. 693; 54 L. J. Ch. 1121; 53 L. T. 288; 33 W. R. 574.

Annotation:—**Refd.** *Re* Blandy Jenkin's Estate, Blandy Jenkins *v.* Walker, [1917] 1 Ch. 46.

1092. —— —— ——.]—Married Women's Property Act, 1882, does not enable a woman married since the commencement of the Act, being a trustee of real estate for sale, to convey to a purchaser except with the concurrence of the husband & by a deed acknowledged by her.—*Re* HARK-

---

but only in the description of the *feme*, is not effectual under the provincial statutes enabling married women to part with their real estates, although signed & sealed by the husband.—DOE d. BRADT *v.* HODGINS (1832), 2 O. S. 247.—**CAN.**

a. —— ——.]—C. S. U. C., c. 83, s. 44, applies only to cases arising under that statute, & does not authorise the ct. in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her.—*Re* MCELROY (1871), 32 U. C. R. 95.—**CAN.**

b. —— —— *Wife deserted by husband.*]—J. H., by his will dated Apr. 14, 1874, devised property to his daughter, M. A. J., for life, with remainder to her children, & died soon after making the will. M. A. J. died about 1880, leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J., married one C., & C. in 1870 deserted his wife & had not been heard of afterwards:—*Held*: M. J. C. could convey her interest in the property without the concurrence of her husband.—*Re* COULTER & SMITH (1885), 8 O. R. 536.—**CAN.**

c. —— ——.]—A woman, married in 1867 without marriage settlement, acquired lands in 1879, by deed of conveyance to her in fee simple absolute:—*Held*: she could convey the lands without the concurrence of her husband.—*Re* KONKLE (1887), 14 O. R. 183.—**CAN.**

d. —— ——.]—A woman married between 1859 & 1872, who had issue living & capable of inheriting, acquired before the year 1872 a vested remainder in fee in land subject to a life estate, & in 1886, the life tenant still being alive, conveyed her remainder by deed without her husband joining therein:—*Held*: the conveyance was valid to pass her whole interest freed from any right, interest, or control of her husband, & the life tenant having died, a good title in fee simple under the conveyance could be made.—*Re* GRACEY & TORONTO REAL ESTATE CO. (1888), 16 O. R. 226.—**CAN.**

e. —— ——.]—Under Land Transfer Act, 1885, it is not necessary to procure the consent of the husband when land is being transferred by a married woman to a purchaser.—*Re* PYKETT (1887), 5 N. Z. L. R. 442 (S. C.).—**N.Z.**

f. —— *Presumption in favour of validity.*]—The patent from the Crown issued in 1848 to M. A. T., describing her as the wife of B. T. In 1853 she conveyed to L., not describing herself as a widow:—*Held*: the description in the patent was some evidence of her being married when it issued; but the ct. presumed in favour of the validity of her deed that she was sole & competent to convey.—EDINBURGH LIFE ASSURANCE CO. *v.* FERGUSON (1872), 32 U. C. R. 253.—**CAN.**

g. —— *Application for permission—How made.*]—Applications under 36 Vict. c. 18, s. 4 (O.), for orders allowing married women to execute conveyances without their husbands

Sect. 3.—*Disposition of wife's property: Sub-sects.* 1, 2, 3, 4, 5

NESS & ALLSOPP'S CONTRACT, [1896] 2 Ch. 358; 65 L. J. Ch. 726; 74 L. T. 652; 44 W. R. 683; 40 Sol. Jo. 566.

Annotations:—**Distd.** *Re* Brooke & Fremlin's Contract, [1898] 1 Ch. 647. **Folld.** *Re* West & Hardy's Contract (1903), 52 W. R. 188.

See, now, Married Women's Property Act, 1907 (c. 18), s. 1.

Deed acknowledged.]—*See* Sub-sect. 5, *post.*

SUB-SECT. 2.—DISPOSITION BY WILL.

See Married Women's Property Act, 1882 (c. 75), ss. 1, 2, 5; Married Women's Property Act, 1893 (c. 63), s. 3; Married Women's Property Act, 1907 (c. 18), s. 1, & *generally*, WILLS.

1093. Under Married Women's Property Act, 1882 (c. 75)—To what property applicable—Only property acquired during coverture.] — Banking accounts were kept in the joint names of husband & wife, & investments in railway stock were made in their joint names. The wife survived her husband five days, having executed a will during coverture:—*Held:* the balances of the joint accounts & the joint investments survived to the wife, but did not pass under her will.—*Re* YOUNG, TRYE *v.* SULLIVAN (1885), 28 Ch. D. 705; 54 L. J. Ch. 1065; 52 L. T. 754; 33 W. R. 729.

1094. —— —— —— Re-execution of will after discoverture.]—Above Act, s. 1 (1) gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture. Consequently, notwithstanding Wills Act, 1837 (c. 26), s. 24, her will made during coverture is not, unless it is re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end.—*Re* PRICE, STAFFORD *v.* STAFFORD (1885), 28 Ch. D. 709; 54 L. J. Ch. 509; 33 W. R. 520; 1 T. L. R. 254; *sub nom. Re* PRICE, PRICE *v.* STAFFORD, 52 L. T. 430.

Annotation:—**Refd.** *Re* Smith's Estate, Clements *v.* Ward (1887), 35 Ch. D. 589.

1095. —— —— ——.] — By marriage settlement in 1863 the wife's property was limited, in default of issue, upon trust for her absolutely if she survived her husband, but if she should die in his lifetime then upon such trusts as she should by will appoint, & in default of appointment for her next of kin. She during coverture made a will dated in 1886, by which, if she should die during the coverture, she appointed the fund to trustees upon certain trusts, & she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her hasband & died without republishing her will, never having had any issue:—*Held:* the will did not dispose of the settled property. Above Act, s. 1 (1), is to be construed along with sects. 2 & 5, & does not give a married woman power to dispose of property not falling within the scope of either of the two latter sects.—*Re* CUNO, MANSFIELD *v.* MANSFIELD (1889), 43 Ch. D. 12; 62 L. T. 15, C. A.

Annotations:—**Refd.** *Re* Drummond & Davies' Contract, [1891] 1 Ch. 524. **Mentd.** St. Michael, Bassishaw, (Rector, etc.) *v.* Parishioners of Same, [1893] P. 233; Lee *v.* Hawtrey, [1898] P. 63; Banister *v.* Thompson, [1908] P. 362; R. *v.* Dibdin, [1910] P. 57.

See, now, Married Women's Property Act, 1893 (c. 63), s. 3.

1096. —— —— Only property within meaning of Act.]—*Re* CUNO, MANSFIELD *v.* MANSFIELD, No. 1095, *ante.*

1097. —— Effect of prior restrictive statute—Church Building Act, 1802 (c. 108).]—Where an Act of Parliament dealing in a special way with a particular subject matter is followed by a general Act dealing in a general way with the subjects of the previous legislation, general words in the general Act are not to be held as repealing the prior special legislation, unless the general Act contains some reference to the special legislation, or unless the general Act cannot be given effect to without such a repeal.

The proviso at the end of sect. 1 of the Act of Geo. 3, excepting "women covert without their husbands" from the power conferred by the Act to make gifts of land or personalty for the purpose of building churches is not repealed by above Act, s. 1 (1). Where, therefore, a married woman bequeathed £300 to the vicar & churchwardens of a church to be applied in the erection of a new church:—*Held:* the bequest was invalid.—*Re* SMITH'S ESTATE, CLEMENTS *v.* WOOD (1887), 35 Ch. D. 589; 56 L. J. Ch. 726; 56 L. T. 850; 51 J. P. 692; 35 W. R. 514; 3 T. L. R. 567.

Annotations:—**Distd.** *Re* Drummond & Davies' Contract, [1891] 1 Ch. 524. **Mentd.** *Re* Douglas, Douglas *v.* Simpson, [1905] 1 Ch. 279.

1098. —— Presumption against separate property rebutted.]—*Semble:* above Act has done away with the presumption theretofore existing to the effect that a married woman had no separate property, & the contrary presumption which has always existed in the case of a will of a *feme sole* or of a man, now applies equally in the case of a will of a married woman.—HARDING *v.* SUTTON (1888), 59 L. T. 838; 5 T. L. R. 48.

1099. —— Will executed before the Act—Property acquired after.] — The will of a married woman, who dies in the lifetime of her husband, made during coverture & prior to the coming into operation of Married Women's Property Act, 1882 (c. 75), she having at the time capacity to make will, is effectual without re-execution to pass separate property which she may acquire under the provisions of the Act.—*Re* BOWEN, JAMES *v.* JAMES, [1892] 2 Ch. 291; 61 L. J. Ch. 432; 8 T. L. R. 524; 36 Sol. Jo. 487.

being parties, should be made to a judge in chambers, not to the referee.—*Re* NOLAN (1873), 6 P. R. 115.—**CAN.**

h. —— *Effect of statute.*]—C. S. N. B., c. 72, s. 1, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband & not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power of disposing of such property or allow her to enter into contracts which at common law would be void.—WALLACE *v.* LEA (1898), 28 S. C. R. 595.—**CAN.**

k. —— *Lease—Ratification by husband.*]—Both pltf. & deft. claimed title, through De B., who had acquired it from her husband during coverture. De B. & her trustees under a deed of settlement, gave a renewable lease of it to deft., but her husband did not join in this lease, & after her death he conveyed all his rights in the property to deft. Pltf. obtained his title to the property through a deed given by the trustees of the children of De B. after her death:—*Held:* the lease by De B. was void, & the conveyance by the husband, after his wife's death, did not confirm the lease, which could only be ratified during the joint lives of the husband & wife, & the deed from the heirs to pltf. was valid.—MARITIME NAIL CO., LTD. *v.* GREGORY (1922), 49 N. B. R. 296.—**CAN.**

PART VI. SECT. 8, SUB-SECT. 2.

l. *Separate estate.*]—A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before May 4, 1859, was held good.—*Re* HILDIKER (1870), 3 Ch. Ch. 72.—**CAN.**

m. —— *May be devised to children only—Validity of devise to husband.*]—C. S. U. C., c. 73, does not authorise a married woman to devise her property otherwise than to or among her child or children, if any. Any disposition in favour either of her husband or other parties is void.—MITCHELL *v.* WEIR (1872), 19 Gr. 568.—**CAN.**

n. —— —— *Validity of devise to*

1100. Under Married Women's Property Act, 1893 (c. 63)—Applicable to all wills of married women—Dying after the Act.]—Above Act, s. 3, applies to every will of a married woman who dies after the date of the Act.—*Re* WYLIE, WYLIE *v.* MOFFAT, [1895] 2 Ch. 116; 64 L. J. Ch. 613; 43 W. R. 475; 11 T. L. R. 341; 39 Sol. Jo. 396; 13 R. 483.

SUB-SECT. 3.—PROPERTY ACQUIRED BETWEEN 1870 AND 1883.

1101. No power to dispose of legal estate or interest—Transfer of stock.]—HOWARD *v.* BANK OF ENGLAND, No. 685, *ante*.

1102. —— Fee simple—Deed acknowledged.]—JOHNSON *v.* JOHNSON, No. 692, *ante*.

1103. —— Converted realty.]—*Re* BACON, TOOVEY *v.* TURNER, No. 667, *ante*.

SUB-SECT. 4.—SAVINGS OF WIFE.

See Part IV., sect. 10, *ante*.

SUB-SECT. 5.—DEED ACKNOWLEDGED.

See, now, Law of Property Act, 1925 (c. 20), s. 167.

SUB-SECT 6.—EFFECT OF DIVORCE OR SEPARATION.

See Part V., *ante*.

one child—To exclusion of others.]—A married woman, under R. S. O., 1877, c. 106, s. 6, cannot devise or bequeath her separate property to one of several children to the exclusion of the others.—MUNRO *v.* SMART (1879), 26 Gr. 37, 310.—**CAN.**

o. —— *Wife one of several residuary legatees—Conveyance to wife by all the residuary legatees.*]—A husband & wife were respectively residuary devisees under a will, & they together with the other residuary devisees united in a conveyance purporting to transfer the property to the wife & her heirs, so that none of the other parties should have any estate, right, title, or interest therein:—*Held:* in equity the wife had an absolute estate in the whole property to her separate use, & had therefore the same power of devising it as if she had been a single woman.—DAVISSON *v.* SAGE (1873), 20 Gr. 115.—**CAN.**

PART VI. SECT. 3, SUB-SECT. 5.

p. *Necessity for acknowledgment—Effect of omission.*]—An heir need not demand possession from a person claiming the land as the grantee of the ancestor, who was a *feme covert*, & executed the deed under which deft. claims with her husband without the acknowledgment required by 59 Geo. III., c. 3, such deed being as to her absolutely void.—DOE d. VANSICKLER *v.* FAIRWELL (1840), 1 Ont. Dig. 2160.—**CAN.**

q. —— ——.]—A purchaser under a mtge. of the property of a married woman, executed by her while living with her husband prior to Married Woman's Property Act, 1895, not appearing to have been executed with the consent of her husband, & not acknowledged as the statute requires, can not maintain ejectment against the mtgor.—EVERETT *v.* EVERETT (1908), 38 N. B. R. 390; 4 E. L. R. 517.—**CAN.**

r. —— ——.]—Where a married woman joined in a conveyance of real estate, but did not acknowledge the deed, she was treated as not being a party to the deed.—MASON *v.* MACKERRAS (1884), 2 N. Z. L. R. 331 (S. C.).—**N.Z.**

s. —— *Presumption of due acknowledgment.*]—Where the question was whether a deed by a married woman had been executed with the requisite formalities, & some evidence was given to show that the deed had been acknowledged before a judge:—*Held:* the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time.—TIFFANY *v.* MCCUMBER (1855), 13 U. C. R. 159.—**CAN.**

t. —— *Deed by infant married woman.*]—R. S. O. 1887, c. 134, s. 6, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment. — CONFEDERATION LIFE ASSOCN. *v.* KINNEAR (1896), 23 A. R. 497.—**CAN.**

a. —— *Separate property.*]—Acknowledgment of execution of deed under 24 Vict. c. 18, is not necessary since M. W. P. Act, 1903.—MCLEOD *v.* CRASWELL (1908), 4 E. L. R. 535.—**CAN.**

b. *Examination—Absence of.*]—A deed executed by husband & wife, but without an examination of the wife & certificate thereof, is void.—DOE d. MCDONALD *v.* TWIGG (1817), 5 U. C. R. 167.—**CAN.**

c. —— —— *Conveyance of leasehold interest.*]—The certificate & examination are unnecessary in the conveyance of a leasehold interest, which the husband alone can dispose of.—SAMPSON *v.* MCARTHUR (1860), 8 Gr. 72.—**CAN.**

d. —— —— *Registration—Priority.*]—A mtge. at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband: & subsequently such mtge. was re-executed by the husband & wife, & the fact of the wife having been duly examined indorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place:—*Held:* the registration was sufficient but the examination of the wife upon the re-execution of the mtge could not relate back to the first execution thereof, so as thereby to gain for it priority over an instrument which had been subsequently executed by the husband & wife, & duly registered.—BEATTIE *v.* MUTTON (1868), 14 Gr. 686.—**CAN.**

e. —— *Who may conduct.*]—A circuit judge in Lower Canada under 7 Vict., c. 18, s. 16, has the power of examining married women respecting their consent to convey their estate.—DOE d. PARK *v.* HENDERSON (1849), 7 U. C. R. 182.—**CAN.**

f. —— ——.]—Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solr. of the husband is not as such disqualified.—ROMANES *v.* FRASER (1870), 17 Gr. 267.—**CAN.**

g. —— *Evidence—What amounts to.*]—A conveyance executed by a married woman & her husband in 1825, was lost:—*Held:* the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been indorsed on the deed.—*Re* HIGGINS (1872), 19 Gr. 303.—**CAN.**

h. —— *When dispensed with.*]—Upon a petition under Settled Estates Act, an order was made dispensing with the examination of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction.—*Re* ENGLISH (1885), 11 P. R. 198.—**CAN.**

k. *Form of certificate—Compliance with statutory requirements.*]—A certificate under 2 Geo. IV., c. 14, was signed by the chairman & countersigned by the clerk of the peace & endorsed on a deed:—*Held:* though deficient in form, the certificate was good.—JACKSON *v.* ROBERTSON (1854), 4 C. P. 272.—**CAN.**

l. —— ——.]—A certificate of examination of a married woman on the back of a conveyance, did not state that she was examined "apart from her husband," & no proof of that fact was given at the trial:—*Held:* insufficient.—STAYNER *v.* APPLEGATE (1859), 8 C. P. 133, 451.—**CAN.**

m. —— ——.]—MONK *v.* FARLINGER (1866), 17 C. P. 41.—**CAN.**

n. —— ——.]—The certificate indorsed on a married woman's deed was given by a person described as the judge of the district ct. in M., & under the seal of the ct., but it was not stated in the certificate or otherwise proved, that such ct. was a ct. of record:—*Held:* insufficient.—MCCAMMON *v.* BEAUPRE (1866), 25 U. C. R. 419.—**CAN.**

aa. —— —— ——.]—AMEY *v.* CARD (1866), 25 U. C. R. 501.—**CAN.**

bb. —— ——.]—The certificate signed by two justices of the peace endorsed on a conveyance by a married woman omitted to state in the body thereof any place where the execution of the deed or the examination of the married woman took place, but in the margin the place wherein the justices were authorised to act was given:—*Held:* the certificate was sufficient.—ROBINSON *v.* BYERS (1867), 13 Gr. 388.—**CAN.**

cc. —— ——.]—The names of the witnesses to the deed were the same as those of the justices, & the handwriting similar, & the date of the deed & certificate the same:—*Held:* it might be inferred that the execution took place in their presence.—SIMPSON *v.* HARTMAN (1868), 27 U. C. R. 460.—**CAN.**

dd. ——.]—MORGAN *v.* SABOURIN (1868), 27 U. C. R. 230.—**CAN.**

ee. —— ——.]—GRANT *v.* TAYLOR (1869), 28 U. C. R. 234.—**CAN.**

ff. —— ——.]—A certificate of an acknowledgment by a married woman, stating that she "acknowledged that she signed, sealed & delivered the deed for the purpose therein mentioned; & being examined separate & apart from her husband, said that she did the same of her own free will & accord," was not sufficient to satisfy 27 Geo. III., c. 9.—ALLISON *v.* SMITH (1877), 1 P. & B. 199.—**CAN.**

SECT. 4.—**UNDER POWERS OF APPOINTMENT.**

SUB-SECT. 1.—IN GENERAL.

See Married Women's Property Act, 1882 (c. 75), s. 4.

1104. Nature of power—Whether separate property of wife.]—The ct. made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced on the ground of her adultery, to pay a moiety of the income of such property for the maintenance & education of the children. The ct. cannot vary a power of appointment vested in a guilty wife.

I cannot interfere with the power of appointment; that is not the property of the wife (*per* CUR.).—SEATEL *v.* SEATEL (1860), 4 Sw. & Tr. 230; 30 L. J. P. M. & A. 216; 164 E. R. 1504.

Annotations:—**Distd.** Michell *v.* Michell, [1891] P. 208. **Refd.** Midwinter *v.* Midwinter (1893), 68 L. T. 262.

1105. ——— ———.]—HOBDAY *v.* PETERS (No. 2), No. 1169, *post.*

1106. — - ——— **Power not exercised.**]—By Married Women's Property Act, 1882 (c. 75), s. 1 (5), "every married woman carrying on a trade separately from her husband shall, in respect of her separate property be subject to the bkpcy. laws in the same way as if she were a *feme sole*": —*Held:* the expression "separate property" includes only that which would, if the woman was unmarried, be her "property" & does not therefore include a general power of appointment by deed or will of which she is the donee but which she has not exercised, & a married woman who has traded separately from her husband & who has been adjudicated a bkpt., cannot be compelled to execute a deed exercising such a power in favour of the trustee in bkpcy.—*Re* ARMSTRONG, *Ex p.* GILCHRIST (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 51 J. P. 292; 34 W. R. 709; 2 T. L. R. 745, C. A.

Annotations:—**Consd.** Goatley *v.* Jones (No. 1), Goatley *v.* Jones (No. 2), [1909] 1 Ch. 557. **Refd.** *Re* Armstrong, *Ex p.* Boyd (1888), 21 Q. B. D. 264; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681. **Mentd.** *Re* Rose, Rose's Trustee *v.* Rose, [1904] 2 Ch. 348.

1107. Court cannot interfere with power—Wife guilty of adultery.]—SEATEL *v.* SEATEL, No. 1104, *ante.*

Compare No. 1106, *ante*, No. 1110, *post.*

1108. Married woman may execute power—Over realty & personalty.]—A *feme covert*, described as such in the will of testator, may, during the coverture, execute by deed a power of disposition, given her by the will, over real & personal estate.—DOWNES *v.* TIMPERON (1828), 4 Russ. 331; 38 E. R. 831.

1109. —— **Over capital & income.**]—A wife who lives with her husband & has separate property over which she has a power of appointment by deed or will, is entitled to dispose not only of the capital, but also of the savings out of income & that by a general residuary clause in her will.—HUMPHERY *v.* RICHARDS (1856), 25 L. J. Ch. 442; 27 L. T. O. S. 95; 2 Jur. N. S. 432; 4 W. R. 432.

1110. Covenant to appoint to trustees of settlement—Specific performance—Damages.]—The ct. will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment. By a marriage settlement, executed in 1867, the husband & wife severally covenanted that all property whatsoever which the wife or the husband in her right should at any time during the coverture become possessed of or entitled to in any manner whatsoever should be settled, & that any power of appointment of which she might then or at any time thereafter during such coverture be the donee, should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment over a sum of stock which, by her will, she exercised in favour of persons other than the trustees: —*Held:* the covenant could not be specifically enforced, but the trustees were entitled to recover by way of damages from the wife's exors. to the extent of her assets the value of the property which would have been in their favour; & the appointed fund was assets for the payment of her debts.

Qu.: whether the husband was liable under his personal covenant.—*Re* PARKIN, HILL *v.* SCHWARZ, [1892] 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77; 41 W. R. 120; 36 Sol. Jo. 647; 3 R. 9.

Annotations:—**Refd.** *Re* Evered, Molineux *v.* Evered (1910), 79 L. J. Ch. 465; *Re* Cavendish Browne's Settlmt. Trusts, Horner *v.* Rawle (1916), 61 Sol. Jo. 27. **Mentd.** *Re* Lawley, Zaiser *v.* Lawley, [1902] 2 Ch. 799; *In the Estate of* Heys, Walker *v.* Gaskill, [1914] P. 192.

1111. Power to appoint at decease—Restraint on anticipation—Whether exercisable by will only.]—*Re* WADDINGTON, BACON *v.* BACON, [1897] W. N. 7.

See, also, Sect. 1, *ante.*

Mode of exercise of power.]—*See* POWERS.

Construction of power.]—*See* POWERS.

Exercise by survivor of several donees.]—*See* POWERS.

Defective appointment & execution.]—*See* POWERS.

Revocation of appointment by will—By subsequent marriage.]—*See* POWERS.

Fraud on power.]—*See* POWERS.

SUB-SECT. 2.—CAPACITY OF MARRIED WOMAN TO APPOINT.

A. Exercise During Coverture.

See, generally, POWERS.

1112. Coverture no bar to exercise of power.]—DANIEL *v.* UPLY (1626), Lat. 134; W. Jo. 137; 82 E. R. 312; *sub nom.* DANYEL *v.* UBLEY, Benl. 178.

Annotations:—**Consd.** Grange *v.* Tiving (1665), O. Bridg. 107. **Refd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Ward *v.* S. E. Ry. (1860), 6 Jur. N. S. 890. **Mentd.** Petty *v.* Goddard (1662), O. Bridg. 35; Leefe *v.* Saltingston (1674), Freem. K. B. 176; Thomlinson *v.* Dighton (1712), 1 Salk. 239; Marlborough *v.* Godolphin (1750), 2 Ves. Sen. 61; Doe d. Gill *v.* Pearson (1805), 6 East, 173; Crockett *v.* Crockett (1848), 2 Ph. 553; *Re* Macleay (1875), L. R. 20 Eq. 186; *Re* Rosher, Rosher *v.* Rosher (1884), 26 Ch. D. 801.

1113. ———.]—Devise of a power to a single woman, to grant an annuity; afterwards she married; this did not divest her of that power & lodge it in her husband.—GIBBONS *v.* MOULTON (1678), Cas. *temp.* Finch, 346; 23 E. R. 189.

1114. ———.]—Appointment pursuant to a power, good; though executed by will of a *feme covert.*—BURNET *v.* MANN (1748), 1 Ves. Sen. 156; 27 E. R. 953, L. C.

Annotation:—**Mentd.** Jessopp *v.* Watson (1833), 1 My. & K. 665.

1115. ———.]—Wife, having specific effects to her separate use, disposes of her separate property by will. After her death her husband sells part of these effects, & dies: his representative is accountable to the wife's administratrix with the will annexed. Account of wife's separate estate, or pin-money, never carried back beyond the year.

A wife may dispose of her separate personal

estate by act in her lifetime, or by will. As to her real estate, all that is not properly conveyed descends to her heir: & no part of it is bound by any bare agreement, in so far as respects her heir. As to the execution of powers by *feme coverts*, if a *feme covert* borrows money on the security of her separate estate, her declarations as such debtor, may be read in evidence.—PEACOCK *v.* MONK (1751), 2 Ves. Sen. 190; 28 E. R. 123, L. C.

Annotations:—**Consd.** Hulme *v.* Tenant (1778), 1 Bro. C. C. 16; Atchison *v.* Le Mann (1854), 23 L. T. O. S. 302. **Refd.** Doe d. Hodsden *v.* Staple (1788), 2 Term Rep. 684; Fettiplace *v.* Gorges (1789), 3 Bro. C. C. 8; Parkes *v.* White (1805), 11 Ves. 209; Downes *v.* Timperon (1828), 4 Russ. 334; Murray *v.* Barlee (1831), 4 Sim. 82; Field *v.* Moore, Field *v.* Brown (1855), 7 De G. M. & G. 691; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Lechmere *v.* Brotheridge (1863), 32 Beav. 353; Taylor *v.* Meads (1865), 4 De G. J. & Sm. 597; Shattock *v.* Shattock (1866), L. R. 2 Eq. 182; Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385; Hale *v.* Sheldrake (1889), 5 T. L. R. 276; *Re* Bowen, James *v.* James (1892), 8 T. L. R. 524. **Mentd.** Gale *v.* Williamson (1841), 8 M. & W. 405: Clifford *v.* Turrell (1845), 14 L. J. Ch. 390; Kelson *v.* Kelson (1853), 1 W. R. 143; *Re* British & Foreign Cork Co., Leifchild's Case (1865), L. R. 1 Eq. 231.

1116. ——.]—DOWNES *v.* TIMPERON, No. 1108, *ante*.

1117. ——.]—A *feme covert* having an interest for life to her separate use, & a power of appointment of the fund by deed, to take effect after her death, assigned her life interest, & appointed the fund after her death, to trustees, upon trust, to invest the fund in the immediate purchase of an annuity for her life. The ct. ordered a transfer of the fund to the new trustees accordingly.—LYNN *v.* ASHTON (1830), 1 Russ. & M. 188; Taml. 328; 39 E. R. 73.

Annotations:—**Consd.** Axe *v.* Marris (1836), Donnelly, 35. **Refd.** Hanchett *v.* Briscoe (1856), 22 Beav. 496.

1118. ——.]—A. being seized of copyholds lands, in contemplation of her marriage with B. surrendered the same, to the intent that the lord might re-grant the same to the use of A. until the solemnisation of the marriage; &, from & after the marriage, to the use of B. for life; &, after his decease, to A. & her assigns for life; &, after her decease, to the use of such child & children of the body of A. by B. to be begotten, & for such estate, etc., charged with any sum or sums for any other of their children, as A. should by deed or will limit, devise, or appoint, etc., &, in default of appointment, to the use of all the children of the marriage, in equal shares; &, in default or failure of such children, then, from & after the decease of B. to the use of A., her heirs & assigns for ever. The marriage took place, & two sons having been born, A. by a will, referring to the power, gave, devised, & appointed the premises to her eldest son C., his heirs & assigns for ever, from & after the decease of B. upon condition, that he should pay to his brother D., the second son £200 within one year after the decease of B. or on D. attaining the age of twenty-one. The will then proceeded: "but, in case it shall happen that neither of my sons aforesaid shall be living at the decease of B. then I do give, devise, direct & appoint, the said copyhold messuage, etc., unto E., the father of B., his heirs & assigns," in trust for sale; subsequently to the date of the will, there were four other children born of the marriage. A. died without altering her will. C. & D. died before their father, B.:—*Held:* the appointment by A. was not void by reason of its having been made by her during coverture, notwithstanding the original surrender contained to express dispensation with the disability arising from coverture.—DOE d. BLOMFIELD *v.* EYRE (1846), 3 C. B. 557; 16 L. J. C. P. 64; 8 L. T. O. S. 214; 10 Jur. 1084; 136 E. R. 223; *affd.* (1848), 5 C. B. 713, Ex. Ch.

Annotations:—**Mentd.** Robinson *v.* Wood (1858), 27 L. J. Ch. 726; Jones *v.* Davies (1880), 28 W. R. 455; Hurst *v.* Hurst (1882), 21 Ch. D. 278; *Re* Deacon's Trusts, Deacon *v.* Deacon, Hagger *v.* Heath (1906), 95 L. T. 701.

1119. ——.]—A. executed a will by virtue of a power of appointment reserved to her on her first marriage in favour of B. She then married B., & subsequently executed a second will. It revoked in express terms all former wills & testamentary appointments, & purported to be made in exercise of the same power & also the power reserved in the settlement on the second marriage, which, however, did not refer to the property affected by the first settlement:—*Held* she had a right to revoke the first will so made by any of the methods prescribed by Wills Act. The ct., looking to the fact that the second will revoked in express terms the first, refused, on the suggestion that probate of both was necessary to enable the Ct. of Ch. to decide on the due execution of the powers, to grant probate of both wills, but granted probate of the second alone.

A husband's rights can only extend to property in respect of which he has some actual or contingent interest; & the fact that a woman is married does not prevent her from directing the devolution of other people's property at their desire without his consent.—HAWKSLEY *v.* BARROW (1866), L. R. 1 P. & D. 147; 35 L. J. P. & M. 67; 14 L. T. 672; 14 W. R. 822.

1120. ——.]—WOOD *v.* WOOD, No. 1156, *post*.

1121. Husband's consent unnecessary.]—HAWKSLEY *v.* BARROW, No. 1119, *ante*.

1122. Effect of coverture on power—Intention of donor.]—GOULD *v.* GOULD, No. 1155, *post*.

1123. "During & notwithstanding coverture"—Exercise during widowhood invalid.]—Limitation in a deed of personal property to the exors., administrators, & assigns of A. after the death of B. & C., does not fail by the death of B. & C. in the lifetime of A.

Qu.: whether, in that event, A. is entitled to take. A trust term, created by a marriage settlement, to raise a sum of money on the decease of the survivor of the husband & wife in case there should be no issue of the marriage living at her death, & to be paid as the wife, at any time or times during her coverture, & notwithstanding the same, by any deed or writing, etc., should appoint or devise The power cannot be exercised during widowhood or a second marriage.—HORSEMAN *v.* ABBEY (1819), 1 Jac. & W. 381; 37 E. R. 420.

Annotations:—**Apld.** Morris *v.* Howes (1846), 16 L. J. Ch. 121. **Mentd.** Holloway *v.* Clarkson (1843), 2 Hare, 521.

1124. —— ——.] — By a marriage settlement the wife has power "notwithstanding her coverture" to appoint to the children of the marriage, & in default of such children, she has a power "during & notwithstanding her coverture," to appoint to other persons. The latter power cannot be exercised during her widowhood. *Qu.:* whether the former can.—BURNHAM *v.* BENNETT (1845), 2 Coll. 254; 9 Jur. 888; 63 E. R. 723; *subsequent proceedings* (1847), 1 De G. & Sm. 513.

Annotations:—**Consd.** *Re* Illingworth, Bevir *v.* Armstrong, [1909] 2 Ch. 297. **Mentd.** Cogan *v.* Duffield (1875), L. R. 20 Eq. 789.

1125. —— **Exercise on remarriage invalid.**]—HORSEMAN *v.* ABBEY, No. 1123, *ante*.

1126. "Notwithstanding coverture"—Whether exercisable during widowhood.]—A power to a woman to appoint notwithstanding coverture

Sect. 4.—*Under powers of appointment: Sub-sect.* 2, *A., B. & C.; sub-sect.* 3.]

may be well exercised after coverture has ceased.—DOE d. SMITH *v.* BIRD (1833), 5 B. & Ad. 695; 2 Nev. & M. K. B. 679; 3 L. J. K. B. 78; 110 E. R. 947.

Annotations:—**Mentd.** Doe d. Edmunds *v.* Llewellin (1835), 2 Cr. M. & R. 503; Doe d. Winder *v.* Lawes (1837), 7 Ad. & El. 195.

1127. —— ——.]—BURNHAM *v.* BENNETT, No. 1124, *ante*.

1128. Will made during coverture—Wife surviving.]—Stock was transferred to trustees in trust for such persons as A. & his wife should jointly appoint; &, in default of appointment, in trust, during their joint lives for the separate use of the wife; & in case A. should die first, in trust for his wife, absolutely: but if she should die first, in trust for him for life, &, subject thereto, in trust for such persons as his wife, notwithstanding her coverture, should, by will, appoint, &, in default of such appointment, in trust for her next of kin. The wife, in A.'s lifetime, made a will in exercise of the last-mentioned power. A. died before her. On her death, her will was admitted to probate, but the probate was limited to the property of which she had power to dispose:—*Held:* the will was inoperative.—PRICE *v.* PARKER (1848), 16 Sim. 198; 17 L. J. Ch. 398; 60 E. R. 849.

Annotations:—**Folld.** Trimmell *v.* Fell (1853), 16 Beav. 537. **Distd.** Thomas *v.* Jones (1862), 2 John. & H. 475. **Consd.** Noble *v.* Phelps (1871), L. R. 2 P. & D. 276. **Apld.** Willock *v.* Noble (1875), L. R. 7 H. L. 580. **Refd.** *In the Goods of* Smith (1858), 27 L. J. P. & M. 39.

1129. Power conditional on predeceasing husband.] — Where a power of appointment was reserved to a married woman, to be exercised by her in case she predeceased her husband, by will, notwithstanding coverture, the lady survived her husband:—*Held:* a will made by the lady in exercise of the power of appointment, in the lifetime of the husband, was not a good execution of the power.—TRIMMELL *v.* FELL (1853), 16 Beav. 537; 22 L. J. Ch. 954; 21 L. T. O. S. 29; 51 E. R. 887.

Annotations:—**Distd.** Jones *v.* Southall (1861), 30 Beav. 187. **Consd.** Willock *v.* Noble (1875), L. R. 7 H. L. 580. **Refd.** *In the Goods of* Smith (1858), 27 L. J. P. & M. 39.

1130. During coverture—Exercise on re-marriage invalid.]—By a marriage settlement a term of years was limited to trustees, upon trust to raise a sum of money, & pay the same when raised to such person or persons & upon such trusts, etc., as the wife "at any time or times thereafter during the coverture, & notwithstanding the same" should by deed or will, etc., appoint:—*Held:* the wife, who married a second time, had a power only to appoint during the first marriage.—MORRIS *v.* HOWES (1846), 16 L. J. Ch. 121; 8 L. T. O. S. 229; 10 Jur. 955, L. C.

1131. Will executed during coverture—Wife surviving husband.] — By a marriage settlement made in 1878 the trustees were to hold the trust funds upon trust, after the death of the wife, for such persons as she should "during coverture by will or deed appoint" & in default of appointment then in trust for her statutory next of kin. By her will made in 1884, in the lifetime of her husband, she appointed the settled funds to her five brothers & sisters in equal shares as tenants in common. The husband died in 1886. In 1898 the widow made a codicil to her will, appointing pltfs. to be exors. of her will, & in other respects confirming her will. She died in 1908 discovert:—*Held:* the execution by the lady of her will, while under coverture operated as a good exercise of the power of testamentary appointment contained in the settlement, notwithstanding that she died discovert.—*Re* ILLINGWORTH, BEVIR *v.* ARMSTRONG, [1909] 2 Ch. 297; 78 L. J. Ch. 701; 101 L. T. 104; 53 Sol. Jo. 616.

Annotation:—**Consd.** *Re* Safford's Settlmt., Davies *v.* Burgess, [1915] 2 Ch. 211.

1132. —— —— ——.]—Where a marriage settlement contains a power of appointment "by will during the continuance of the intended coverture," notwithstanding that the death of the wife does not take place until after the determination of the coverture, the power is validly exercised by an appointment contained in a will executed by her before the determination of the coverture.—*Re* SAFFORD'S SETTLEMENT, DAVIES *v.* BURGESS, [1915] 2 Ch. 211; 84 L. J. Ch. 766; 113 L. T. 723; 31 T. L. R. 529; 59 Sol. Jo. 666.

1133. Appointment of realty — Validity.] — A married woman by her will, in exercise of a power of appointment, duly appointed certain property upon trust for a class of persons including her heir-at-law. She also affected to devise freeholds, to which she was entitled in fee simple but not for her separate use, to persons other than her heir-at-law:—*Held:* the heir-at-law was not put to his election.—*Re* DE BURGH LAWSON, DE BURGH LAWSON *v.* DE BURGH LAWSON (1885), 55 L. J. Ch. 46; 53 L. T. 522; 34 W. R. 39.

Annotation:—**Refd.** *Re* Harris, Leacroft *v.* Harris, [1909] 2 Ch. 206.

Construction of power.]—*See* POWERS.

B. Infant Married Woman.

1134. Appointment of realty — Invalid.] — A. devises in trust for sole & separate use of his daughter, a *feme covert*, for life, & to be at her own disposal, with power notwithstanding coverture to dispose thereof. She when nineteen in pursuance of her power, disposes of it by will: this not a good execution of the power as to the real estate, which may be claimed by the heir-at-law, although at the same time claiming a legacy; nor is the husband entitled to be tenant by courtesy.—HEARLE *v.* GREENBANK (1749), 3 Atk. 695; 1 Ves. Sen. 298; 26 E. R. 1200, L. C.

Annotations:—**Consd.** Boughton *v.* Boughton (1750), 2 Ves. Sen. 12; *Re* Cardross's Settlmt. (1878), 7 Ch. D. 728; *Re* D'Angibau, Andrews *v.* Andrews (1880), 15 Ch. D. 228. **Apld.** *Re* De Burgh Lawson, De Burgh Lawson *v.* De Burgh Lawson (1885), 55 L. J. Ch. 46. **Consd.** *Re* Wernher, Wernher *v.* Beit, [1918] 1 Ch. 339. **Refd.** Frank *v.* Standish (1772), 15 Ves. 391, n.; Cull & Hay *v.* Showell (1773), Amb. 727; Whistler *v.* Webster (1794), 2 Ves. 367; Mitchell *v.* Bower (1796), 3 Ves. 283; Craufurd *v.* Coutts (1806), 2 Bli. 655; Murray *v.* Elibank (1806), 13 Ves. 1; Thellusson *v.* Woodford (1806), 13 Ves. 209; Lloyd *v.* Williams (1816), 1 Madd. 450; Morgan *v.* Morgan (1820), 5 Madd. 408; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90; Blacket *v.* Lamb (1851), 14 Beav. 482; Moore *v.* Webster (1866), L. R. 3 Eq. 267; Appleton *v.* Rowley (1869), L. R. 8 Eq. 139; Cooper *v.* Macdonald (1877), 7 Ch. D. 288; *Re* Anderson, Pegler *v.* Gillatt, [1905] 2 Ch. 70; *Re* Harris, Leacroft *v.* Harris, [1909] 2 Ch. 206; *Re* De Virte, Valani *v.* De Virte, [1915] 1 Ch. 920; *Re* Ogilvie, Ogilvie *v.* Ogilvie, [1918] 1 Ch. 492. **Mentd.** Farquharson *v.* Colville (1772), Rom. 129; Crickett *v.* Dolby (1795), 3 Ves. 10; Sheddon *v.* Goodrich (1803), 8 Ves. 481; Dundas *v.* Dundas (1830), 2 Dow. & Cl. 349; Festing *v.* Allen (1844), 5 Hare, 573; Donovan *v.* Needham (1846), 9 Beav. 164; *Re* George's Estate, George *v.* Turnell (1876), 25 W. R. 182; May *v.* Potter (1877), 25 W. R. 507; *Re* Bowlby, Bowlby *v.* Bowlby (1904), 73 L. J. Ch. 810.

1135. Appointment of personalty — Validity — Intention of donor of power material.] — An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority. By a settlement made with the sanction of the ct. upon the marriage of a lady then & therein described as "an infant of

seventeen years" certain funds belonging to her were vested in trustees upon trust to retain existing investments or reinvest "with the consent" of the lady & her husband during their joint lives; the lady taking the first life interest under the settlement:—*Held:* the lady had power to consent to a proposed reinvestment notwithstanding her minority.—*Re* CARDROSS'S SETTLEMENT (1878), 7 Ch. D. 728; 47 L. J. Ch. 327; 38 L. T. 778; 26 W. R. 389.

Annotations:—**Consd.** *Re* D'Angibau, Andrews *v.* Andrews (1880), 15 Ch. D. 228; *Re* Newcastle's Estates (1883), 24 Ch. D. 129. **Folld.** *Re* Sutton, Boscawen *v.* Wyndham, [1921] 1 Ch. 257. **Refd.** *Re* Wernher, Wernher *v.* Beit, [1918] 2 Ch. 82.

1136. .]—Testator by his will settled a legacy of £50,000 upon usual trusts for A., his wife & issue, & declared that if no issue of A. should attain a vested interest then the legacy should fall into & form part of his, testator's, residuary estate, & testator empowered the trustees on A.'s marriage & with his consent to revoke the trusts & to resettle the legacy upon such trusts for the benefit of A., his wife, & issue, & with such powers & provisions as the trustees should deem proper. By a codicil testator bequeathed a sum of £50,000 to his trustees to be held by them upon the trusts & with powers for the benefit of B., her husband, & issue, similar to those for the benefit of A., his wife, & issue, declared in his will concerning the £50,000 thereby settled, except that no part of the capital was to be paid or advanced to or for the benefit of B.

Both A. & B. were infants at the date of the will. After the death of testator B. married, being still an infant, & by a deed executed in contemplation of her marriage the trustees with her consent & in exercise of the power conferred on them by the will & codicil revoked the trusts of her legacy & resettled the same upon trusts for her benefit, & her husband & issue, which varied somewhat from those declared in the will; in particular the ultimate trust in default of her issue was for her absolutely. On the question whether the resettlement was valid regard to the fact that B. was an infant:—*Held:* (1) upon the true construction of the will & codicil testator intended to confer a power on B. during her minority to consent to an exercise by the trustees of their power of revocation & resettlement, & he could lawfully confer such a power upon her.

(2) The ultimate trust in the resettlement in default of B.'s issue for B. absolutely, was prohibited by the codicil, & therefore not authorised by the power to resettle.—*Re* SUTTON, BOSCAWEN *v.* WYNDHAM, [1921] 1 Ch. 257; 90 L. J. Ch. 71; 124 L. T. 526; 65 Sol. Jo. 155.

1137. —— —— —— Power in gross.]—An infant can exercise a power, collateral or in gross, over personal, & also over real property, in which he has an interest, provided such interest cannot be affected by the exercise of the power. By a settlement made in the name of a lady then an infant, & therein described as "an infant of the age of nineteen years & upwards," it was agreed that after her marriage, as soon as the case would admit, certain personal estate in which the infant took a vested interest on her marriage should be assigned to trustees upon trust for investment with the consent of husband & wife, & to pay the income to the wife for her separate use, & on her death to the husband till bkpcy. or alienation, & after trusts for the issue, in trust in default of issue for such person or persons as the wife should by deed or will appoint. An appointment by deed, while still a minor, was made by the wife in her husband's favour:—*Held:* such power, being a power collateral or in gross, could be exercised by an infant, & the appointment was valid; the settlement showed an intention that the power should be exercised during infancy, & the appointment was also valid on that ground.—*Re* D'ANGIBAU, ANDREWS *v.* ANDREWS (1880), 15 Ch. D. 228; 49 L. J. Ch. 756; 43 L. T. 135; 28 W. R. 930, C. A.

Annotations:—**Consd.** *Re* Sutton, Boscawen *v.* Wyndham, [1921] 1 Ch. 257. **Refd.** *Re* Baker, Collins *v.* Rhodes, *Re* Seaman, Rhodes *v.* Wish (1881), 44 L. T. 414; Shipway *v.* Ball (1881), 16 Ch. D. 376; *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89; *Re* Newcastle's Estates (1883), 24 Ch. D. 129; Pouey *v.* Hordern, [1900] 1 Ch. 492; *Re* Plumptre's Marriage Settlmt., Underhill *v.* Plumptre, [1910] 1 Ch. 609; Pullan *v.* Koe, [1913] 1 Ch. 9; *Re* Pryce, Nevill *v.* Pryce, [1917] 1 Ch. 234; *Re* Wernher, Wernher *v.* Beit, [1918] 2 Ch. 82. **Mentd.** *Re* Torrington, [1913] 2 Ch. 623.

See, further, INFANTS; POWERS.

C. Effect of Separation or Dissolution of Marriage.

See Matrimonial Causes Act, 1857 (c. 85), s. 26.

1138. Divorce—Appointment by husband & wife jointly—Moiety to each.]—*Re* LINZEE'S SETTLEMENT, No. 856, *ante.*

1139. —— Appointment by wife to herself.]—By the settlement made in 1840, on the marriage of C. M., the wife, & H. B., the husband, a fund was settled upon the children of the said C. M. by the said H. B., & in default as C. M. should appoint. In 1860 the marriage was dissolved, there being then no issue to take:—*Held:* the power of appointment arose, notwithstanding the possibility of a marriage & future issue.—BOND *v.* TAYLOR (1861), 2 John. & H. 473; 31 L. J. Ch. 784; 5 L. T. 445; 8 Jur. N. S. 1090; 10 W. R. 169; 70 E. R. 1144.

SUB-SECT. 3.—EXERCISE OF POWER BY WILL.

1140. Validity of appointment.]—A wife by the consent of her husband may make an appointment in the nature of a will.—BROOK *v.* TURNER (1677), 2 Mod. Rep. 170; 86 E. R. 1005.

Annotations:—**Refd.** Jenkin *v.* Whitehouse (1757), 1 Burr. 431; *Re* Inman, *Ex p.* Tucker (1840), 1 Man. & G. 519. **Mentd.** Barnes *v.* Vincent (1846), 5 Moo. P. C. C. 201.

1141. ——.]—A woman by marriage articles reserved a power of disposing of her present, or any future estate, real or personal, by deed or will. A devise is a good execution of her power, the legal estate being in trustees. Devise to first & other sons, & in default to daughters as tenants in common, & in default of such issue over, raises cross remainders between the daughters.—WRIGHT *v.* CADOGAN (LORD CHARLES) (1766), 1 Bro. Parl. Cas. 486; 1 E. R. 707, H. L.; *affg.* S. C. *sub nom.* WRIGHT *v.* ENGLEFIELD (1764), Amb. 468, L. C.

Annotations:—**Apld.** Rippon *v.* Dawding (1769), Amb. 565. **Consd.** Field *v.* Moore, Field *v.* Brown (1855), 7 De G. M. & G. 691. **Refd.** Twisden *v.* Lock (1768), Amb. 663; Doe d. Burville *v.* Burville (1773), Lofft, 101; Compton *v.* Collinson (1788), 2 Bro. C. C. 377; Doe *v.* Staple (1788), 2 Term Rep. 684; Dye *v.* Dye (1884), 53 L. J. Q. B. 442.

1142. Power to be exercised by will only—Exercise otherwise invalid.]—SOCKET *v.* WRAY (1794), 2 Atk. 68, n.; 4 Bro. C. C. 483; 26 E. R. 440.

Annotations:—**Consd.** Richards *v.* Chambers, Seaman *v.* Duill (1805), 10 Ves. 580; Heatley *v.* Thomas (1809), 15 Ves. 596. **Refd.** Bradley *v.* Peixoto (1797), 3 Ves. 324; Whistler *v.* Newman (1798), 4 Ves. 129; Sperling *v.* Rochfort (1803), 8 Ves. 164; Anderson *v.* Dawson

Sect. 4.—Under powers of appointment: Sub-sects. 3 & 4.]

(1808), 15 Ves. 532; Jackson *v.* Hobhouse (1817), 2 Mer. 483; Murray *v.* Barlee (1831), 4 Sim. 82; Johnson *v.* Freeth (1836), Donnelly, 16; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482.

For mode of exercise of powers generally, *see* POWERS.

1143. Effect of Wills Act, 1837 (c. 26), ss. 7, 27.]—Above Act does not enlarge the disposing power of a married woman, but enables that power to be exercised, construed, & operated upon in the manner there provided. Hence, sect. 7 of that Act does not prevent sect. 27 from applying to married women having testamentary powers of appointment, in the same way that it would apply to persons *sui juris*.—BERNARD *v.* MINSHULL (1859), John. 276; 28 L. J. Ch. 649; 5 Jur. N. S. 931; 70 E. R. 427.

Annotations:—**Consd.** Thomas *v.* Jones (1862), 2 John. & H. 475. **Refd.** Noble *v.* Willock (1873), 42 L. J. Ch. 321; *Re* Eyre, Eyre *v.* Eyre (1883), 49 L. T. 259; *Re* Bagot, Paton *v.* Ormerod, [1893] 3 Ch. 348. **Mentd.** Irvine *v.* Sullivan (1869), L. R. 8 Eq. 673.

1144. Capacity to dispose of capital & income—By general residuary clause.]—HUMPHERY *v.* RICHARDS, No. 1109, *ante*.

1145. Effect of appointment by will—Settled property devolves as wife's property—When not exhausted by appointment—Gift over in default ineffective.]—By a marriage settlement a fund was settled upon such trusts as the wife should, notwithstanding coverture, by deed or will appoint; & in default of appointment, in case, which happened, there should be no issue of the marriage, in trust for such persons as should at the death of the survivor of the husband & wife be the next of kin of the wife. By her will, which purported to be in exercise of the power, the wife devised & bequeathed all her real & personal estate over which she had any disposing power to her exors. therein named. She then gave several legacies, which did not exhaust the fund, & appointed exors. She died in her husband's lifetime:—*Held:* the fund was, by the appointment, all converted into the wife's general personal estate, & hence the unexhausted portion belonged to the husband & not to the persons entitled in default of appointment under the settlement.—BRICKENDEN *v.* WILLIAMS (1869), L. R. 7 Eq. 310; 17 W. R. 441; *sub nom.* BICKENDEN *v.* WILLIAMS, 38 L. J. Ch. 222.

Annotations:—**Folld.** *Re* Pinède's Settlmt. (1879), 12 Ch. D. 667. **Refd.** Bristow *v.* Skirrow (1870), L. R. 10 Eq. 1; *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18; *Re* Ickeringill, Hinsley *v.* Ickeringill (1881), 29 W. R. 500; *Re* Pryce, Lawford *v.* Pryce, [1911] 2 Ch. 286.

1146. —— —— —— ——.]—Testatrix devising property by will by virtue of a power of appointment:—*Held:* upon the construction of the will, to have made the property her own, so that on the death of the devisee in her lifetime the gift over in default of appointment did not take effect.—WILLOUGHBY OSBORNE *v.* HOLYOAKE (1882), 22 Ch. D. 238; 48 L. T. 152; *sub nom. Re* WILLOUGHBY-OSBORNE, WILLOUGHBY-OSBORNE *v.* HOLYOAKE, 52 L. J. Ch. 331; *sub nom.* OSBORNE *v.* HOLYOAKE, 31 W. R. 236.

Annotation:—**Apld.** Coxen *v.* Rowland, [1894] 1 Ch. 406.

Testatrix having, under a deed settlement, a general power of appointment over certain real estate, gave all the real & personal estate which she might be possessed of or entitled to, or of which by virtue of any power or authority she was competent to dispose, "in manner following"; & then, after making certain specific devises & bequests in which she treated the subject of her gifts as her own, she gave the property forming the subject of the power to her husband, & also made him her residuary legatee. Throughout her will she drew no distinction between property which belonged to her & property over which she had only a power of disposition. Her husband predeceased her:—*Held:* she had indicated her intention that the power should be exercised, & the property subject to it should be deemed hers for all purposes; &, consequently, it went to her heirs, & not as in default of appointment under the settlement.—COXEN *v.* ROWLAND, [1894] 1 Ch. 406; 63 L. J. Ch. 179; 70 L. T. 89; 42 W. R. 568; 8 R. 525; *sub nom.* COXON *v.* ROWLAND, 38 Sol. Jo. 98.

Annotations:—**Consd.** *Re* Boyd, Kelly *v.* Boyd, [1897] 2 Ch. 232. **Apprvd.** *Re* Marten, Shaw *v.* Marten, [1902] 1 Ch. 314. **Refd.** *Re* Pryce, Lawford *v.* Pryce, [1911] 2 Ch. 286.

1148. —— —— ——.]—Under a settlement two sums of stock were vested in A., B., & C., as trustees, upon trust as testatrix, a married woman, should by will appoint, & in default of appointment upon other trusts. Testatrix, in exercise of that power, appointed that A., B., & C. should stand possessed of the said two sums in trust to pay a legacy of £2,000, which lapsed, & other legacies amounting to £6,100. She bequeathed to her husband £2,000, which she authorised her exors. to pay, & bequeathed to him her H. stock not included in the settlement. She directed that her funeral expenses be paid by her said trustees out of her said trust property, & that her legacies be paid free of duty. & as to all the residue of her personal estate whatsoever she bequeathed the same to her nephew, who died in her lifetime. She appointed A., B., & D. her exors. At the date of the will the value of the trust property was about £1,000, & she had no other property except the H. stock & some small savings of her separate estate:—*Held:* the trust property was intended by testatrix to be taken out of the settlement for all purposes, & having regard to Wills Act, s. 27, the balance, after payment of all the legacies, duty, & expenses, became part of her personal estate & passed to her husband.—*Re* PINÈDE'S SETTLEMENT (1879), 12 Ch. D. 667; 48 L. J. Ch. 741; 41 L. T. 579; 28 W. R. 178.

Annotations:—**Apld.** Coxen *v.* Rowland, [1894] 1 Ch. 406. **Distd.** *Re* Boyd, Kelly *v.* Boyd, [1897] 2 Ch. 232. **Apld.** *Re* Marten, Shaw *v.* Marten, [1902] 1 Ch. 314. **Refd.** *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18; *Re* Ickeringill's Estate, Hinsley *v.* Ickeringill (1881), 17 Ch. D. 151; Willoughby Osborne *v.* Holyoake (1882), 22 Ch. D. 238; Rous *v.* Jackson (1885), 29 Ch. D. 521.

1149. Will made during coverture—Wife becoming absolutely entitled when discovert—Necessity for republishing will.]—BISHOP *v.* WALL, No. 945, *ante*.

1150. —— —— —— **Married Women's Property Act, 1893 (c. 63), s. 3.**]—The effect of Wills Act, 1837 (c. 26), s. 24, is to make the will of a testator operate upon all the property of which he dies possessed. Above sect. extends this clause to the will of a married woman made during coverture in respect of any after-acquired property, & precludes the necessity of such will being republished should the coverture have ceased.

Testatrix made her will in 1895, during the lifetime of her husband, & therein exercised a power of appointment given to her by her marriage settlement, dated 1861, in respect of the funds comprised in the settlement. In exercising the power she used the usual words "& of all other

powers, if any, hereunto enabling me." By the death of her husband in 1905, without leaving any issue of the marriage, she became, by the terms of the settlement, absolutely entitled to the settled property. She died in 1908 a lunatic, without having revoked, altered, or republished her will :—*Held :* the appointments made by the will were clear intentions of testatrix to dispose of the settled property, & the effect of above sect. was to make those appointments valid dispositions of the funds in question, notwithstanding testatrix having subsequently become absolutely entitled. The words "all other powers hereunto enabling me" were applicable to the power given by above Act, & the case was not affected by the lady becoming a lunatic. The appointees must take in the shares specified.—*Re* JAMES, HOLE *v.* BETHUNE, [1910] 1 Ch. 157 ; 79 L. J. Ch. 45 ; 101 L. T. 625.

Liability to debts—Of property disposed of by will.]—See Sub-sect. 6, *post.*

Operation of rule against perpetuities.]—*See, generally,* PERPETUITIES ; POWERS.

SUB-SECT. 4.—APPOINTMENT TO SELF OR HUSBAND.

1151. Appointment to husband—Validity.]—A sum of money in the public funds being given by will to trustees for the separate use of a *feme covert,* & to be subject to her appointment after her death ; the wife made an appointment of this money to her husband ; & on bill filed by husband & wife against the trustees to transfer this fund, the ct. on examination of the wife decreed the same accordingly.—FREDERICK *v.* HARTWELL (1785), 1 Cox, Eq. Cas. 193 ; 29 E. R. 1124.

1152. —— —— Presumption of.]—NEDBY *v.* NEDBY, No. 1365, *post.*

1153. —— Husband executor—Probate duty.]—Stock was settled on a wife for her separate use for life, with a power of appointment by will. The trustees, at the request of the husband & wife, sold out the stock, & paid the proceeds to the husband, who afterwards became bkpt. The wife filed a bill to compel the trustees to replace the stock, & obtained a decree, under which the trustees transferred part of the stock into ct., & they were allowed time to transfer the remainder. The wife died, having by her will appointed the stock to her husband, & appointed him her exor. He filed a bill of revivor & supplement against the trustees & his assignees, claiming the stock under the appointment, & praying the same relief as his wife might have had. But, as he had received the proceeds of the stock sold out, his bill was dismissed.

A woman entitled to a sum of stock settled it on her marriage for her separate use for life, with power to her to appoint it by will only, but no trust was declared in default of appointment. After her marriage she signed a promissory note, & then by will appointed the stock to her husband. *Semble :* the holder of the note is not defeated thereby.

A married woman having a testamentary power to appoint a fund exercised it in favour of her husband, & appointed him her exor. :—*Held :* if the husband claimed the fund as his wife's exor. he must pay probate duty on the fund.—NAIL *v.* PUNTER (1832), 5 Sim. 555 ; 58 E. R. 447.

Annotations :—**Refd.** Davies *v.* Hodgson (1858), 25 Beav. 177 ; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494 ; London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572 ; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521 ; Crichton *v.* Crichton, [1896] 1 Ch. 870.

1154. —— After breach of trust—Instigated by husband & wife—Liability of trustees.]—NAIL *v.* PUNTER, No. 1153, *ante.*

1155. —— Invalid exercise during coverture.]—S., by indenture, dated in Aug. 1845, transferred a sum of annuities into the names of two trustees & declared that they should stand possessed of the same, or the securities on which the same should be invested, & the dividends, & interest & annual produce arising therefrom, in trust for such person as S. should appoint, & in default of appointment in trust to pay the dividends, interest, & annual produce arising from the same, etc., unto, or permit the same to be received by S. during the time she should continue *sole ;* & in the event of her marriage, in trust to pay the dividends, etc., to S. during her life, for her separate use, without power of anticipation, & after the decease of S. in trust for her children, grandchildren, or other issue, to be born in her lifetime, to be vested in & paid to such children, etc., at such times as S., whether *covert* or *sole,* should appoint, & in default of such appointment in trust for all her children in equal shares absolutely, & if there should be no child of S., in trust for her next of kin. S., in May, 1848, intermarried with G., & by him had one child. By a deed poll dated in Feb. 1853, S., with the privity & concurrence of A., & in exercise of the power reserved to her by the indenture of 1845, appointed that the trustees should, after her decease, stand possessed of the fund to raise & pay a portion thereof to her husband G. for his own absolute use & benefit, & appointed the residue of the fund in trust for all her children by her then present or any future husband who should attain the age of twenty-five, to be divided equally among them, with a proviso in favour of the issue of those dying under twenty-five.

But if there should not be any child or other issue of S., then in trust to pay the interest, etc., to be, for his life, & after his decease in trust for her next of kin. S. died in July, 1854, leaving her husband & one son surviving :—*Held :* the deed poll of 1853 was wholly inoperative, & the son of S. was entitled to the fund but subject to the trusts of the original settlement.

The question here is whether the power reserved by this lady to herself generally to appoint the property in question, was so limited as that she had a right to exercise that general power after her marriage & during coverture. A power given to a woman while *sole* to make at any time an appointment of property in which she has an interest as well as the power over it, might, if there was nothing to control it, enable the power to be exercised by her during coverture. But the general proposition must be subject to control by the expressions to be found in the instrument (STUART, V.-C.).—GOULD *v.* GOULD (1856), 25 L. J. Ch. 642 ; 2 Jur. N. S. 484 ; 4 W. R. 516.

Annotation :—**N.F.** Wood *v.* Wood (1870), L. R. 10 Eq. 220.

1156. Appointment to husband & self—Valid.]—A general power of appointment was given to a *feme sole* under a settlement of her property, with subsequent trusts, in default of appointment, for herself, & any future husband, & a power of appointment among children, & with a provision that her after-acquired property should be subject to the same trusts :—*Held :* the general power could be exercised during coverture, & an appointment made in exercise of it after marriage in favour of the donee of the power & her husband was valid.—WOOD *v.* WOOD (1870), L. R. 10 Eq. 220 ; 39 L. J. Ch. 790 ; 23 L. T. 295 ; 18 W. R. 819.

Sect. 4.—*Under powers of appointment: Sub-sects.* 4, 5

1157. Appointment to self—Evasion of covenant—Settlement of after-acquired property—Validity.]—A marriage settlement contained a covenant that if, during the coverture, the wife should become entitled to any property of the value of £500 or upwards, it should be vested in the trustees upon the trusts of the settlement. After the marriage a sum of £5,499 19*s.* 1*d.* was bequeathed upon such trusts as the wife should appoint. She executed eleven successive deeds, several of them on the same day, by each of which she appointed £499 19*s.* 11*d.* for her own separate use:—*Held:* the money in question was not bound by the covenant in the settlement, & the wife was entitled to the whole.—BOWER *v.* SMITH (1871), L. R. 11 Eq. 279; 40 L. J. Ch. 194; 24 L. T. 118; 19 W. R. 399.

Annotations:—**Expld.** Steward *v.* Poppleton, [1877] W. N. 29. **Folld.** *Re* Gerard, Oliphant *v.* Gerard (1888), 58 L. T. 800. **Expld.** *Re* Davies, Harrison *v.* Davis, [1897] 2 Ch. 204; *Re* O'Connell, Mawle *v.* Jagoe, [1903] 2 Ch. 574. **Consd.** Tremayne *v.* Rashleigh, [1908] 1 Ch. 681. **Mentd.** *Re* Hinckes, Dashwood *v.* Hinckes (1921), 124 L. T. 681.

1158. —— —— —— ——.]—By a marriage settlement, made in 1878, it was agreed that if M., the intended wife, or her husband in her right, should at one & the same time, & from the same source, become entitled to any real or personal property of the value of £500 or upwards, then & in every such case the husband & wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property assigned by M. By his will, made in 1884, the father of M. bequeathed to the trustees of the will a sum of £4,000 upon trust for such persons & purposes as M. should appoint in writing, & in default of or subject to any such appointment in trust for her sole & separate use, & testator declared it to be his intention that M. might be able, by exercising her power of appointment, to defeat the operation of the covenant, contained in her marriage settlement for the settlement of her after-acquired property. Testator died in 1887. M. appointed that the sum of £4,000 should be held in trust for her separate use by nine separate appointments, made on separate days, & each under £500 in amount:—*Held:* the sum of £4,000 had been properly appointed by M., & was payable to her, & was not bound by her covenant to settle after-acquired property.—*Re* GERARD (LORD), OLIPHANT *v.* GERARD (1888), 58 L. T. 800.

Annotations:—**Refd.** *Re* O'Connell, Mawle *v.* Jagoe, [1903] 2 Ch. 574; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681.

5.—RELEASE OF POWER BY MARRIED WOMAN.

1159. Right to release—By deed unacknowledged—Conveyancing Act, 1881 (c. 41), s. 52.]—A married woman had, under a settlement executed on her marriage in 1872, a life interest in personalty, subject to a restraint on anticipation, with a power of appointment amongst her children:—*Held:* under above sect. she could by deed unacknowledged release her power.—*Re* CHISHOLM'S SETTLEMENT, *Re* HEMPHILL'S SETTLEMENT, HEMPHILL *v.* HEMPHILL, [1901] 2 Ch. 82; 70 L. J. Ch. 533, C. A.

Annotation:—**Mentd.** *Re* Royal Naval School, Seymour *v.* Royal Naval School, [1910] 1 Ch. 806.

See, now, Law of Property Act, 1925 (c. 20), s. 167.

1160. Release with view to transfer—Wife entitled to settled property—Married Women's Property Act, 1882 (c. 75).]—*Re* ONSLOW, PLOWDEN *v.* GAYFORD, No. 679, *ante.*

1161. —— —— ——.]—*Re* DAVENPORT, TURNER *v.* KING, No. 659, *ante.*

1162. Release benefiting third party—Independent advice—Validity.]—By a post-nuptial settlement made in 1890, certain funds, the property of the husband, were settled subject to the life interest of the husband's mother, upon trust for the husband for life, &, after his death for the wife for life, &, after the death of the survivor, in trust for children, & in default of issue as the husband & wife jointly should appoint, or in default of such appointment as the survivor should appoint, & in default of appointment for applts. W. & S. absolutely. The solr. who prepared the deed, & was one of the trustees under it, was the father of S., one of the ultimate beneficiaries. In 1891 the husband & his mother wishing to prevent the possibility of the wife, if she survived, exercising her power of appointment in favour of a second husband, had a deed prepared by which the wife's interest, should she survive, was limited to her widowhood, & her power of appointment was excluded, & the husband was given a sole power of appointment. This deed was prepared by the same solr., who stated that he explained its effect to the wife, & she was told that it was intended to correct a "mistake" in the previous settlement, & executed it in that belief, without any independent advice. In 1893 the husband died without having exercised his power of appointment & without issue. In 1894 a deed was executed by which the widow's interest was extended to a life interest, but in other respects confirming the deed of 1891. In 1897 the widow married resp., & in 1898 commenced this action, claiming a declaration that the deed of 1891 was not binding upon her, so far as it deprived her of the power of appointment conferred on her by the deed of 1890, & that the deed of 1894 was not binding so far as it confirmed the deed of 1891:—*Held:* in the circumstances the deed of 1891 must be set aside.—WILLIS *v.* BARRON, [1902] A. C. 271; 71 L. J. Ch. 609; 86 L. T. 806; 18 T. L. R. 602, H. L.; *affg.* S. C. *sub nom.* BARRON *v.* WILLIS, [1900] 2 Ch. 121, C. A.

Annotations:—**Refd.** Wright *v.* Carter, [1903] 1 Ch. 27; Bank of Africa *v.* Cohen, [1909] 2 Ch. 129; Howes *v.* Bishop, [1909] 2 K. B. 390; Bank of Montreal *v.* Stuart, [1911] A. C. 120; Moody *v.* Cox & Hatt (1917), 116 L. T. 740; Westen *v.* Fairbridge, [1923] 1 K. B. 667.

SUB-SECT. 6.—APPOINTED PROPERTY LIABLE FOR DEBTS.

A. In General.

1163. Power not exercised—Not "separate property"—Exercise not compelled in favour of creditors—Married woman trading alone.]—*Re* ARMSTRONG, *Ex p.* GILCHRIST, No. 1106, *ante.*

1164. Joint power in husband & wife—Liability to execution—Execution directed against separate estate.]—Real property over which a married woman & her husband have a joint general power of appointment by deed cannot be taken in execution under a writ of *elegit* issued under an order for payment of costs by the married woman &

a. Right to release—Testamentary power.]—A testamentary power of appointment is unaffected by a clause against anticipation, & is capable of being released under Act for abolition of Fines & Recoveries.—HEATH *v.* WICKHAM (1880), 5 L. R. Ir. 285.—IR.

her husband by which execution against the married woman is limited to her separate estate.—GOATLEY *v.* JONES (No. 1), GOATLEY *v.* JONES (No. 2), [1909] 1 Ch. 557; 78 L. J. Ch. 420; 100 L. T. 512.

General power exercised by will.]—*See* Sub-sect. 6, B., *post.*

General power with absolute remainder.]—*See* Sub-sect. 6, C., *post.*

Liability for debt of married woman's property.]—*See* Part VIII., *post.*

See, generally, POWERS.

B. Power Exercised by Will.

(*a*) *Before Married Women's Property Act*, 1882.

1165. Whether appointed property liable.]—NAIL *v.* PUNTER, No. 1153, *ante.*

1166. ——.]—Testator bequeathed certain stock to trustees upon such trusts & subject to such powers, etc., as A. should by deed or will direct or appoint; & in default of appointment, upon trust to pay the dividends to A. during her life, & after her decease to pay the principal amongst her children. After testator's death A. executed a deed according to the mode described by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself & a new trustee, upon such trusts & subject to such powers, etc., as A. should by deed, with or without power of revocation & new appointment, or by her last will, direct & appoint, with certain limitations over in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. & the new trustee. A. afterwards, by will by virtue & execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with & become part of her residuary estate, & follow the dispositions thereof thereinafter mentioned:—*Held:* the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, & became her personal estate, in which she had a beneficial interest, & consequently was liable to the payment of probate duty.—A.-G. *v.* STAFF (1833), 2 Cr. & M. 124; 4 Tyr. 14; 3 L. J. Ex. 6; 149 E. R. 700.

Annotations:—**Consd.** Platt *v.* Routh (1840), 6 M. & W. 756. **Refd.** Ewart *v.* Ewart (1853), 1 Eq. Rep. 536. **Mentd.** Vandiest *v.* Fynmore (1834), 6 Sim. 570.

1167. ——.]—The general engagements of a married woman are enforced by a ct. of equity against her separate estate, not as executions of a power of appointment, but on the principle that to whatever extent she has, by the terms of the settlement, the power of dealing with her separate property, she has also the other power incident to property in general, namely, the power of contracting debts to be paid out of it. Where a married woman whose real estate was settled, on her marriage, to such uses as she should, by any deed or instrument in writing, attested by one witness, or by her will, appoint & in default of appointment, upon trusts for her sole & separate use for life, with remainder over, made her will, in pursuance of the power, & thereby charged her real estate with payment of her debts:—*Held:* this was a good charge on the real estate of all her written engagements; & *semble:* also of her debts generally, whether evidenced by writing or not.—OWENS *v.* DICKENSON (1840), Cr. & Ph. 48; 4 Jur. 1151; 41 E. R. 407, L. C.

Annotations:—**Consd.** Vaughan *v.* Vanderstegen (1854), 2 Drew. 165; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494. **Refd.** Tomlin *v.* Tomlin (1841), 1 Hare, 236; Woodgate *v.* Field (1842), 2 Hare, 211; Crofts *v.* Middleton (1855), 2 K. & J. 194; Bolden *v.* Nicholay (1857), 3 Jur. N. S. 884; Wright *v.* Chard (1859), 4 Drew. 673; Shattock *v.* Shattock (1866), 14 L. T. 452; Picard *v.* Hine (1869), 5 Ch. App. 274; London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572; *Re* Poole's Estate, Thompson *v.* Bennett (1877), 6 Ch. D. 739; Pike *v.* Fitzgibbon (1880), 14 Ch. D. 837; Robinson *v.* Pickering (1881), 16 Ch. D. 660; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482. **Mentd.** Hughes *v.* Eades (1842), 11 L. J. Ch. 297; Whitaker *v.* Wright (1843), 2 Hare, 310; Field *v.* Titmuss (1851), 1 Sim. N. S. 218; Wheeler *v.* Gill (1874), L. R. 19 Eq. 316.

1168. ——.]—By a marriage settlement certain freehold, leasehold, & personal property was vested in trustees upon trust for the wife during her life for her separate use, & after her decease for such persons as the wife should appoint by will, & in default of appointment for the benefit of the children of the marriage. The wife survived her husband, & appointed all her property by will to her children. She then privately married a second husband, but continued to pass as a widow, & describing herself as a widow she borrowed money & mortgaged her property to secure the repayment. A second marriage ceremony was afterwards publicly performed:—*Held:* the will was revoked as to the freehold estate by the second marriage; the execution of the power as to the rest of the property did not constitute that property separate estate of the married woman, nor was it liable as such to debts contracted during coverture; but the concealment of the second marriage amounted to an act of fraud, & the mtgee. was entitled to stand as a creditor upon the general assets, & if they were not sufficient, then the appointed property was liable to supply the deficiency as in the case of a *feme sole.*—VAUGHAN *v.* VANDERSTEGEN (1854), 2 Drew. 165, 363; 2 Eq. Rep. 1229; 23 L. J. Ch. 793; 2 W. R. 599; 61 E. R. 759; *sub nom.* VAUGHAN *v.* VANDERSTEGEN, VAUGHAN *v.* WIGGINS, GALES *v.* DUNBOYNE (LORD), GATES *v.* WIGGINS, 23 L. T. O. S. 309.

Annotations:—**Folld.** Hobday *v.* Peters (No. 2) (1860), 28 Beav. 354; Blatchford *v.* Woolley (1863), 2 Drew. & Sm. 204; Shattock *v.* Shattock (1866), L. R. 2 Eq. 182. **Consd.** London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572. **Refd.** *Re* King & King, *Ex p.* Unity Joint Stock Mutual Banking Assocn. (1858), 3 L. T. O. S. 124; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Wright *v.* Leonard (1861), 11 C. B. N. S. 258; Beecher *v.* Major (1865), 6 New Rep. 370; Matthewman's Case (1866), L. R. 3 Eq. 781; *Re* Lush's Trusts (1869), 4 Ch. App. 591; Arnold *v.* Woodhams (1873), L. R. 16 Eq. 29; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482. **Mentd.** Wright *v.* Chard (1859), 4 Drew. 673; Tatham *v.* Drummond (1864), 2 Hem. & M. 262; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681; Leslie *v.* Sheill, [1914] 3 K. B. 607.

1169. ——.]—If a general power of appointment be expressly given to a married woman over any property or any interest in property, such property or interest does not thereby become settled to her separate use, nor does it become so by her exercising the power.

When a *feme covert* has a general power to appoint property by will, & executes it in favour of a legatee, the appointed property does not, as in the case of a man, become assets for the payment of her debts. But the case is otherwise where the *feme covert* has practised a fraud in her contracts; in such a case the appointed property is liable.—HOBDAY *v.* PETERS (No. 2) (1860), 28 Beav. 354; 29 L. J. Ch. 780; 2 L. T. 590; 6 Jur. N. S. 794; 8 W. R. 512; 54 E. R. 402.

Annotations:—**Refd.** Sharpe *v.* Foy (1868), 4 Ch. App. 35; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482.

1170. ——.]—A married woman with separate estate in personalty for life, & a general power

Sect. 4.—Under powers of appointment: Sub-sect. 6, B. (a) & (b), & C.]

of appointment by will, does not, by exercising the power, make the fund assets for payment of her creditors.—BLATCHFORD *v.* WOOLLEY (1863), 2 Drew. & Sm. 204; 62 E. R. 599; *sub nom.* BLACHFORD *v.* WOOLLEY, 1 New Rep. 507; 32 L. J. Ch. 534; 8 L. T. 232; 9 Jur. N. S. 568; 11 W. R. 478.

Annotations:—**Refd.** Lechmere *v.* Brotheridge (1863), 32 Beav. 353; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482.

1171. ——.]—Property settled to the separate use of a married woman for life, with a power to appoint the reversion by deed or will, which she exercises by will, is not liable after her death to the payment of her debts.—SHATTOCK *v.* SHATTOCK (1866), L. R. 2 Eq. 182; 35 Beav. 489; 35 L. J. Ch. 509; 14 L. T. 452; 12 Jur. N. S. 405; 14 W. R. 600; 55 E. R. 986.

Annotations:— **Consd.** Matthewman's Case (1866), L. R. 3 Eq. 781; Adamson *v.* Hammond (1873), L. R. 3 P. & D. 141. **N.F.** London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572. **Consd.** *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482. **Refd.** Mayd *v.* Field (1876), 45 L. J. Ch. 699.

1172. ——.]—A., under a settlement made upon her marriage, had a power of appointment over a certain fund. B., her husband, in her lifetime, obtained possession of the fund, & after her death transferred it to the trustees of a settlement made in contemplation of the marriage of C., his adopted daughter. Neither C., her husband, nor the trustees, had notice of the trusts of the original settlement. In a suit instituted after B.'s death, the will of A., appointing the fund in favour of B., was pronounced for, & the costs of the opponents of the will were ordered to be paid out of A.'s estate:—*Held:* the trustees of the settlement made on the marriage of C. were innocent purchasers for valuable consideration of the fund, & it therefore ceased in their hands to be part of A.'s estate, or to be chargeable with costs.

Semble: where a married woman exercises by will a power of appointment over her separate personal estate, although the estate may be liable to the payment of her debts in the hands of the appointee, it would not be liable to the payment of the costs of a suit touching the validity of her will ordered to be paid out of her estate.—ADAMSON *v.* HAMMOND (1873), L. R. 3 P. & D. 141; 43 L. J. P. & M. 17; *sub nom.* ADAMSON *v.* ADAMSON & HAMMOND, 29 L. T. 700; 38 J. P. 89.

1173. ——.] — Property was settled on a married woman for her separate use for life, with remainder for such persons as she should by her will appoint, with remainder, in default of appointment, for her children or her next of kin, & the married woman made a testamentary appointment in favour of her daughter:—*Held:* the appointed property was liable to the payment of the appointor's debts as if it were her separate estate.—*Re* HARVEY'S ESTATE, GODFREY *v.* HARBEN (1879), 13 Ch. D. 216; 28 W. R. 73; *sub nom. Re* HARVEY'S ESTATE, GILBERT *v.* HARBEN, 49 L. J. Ch. 3.

Annotations:—**Consd.** Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454. **Folld.** Hodges *v.* Hodges (1882), 20 Ch. D. 749. **Consd.** *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482.

1174. ——.]—Pltf. advanced money from 1866 to 1870 for the support of a married woman living apart from her husband, & intitled, under a separation deed, to separate estate, with a power of appointment by deed or will. She died in 1870, having made an appointment by will. No payment was made to her under the deed. In 1871 a suit was commenced to administer the trusts of the separation deed, & the chief clerk's certificate was not made till 1876. In 1879 pltf. obtained letters of administration with the will annexed to the married woman's estate, & brought an action for the amount he had advanced:—*Held:* as against the appointees under her will, in the circumstances there had been no laches on the part of pltf.; the debts were a charge on her separate estate; & were not barred by Stat. Limitations.—HODGSON *v.* WILLIAMSON (1880), 15 Ch. D. 87; 42 L. T. 676; *sub nom. Re* BARBER, HODGSON *v.* WILLIAMSON, 28 W. R. 944.

Annotation:—**Dbtd.** *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94.

1175. ——.]—A married woman who died in 1880 entitled for her life for her separate use, without power of anticipation, to the income of certain estate, with a general testamentary power of appointing the same estate, by her will directed her extrices. thereinafter named to pay her just debts, & by virtue of the power appointed, devised & gave the same estate unto two daughters, whom she appointed extrices. upon certain trusts for the benefit of her children equally for life, & after the death of the survivor for the benefit of her grandchildren equally. In an administration action the chief clerk certified that testatrix was indebted at the time of her death to several persons:—*Held:* the debts, so called, were a charge upon the appointed property.—*Re* DE BURGH LAWSON, DE BURGH LAWSON *v.* DE BURGH LAWSON (1889), 41 Ch. D. 568; 58 L. J. Ch. 561; 37 W. R. 797.

(*b*) *Since Married Women's Property Act*, 1882.

See Married Women's Property Act, 1882 (c. 75), ss. 1, 4.

1176. Application of Act—Liabilities incurred before Act.]—An appointment by a married woman by will, in exercise of a general power of appointment by deed or will, or by will only, does not make the appointed property liable to engagements entered into with her on the credit of her separate estate prior to Jan. 1, 1883, the date of the commencement of Married Women's Property Act, 1882, sect. 1 of the Act applying only to contracts made after that date. In 1881 a married woman concurred with her husband in a mtge. & thereby covenanted with the mtgees. "with the intent to bind her separate estate," that she or her husband would pay the interest on the mtge. debt, & she assigned a life-policy to which, under Married Women's Property Act, 1870, she was entitled for her separate use, to the mtgees. as security, with other property belonging to & assigned by the husband, for the mtge. debt & interest. Subsequently, by another deed dated in 1881, certain prior mtge. debts on the husband's property were transferred to the same mtgees. the married woman being a party, with her husband, to the transfer, & covenanting, "with the intent to bind her separate estate," for payment by her or her husband of the interest on the several mtge. debts so transferred. The married woman joined in the mtge. & transfer only as surety for her husband. By a separation deed, dated in 1884, the married woman covenanted with her husband to pay the interest on the several mtge. debts. At the dates of the three deeds she had, besides separate estate consisting of the said policy & some furniture, a general power of appointment by will over a fund. In 1887 she died, leaving her husband surviving, & having by

will appointed the fund to her infant daughter absolutely at twenty-one or marriage:—*Held:* the appointed fund was not liable to satisfy the married woman's obligations with the mtgees. since such obligations were incurred before the commencement of Married Women's Property Act, 1882; & the exercise of the power did not make the appointed property liable as assets of the appointor because such obligations were not strictly speaking debts:—*Semble:* even if the married woman's obligations had been incurred since the commencement of Married Women's Property Act, 1882, the fund would not have been liable as "separate property" of the married woman within sect. 1 (4).—*Re* ROPER, ROPER *v.* DONCASTER (1888), 39 Ch. D. 482; 58 L. J. Ch. 215; 59 L. T. 203; 36 W. R. 750.

Annotations:—**Consd.** *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510. **Refd.** *Re* Ann, Wilson *v.* Ann, [1894] 1 Ch. 549; *Re* Hughes, Brandon *v.* Hughes, [1898] 1 Ch. 529; *Re* Lawley, Zaiser *v.* Lawley, [1902] 2 Ch. 673.

1177. Appointment made after.] A married woman, while under a protection order obtained by her under Matrimonial Causes Act, 1857 (c. 85), s. 21, is in the position of a *feme sole* as regards all property coming to her after the date of the order, & also for all purposes of contract; so that her execution by will since Married Women's Property Act, 1882 (c. 75), of a general power of appointment created subsequently to the date of the protection order makes the property appointed liable, under sect. 4 of the latter Act, for debts or liabilities incurred by her while under the order, even though they may have been incurred before that Act, sect. 4 extending to an appointment since the Act by a married woman who had debts & liabilities existing at the date the Act came into operation.—*Re* HUGHES, BRANDON *v.* HUGHES, [1898] 1 Ch. 529; 67 L. J. Ch. 279; 78 L. T. 432; 46 W. R. 502; 42 Sol. Jo. 412, C. A.

Annotation:—*Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1.

1178. Effect of Act—Materiality of separate property—At date liability contracted.] — Under Married Women's Property Act, 1882 (c. 75), s. 1 (3), (4), & s. 4, when read together, property appointed by a married woman by will under a general testamentary power becomes, on her death, liable for her "debts & other liabilities" even though she may have had no separate estate at the time she contracted them.—*Re* ANN, WILSON *v.* ANN, [1894] 1 Ch. 549; 63 L. J. Ch. 334; 70 L. T. 273.

Annotations:—**Overd.** *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1. **Refd.** *Re* Hughes, Brandon *v.* Hughes, [1898] 1 Ch. 529.

1179. —— — — ——.]—By a marriage settlement of June 2, 1890, testatrix on her marriage with Mr. A. assigned a reversionary interest to trustees upon trust, after the fund had been received by them, upon her request to raise thereout a sum not exceeding £7,000, & to pay the same to her for her separate use, but so that she should not have power to alienate or charge her interest in the £7,000 during coverture, & then upon trusts under which she took a general power of appointment. By an indenture of Jan. 29, 1891, in consideration of £10,000 advanced by A. to Mr. A. he covenanted to repay the same & interest, & testatrix covenanted that when the reversionary interest fell in she would immediately request the trustees to raise & pay to her £4,000, & that she, her exors. or administrators, would pay it over to A., or so much thereof as should be required to satisfy the amount then due. Mr. A. died, & on her second marriage with Mr. F. testatrix executed a new settlement of her reversionary interest upon trusts under which she had a general power of appointment. The reversionary interest fell into possession in 1901. Testatrix by her will exercised her power of appointment & thus made the fund liable for her debts & other liabilities under Married Women's Property Act, 1882, s. 4. She died in 1907. Only about £1,200 of the £10,000 had been repaid, & A. now claimed to be paid out of testatrix's estate the £4,000 under the covenant contained in the deed of Jan. 29, 1891. It was admitted that owing to the restraint on alienation contained in the first settlement the covenant was inoperative as a charge:—*Held:* inasmuch as on the evidence, testatrix had no separate estate in respect of which she could be supposed to have contracted at the time when she made the covenant, it did not constitute a contract with respect to her separate property for breach of which an action for damages would lie against her estate.—*Re* FIELDWICK, JOHNSON *v.* ADAMSON, [1909] 1 Ch. 1; 78 L. J. Ch. 153; 100 L. T. 106; 53 Sol. Jo. 47, C. A.

See, now, Married Women's Property Act, 1893 (c. 63), s. 1.

1180. —— Appointment of legacy in satisfaction of debt—Satisfaction during testator's lifetime—Legacy available as assets.]—Under a marriage settlement the husband, in case he survived his wife, was entitled for life to the income of a moiety of the settled funds; & in the same event the wife had power to appoint by will the income of the other moiety to the husband for life, & also, in default of issue taking a vested interest in the settled funds, a general power of appointment by will over the capital thereof. By her will the wife appointed that the trustees of the settlement should raise out of the moiety of the settled fund to the income of which the husband was not entitled for life after her decease (*inter alia*) the following legacies, namely, "to my friend D. £1,100 in satisfaction of a debt to that amount due from me to her," etc., & subject as aforesaid should pay the whole income of that moiety to the husband for life. No debt was due to D. from the wife, but there was a debt of £1,165 due to D. from the husband, who repaid it after the wife's death. The wife's estate proved insufficient to pay her debts by more than the £1,100:—*Held:* the appointment of the legacy of £1,100 was an effectual appointment, & rendered that legacy assets for payment of the wife's creditors by Married Women's Property Act, 1882 (c. 75), s. 4.—*Re* HODGSON, DARLEY *v.* HODGSON, [1899] 1 Ch. 666; 68 L. J. Ch. 313; 80 L. T. 276; 47 W. R. 443.

C. Life Interest to Woman with Absolute Remainder in Default.

1181. Gift in default to statutory next of kin.]—Bond of a *feme covert* as a surety enforced against her separate estate under a settlement to her separate use with power of appointment by will or any writing purporting to be her will, & in case she should die in the life of her husband, & without making any will or other disposition as to the whole or any part, then as to the whole or such part as to which no gift or disposition should be so made, to the persons who would be entitled by the Statute, if she had died intestate & unmarried.—HEATLEY *v.* THOMAS (1809), 15 Ves. 596; 33 E. R. 880.

Annotations:—**Consd.** Lee *v.* Muggeridge (1812) 1 Ves. & B. 118; Mayd *v.* Field (1876), 3 Ch. D. 587. **Refd.** Francis *v.* Wigzell (1816), 1 Madd. 258; Murray *v.* Barlee (1834), 3 My. & K. 209; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Shattock *v.* Shattock (1866), L. R. 2 Eq. 182; London Chartered Bank of Australia *v.* Lemprière (1873),

Sect. 4.—Under powers of appointment: Sub-sect. 6, C. Sects. 5 & 6: Sub-sects. 1 & 2.]

9 Moo. P. C. C. N. S. 426; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216; Paul *v.* Paul (1880), 15 Ch. D. 580; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521; *Ex p.* Gilchrist (1886), 51 J. P. 292; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

1182. Gift in default to executors & administrators.]—A *feme covert* having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her exors. or administrators, opened two accounts with her bankers, a private & an administration account, & directed the bankers by the joint letter of herself & her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn:—*Held*: she had contracted so as to bind her separate estate, & the bankers had a lien on the administration account in respect of the overdrawn private account.—LONDON CHARTERED BANK OF AUSTRALIA *v.* LEMPRIÈRE (1873), L. R. 4 P. C. 572; 9 Moo. P. C. C. N. S. 426; 42 L. J. P. C. 49; 29 L. T. 186; 21 W. R. 513; 17 E. R. 574, P. C.

Annotations:—**Consd.** Adamson *v.* Hammond (1873), L. R. 3 P. & D. 141. **Folld.** *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216. **Refd.** Outram *v.* Hyde (1875), 24 W. R. 268; Wainford *v.* Heyl (1875), L. R. 20 Eq. 321; Mayd *v.* Field (1876), 3 Ch. D. 587; *Re* Grissell, *Ex p.* Jones (1879), 12 Ch. D. 484; National Bank of Australasia *v.* United Hand-in-Hand Band of Hope Co. (1879), 4 App. Cas. 391; Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454; Paul *v.* Paul (1882), 51 L. J. Ch. 839; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

1183. Absolute remainder in default.]—Personal property settled on the marriage of C. W. in trust as she should during coverture by deed or will appoint, & subject thereto for her separate use for life, & if she survived her husband, which happened, for her absolutely:—*Held*: to be bound by her general engagements.

Accordingly C. W. having in a settlement on the marriage of her daughter L. covenanted with the trustees thereof for the payment to them on her decease of £1,000 to be in trust for L. for life, then for the husband of L. for life, then upon the usual trusts for her children:—*Held*: the trustees of L.'s settlement were entitled on the death of C. W. to stand in the position of creditors in respect of the property comprised in the first settlement.—MAYD *v.* FIELD (1876), 3 Ch. D. 587; 45 L. J. Ch. 699; 34 L. T. 614; 41 J. P. 20; 24 W. R. 660.

Annotations:—**Consd.** Skinner *v.* Todd (1881), 51 L. J. Ch. 198; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482. **Refd.** *Re* Tussaud's Estate, Tussaud *v.* Tussaud (1878), 9 Ch. D. 363; *Re* Wilson's Estate, Menteath *v.* Campbell (1878), 26 W. R. 848; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216.

1184. —— Immaterial whether power exercised.]—HODGES *v.* HODGES, No. 1010, *ante*.

SECT. 5.—LIABILITY OF WIFE'S PROPERTY FOR DEBTS.

See Part VIII., Sect. 1, *post*.

Liability to execution.]—*See* Part XII., Sect. 1, sub-sect. 1, G., *post*.

SECT. 6.—DEALINGS BY HUSBAND WITH WIFE'S PROPERTY.

SUB-SECT. 1.—IN GENERAL.

1185. Renewal of lease in own name—Settled on wife—Benefit of wife—Constructive trustee.]—A husband made a voluntary settlement of leaseholds for the benefit of his wife & afterwards, without disclosing the settlement, obtained a renewal in his own name, but with the intention of giving his wife the benefit of the renewed lease:—*Held*: (1) the renewed lease was held by the husband as constructive trustee for his wife, & the trust arising by operation of law, it was within the exception of Statute of Frauds, s. 7, so as to make the absence of writing immaterial; (2) as the husband's intention was to benefit his wife she was not bound to repay to her husband's estate the premium paid by him for the renewal.—*Re* LULHAM, BRINTON *v.* LULHAM (1885), 53 L. T. 9; 33 W. R. 788, C. A.

1186. Goods sent to auctioneer for sale—Notice of wife's claim—Liability of auctioneer.]—Goods, the separate property of a married woman, were placed by her husband in a hired warehouse, & entrusted to auctioneers for the purpose of sale:—*Held*: the auctioneers became possessed of the goods; so that, having received notice of the wife's claim before sale, they were liable to the wife for the value of both the goods sold & goods not sold but afterwards removed by the husband.—DAVIS *v.* ARTINGSTALL (1880), 49 L. J. Ch. 609; 42 L. T. 507; 29 W. R. 137.

1187. Non-payment by husband of mortgage interest—Presumption of gift of interest by wife—Statute of Limitations.]—*Re* HAWES, *Re* BURCHELL, BURCHELL *v.* HAWES, No. 1405, *post*.

PART VI. SECT. 6, SUB-SECT. 1.

b. *Demise in own name—Power to maintain ejectment.*]—Though the wife own the fee, the husband may maintain ejectment on his own demise alone, but he must prove his marriage.—DOE d. PETERSON *v.* CRONK (1847), 5 U. C. R. 135.—**CAN.**

c. —— *Action by wife to set aside—Homestead—Pleading.*]—In an action brought by a wife to set aside a lease made by her husband to deft. to which she was not a party, deft's motion to strike out the statement of claim as not pleading an Act Respecting Homesteads or as claiming relief not provided by the statute, was dismissed.—RATNER *v.* VICKER, [1919] 1 W. W. R. 631.—**CAN.**

d. *Arrangement giving possession of land—Arbitration.*]—Land belonged to a married woman, & a railway co. had taken possession of it upon an arrangement with her husband, which would have been an answer to the application if he had been the owner. An arbn. was ordered.—*Re* BENSON & PORT HOPE, LINDSAY, & BEAVERTON RY. CO. (1870), 29 U. C. R. 529.—**CAN.**

e. *Parol gift of land to wife—Possession of husband—Acquisition of title.*]—There was a parol gift of land to a married woman, & the property was actually occupied by the husband of the donee & worked by him, she residing with him as his wife:—*Held*: the wife could acquire no title by such possession either against her husband or the donor—the title so acquired would be the title of the husband.—DOE d. VINCENT *v.* MURRAY (1874), 2 Pug. 375.—**CAN.**

f. *Effect of statute.*]—The effect of Married Woman's Property Act, 1859," as to property not excepted thereby, is that all interference on the part of the husband during their joint lives is ended.—CAMERON *v.* WALKER (1889), 19 O. R. 212.—**CAN.**

g. *While living apart from wife.*]—A married woman being the owner in fee at the time of her marriage of a lot of land, was compelled to live separate & apart from her husband not wilfully & of her own accord:—*Held*: while such separation continued she was entitled to an injunction restraining her husband from enjoying any marital rights in the property, or interfering with its use & occupation by her.—JOHNSTON *v.* JOHNSTON (1895), 1 N. B. Eq. Rep. 164.—**CAN.**

h. *Agreement to sell wife's land—As agent of wife—Power to pay commission to agent of purchaser.*]—The fact that a woman empowers her husband to buy property for her, & to agree to transfer her land in part payment therefor, does not give him implied authority to agree, on her behalf, to pay to the person, whom she knows only as the agent of the other party, a commission as if he were her agent selling the land—SWANSON *v.*

1188. -.]—*Re* DIXON, HEYNES *v.* DIXON, No. 1406, *post.*

1189. Legacy detained by husband—Notice of separate use—Liability of husband's estate—Statute of Limitations.]—A woman who was married in 1854 received in 1876 a legacy of £300 given for her separate use, but was forcibly deprived of the money by her husband, who knew that it was a legacy. During the husband's lifetime the wife frequently asked him for the money; but no proceedings to recover it were taken until after his death, which occurred in 1894:—*Held:* (1) the husband was affected with notice of the separate use, & was a trustee of the money for his wife; (2) Stat. Limitations was no defence to proceedings by her against his exors.: (3) the wife was entitled to be paid the amount of the legacy, with interest at 4 per cent. from the date of her husband's death.—WASSELL *v.* LEGGATT, [1896] 1 Ch. 554; 65 L. J. Ch. 240; *sub nom. Re* WASSELL, WASSELL *v.* LEGGATT, 74 L. T. 99; 44 W. R. 298; 12 T. L. R. 208; 40 Sol. Jo. 276.

See, generally, LIMITATION OF ACTIONS.

1190. Purchase out of wife's income—Land conveyed in own name—Resulting trust.]—MERCIER *v.* MERCIER, No. 1409, *post.*

Wife of unsound mind.]—*See* Sub-sect. 4, *post.*

Expenditure by husband on improvements.]—*See* Sub-sect. 2, *post.*

Discharge of incumbrances on wife's property.]—*See* Sub-sect. 3, *post.*

Possession of wife's income or capital—Liability to account.]—*See* Part VI., Sect. 9, sub-sect. 3, *post.*

SUB-SECT. 2.—IMPROVEMENT OF WIFE'S PROPERTY.

1191. Expenditure on estate—Enfranchisement of copyholds—Gift to wife—Protection against creditors.]—Settlement sustained by the consideration of marriage against creditors; notwithstanding false recitals, that the property was the wife's; protecting also voluntary expenditure by the husband after the marriage in improvement by building & enfranchising copyholds; but not jewels & furniture, purchased by him after the marriage. & given to her.—CAMPION *v.* COTTON (1810), 17 Ves. 263; 34 E. R. 102.

Annotations:—**Refd.** Colombine *v.* Penhall, Penhall *v.* Miller (1853), 1 Sm. & G. 228; Fraser *v.* Thompson (1859), 4 De G. & J. 659. **Mentd.** *Re* McBurnie, *Ex p.* McBurnie's Trustees (1852), 16 Jur. 807; *Re* Reis, *Ex p.* Clough (1904), 73 L. J. K. B. 929.

1192. Under mistake—Reimbursement-Lien.]—The wife being entitled in equity to real estate under a contract of sale entered into before her marriage, the husband, after their marriage, completed the purchase & took the conveyance to himself; afterwards, acting upon the supposition that the estate was his own, the husband laid out money in improvements upon it, & ultimately, in the lifetime of the wife, under the same mistake, sold the estate, & the purchasers took a conveyance from him. The husband survived the wife. After the death of the husband the heir-at-law of the wife recovered the estate from the purchasers by a suit in equity:—*Held:* the husband & the purchasers from him were entitled in that suit to a lien on the estate in respect of the purchase-money paid by the husband. *Semble:* also, in respect of the moneys expended on lasting improvements.—NEESOM *v.* CLARKSON (1845), 4 Hare, 97; 9 Jur. 822; 67 E. R. 576.

1193. —— Reimbursement—Rents received by husband.]—A husband contracted for a lease of some premises, & he afterwards induced the trustees of his marriage settlement, who held moneys for the separate use of his wife, without power of anticipation, to act in breach of their trust, & to purchase the property. The property was conveyed to the trustees, &, by a deed executed by the husband & wife, it was declared that it should be held for their indemnity & on the trusts of the settlement. The husband laid out very considerable sums of money in building & repairs, &, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose; the trustees insisted on receiving the rents, & proceeded at law to enforce their rights; whereupon the husband filed a bill against the trustees & his wife, claiming a lease under the agreement, & asking for a sale of the property, & for the application of the produce, first in replacement of the trust funds, & afterwards in reimbursing pltf. his outlay. A motion for a receiver was refused with costs.—WILES *v.* COOPER (1846), 9 Beav. 294; 15 L. J. Ch. 129; 50 E. R. 357.

Annotation:—**Mentd.** Wiles *v.* Gresham (1853), 1 Eq. Rep. 348.

1194. —— Husband tenant pur autre vie—Wife entitled in remainder—No charge.]—A husband expended money in necessary repairs of property of which he was tenant *pur autre vie*, the

THOMAS (1914), 30 W. L. R. 24 25 Man. L. R. 94 7 W. W. R. 652; 20 D. L. R. 609. **CAN.**

k. *Homestead—General rule.*]—The assent of the husband alone to an agreement of sale respecting the homestead is an ineffectual assent. The bargain is inchoative until the wife assents in the manner required in the statute & the husband is not liable for failure to perform the agreement in so far as it relates to the homestead.—HALLDORSON *v.* HOLIZKI, [1919] 1 W. W. R. 472.—**CAN.**

l. —— ——.]—Under Homestead Acts a husband cannot make any disposition of his homestead without the consent of his wife, & any attempted disposition, save in cases exempted by statute, is null & void.—BIGGS *v.* ISENBERG, [1920] 3 W. W. R. 357.—**CAN.**

m. —— *Caveat by wife.*]—A *caveat* filed under M. W. Home Protection Act, 1915, while that Act was in effect, may be maintained until it is disposed of in the manner provided by s. 7, notwithstanding the repeal of the Act by Dower Act, c. 14, 1917, at least, in a case where before Dower Act came into force, the husband entered into an agreement for the sale of the land in question to a third party.—RUSSELL *v.* RUSSELL, [1917] 3 W. W. R. 549.—**CAN.**

n. —— ——.]—A homestead under Homesteads Act, 1915, against the alienation of which without her consent a wife may file *caveat*, may be land of which the husband is not the registered owner.—*Re* WOLTER, [1917] 3 W. W. R. 573.—**CAN.**

o. —— *Right of wife to possession.*]—So long as land is the homestead of her husband under Homesteads Act, a wife has the right to reside thereon &, as against one to whom it has been transferred without her consent, is entitled, in addition to the setting aside of the transfer, etc., to an order for possession.—KELLER *v.* SCHULTZ, [1920] 3 W. W. R. 188; 53 D. L. R. 437.—**CAN.**

PART VI. SECT. 6, SUB-SECT. 2.

p. *Expenditure on estate—Building erected by husband—Liability of wife.*]—Land was conveyed to deft., "to & for her separate use for ever." Deft.'s husband employed pltf. to build on this land, & pltf. rendered his account to the husband, knowing nothing of deft. in the matter:—*Held:* deft. was not liable; for although the land was her separate estate, it could not be said that this work was done at her request or on her credit, or that there was any contract with her.—WAGNER *v.* JEFFERSON (1876), 37 U. C. R. 551.—**CAN.**

q. —— —— ——.]—Pltf. & her husband, were married in Feb. 1865, pltf. then owning land in fee simple. Deft. expended $2,000, on improving the lands. Pltf. & deft. resided together on the lands until Apr. 1886, when they disagreed, & pltf. left the premises:—*Held:* deft. could not claim for the moneys expended by him on the land.—TILL *v.* TILL (1888), 15 O. R. 133.—**CAN.**

r. —— *Grain sowed by husband.*]—A. sowed grain on land belonging to his wife, B. A. always looked after the land & farm, as though it belonged to him, & B. never interfered with its management by A. B. died subsequent to the sowing of the grain:—*Held:*

Sect. 6.—*Dealings by husband with wife's property: Sub-sects.* 2, 3 & 4. *Sects.* 7 & 8: *Sub-sects.* 1

remainder being in his wife. The estate *pur autre vie* having shortly afterwards expired, & a divorce having been decreed by reason of the wife's adultery, the husband filed his bill to have the amount of his expenditure declared a charge upon the property. To this bill a demurrer for want of equity was allowed.—HAMER *v.* TILSLEY (1859), John. 486; 29 L. J. Ch. 32; 1 L. T. 54; 5 Jur. N. S. 1344; 8 W. R. 20; 70 E. R. 513.

SUB-SECT. 3.—DISCHARGE OF INCUMBRANCE ON WIFE'S PROPERTY.

1195. Husband entitled to charge on estate—In absence of contrary intention.] — A husband paying off an incumbrance, subject to which the estate stands limited to his wife for life for her separate use with remainder as she shall by will appoint, is, in the absence of evidence of a contrary intention, entitled to the charge as against the estate.

Whether it is a charge on the husband's estate which is paid by the wife, or a charge on the wife's estate paid by the husband, the same presumption attaches to the transaction.—OUTRAM *v.* HYDE (1875), 24 W. R. 268.

1196. Part principal repaid—Subsequently reborrowed by husband—Total amount repayable on redemption.]—Baron & *feme* by deed & fine mortgage the wife's land for £400, the husband pays in part of the principal, & afterwards borrows the same sum again of the mtgee. Decreed the heir of the wife should not redeem without paying off both sums.—RAYSON *v.* SACHEVEREL (1682), 1 Vern. 41; 23 E. R. 295; *sub nom.* RAUSON *v.* SACHEVEREL, 2 Cas. in Ch. 98, L. C.

Annotation:—**Refd.** Clinton *v.* Hooper (1791), 1 Ves. 173.

1197. —— Mortgage before marriage—Right to recoupment.]—*Feme sole* makes a mtge., & afterwards marries; the mtge. is then transferred, & the husband joins in the transfer, & covenants to pay the money. During the coverture, the husband by gradual payments out of his own property reduces the money due upon the mtge.; by his will he makes a disposition of the mortgaged premises, & dies in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mtge.; the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mtgee., for the sums paid by him out of his own property in reduction of the mtge. debt.—PITT *v.* PITT (1823), Turn. & R. 180; 37 E. R. 1065.

Annotations:—**Consd.** Neesom *v.* Clarkson (1845), 4 Hare, 97. **Apld.** Outram *v.* Hyde (1875), 24 W. R. 268. **Refd.** Clark *v.* Burgh (1845), 2 Coll. 221. **Mentd.** Cole *v.* Stutely (1842), 6 Jur. 314; Patten *v.* Bond (1889), 60 L. T. 583.

1198. Repayment before marriage—No marriage settlement—No gift presumed.] — Previously to a marriage then in contemplation, the intended husband, by his agent, paid off two equitable mtge. debts of the intended wife, secured by a deposit of title deeds belonging to her. He did this apparently to save the expense of a legal mtge., which would otherwise have been required by the mtgees. The title deeds still remained in the custody of the mtgees. The marriage was solemnised; there was no settlement, or agreement for a settlement. There was no issue of the marriage; the husband predeceased the wife intestate. His widow took out administration to him:—*Held:* the husband did not intend to make a gift to the wife of the money which he had paid for her, & the debt still existed on the security of the equitable mtge. in favour of the personal estate of the deceased husband.—GOOCH *v.* GOOCH (1851), 17 L. T. O. S. 274; 15 Jur. 1166.

Compare Sect. 8, sub-sect. 3, A., *post.*

See, further, MORTGAGE.

SUB-SECT. 4.—WIFE OF UNSOUND MIND.

See, generally, LUNATICS.

1199. Liability to account—Receipt of wife's income — Expenses of maintenance.] — In an account of dividends of the wife's separate property, directed against husband's estate, consideration should be had of his extra expenses in the maintenance, in consequence of her being insane.—A.-G. *v.* PARNTHER (1793), 4 Bro. C. C. 409; 29 E. R. 962.

Annotation:—**Folld.** *Re* Lawrence, Lawrence *v.* Lawrence, [1916] W. N. 205.

1200. —— —— —— Excess over income.]—*Re* LAWRENCE, LAWRENCE *v.* LAWRENCE, [1916] W. N. 205.

1201. —— Wife's settled estates.]—F., upon her marriage with C., under the trusts of a marriage settlement executed in 1771, became entitled to annuities charged upon land, by way of pin money, amounting to £1,000 *per annum.* C., who afterwards became Duke of Norfolk, died in 1815. In 1816, upon a commission of lunacy, F. was found a lunatic, without lucid intervals, from Dec. 1782. During all this time she had lived with her husband & in general society according to her rank. In 1820 F. died intestate.

Upon a bill filed in chancery by the administrator of F. against the exor. of C., claiming arrears of pin money from Dec. 1782, to the death of C.:—*Held:* the claim under the circumstances was not sustainable.—HOWARD *v.* DIGBY (EARL) (1834), 8 Bli. N. S. 224; 2 Cl. & Fin. 634; 5 E. R. 928, H. L.; *revsg.* S. C. *sub nom.* DIGBY (EARL) *v.* HOWARD (1831), 4 Sim. 588.

Annotations:—**Refd.** Leach *v.* Way (1835), 5 L. J. Ch. 100; Lea *v.* Grundy (1855), 24 L. T. O. S. 287; Rowley *v.* Unwin (1855), 2 K. & J. 138; Moore *v.* Barber (1865), 5 Giff. 43; Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385; *Re* J., [1909] 1 Ch. 574. **Mentd.** Wentworth *v.* Tubb (1842), 12 L. J. Ch. 61; Molton *v.* Camroux (1848), 2 Exch. 487; *Ex p.* Holden (1863), 13 C. B. N. S. 641; Dixon *v.* Dixon (1878), 9 Ch. D. 587; *Re* Rhodes, Rhodes *v.* Rhodes (1890), 44 Ch. D. 94.

1202. Application of wife's income to maintenance—By order of court—Payment of surplus to husband.]—A wife being of unsound mind & in confinement, & her husband being poor & unable so to maintain her, the ct. ordered that the surplus income of her separate property, after providing for her maintenance, should be paid to the husband, but refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance.

Qu.: whether if the expenses of her past maintenance had been still unpaid, that circumstance would have made any difference.—EDWARDS *v.* ABREY (1846), 2 Ph. 37; 2 Coop. *temp.* Cott. 177;

---

the grain was the property of A.—*Re* WINTER'S ESTATE (1904), 7 Terr. L. R. 250.—**CAN.**

s. —— *Husband's right to wages.*]— A husband living with his wife on a farm of which she has the beneficial ownership, & exerting himself, by working the farm, to earn the common livelihood, is presumed to do so by virtue of the relationship & duties resulting from the marriage, & is not entitled to wages.—TOWNS *v.* TOWNS (1913), 23 W. L. R. 958; 10 D. L. R. 448; 4 W. W. R. 196.—**CAN.**

15 L. J. Ch. 404 ; 7 L. T. O. S. 485 ; 10 Jur. 650 ; 41 E. R. 855, L. C.
Annotation :—**Mentd.** Vane *v.* Vane (1876), 45 L. J. Ch. 381.

1203. —— ——.]—Property was settled upon a lady for her separate use for life ; & after the death of herself & her husband, upon certain trusts for their children. The lady, after the marriage, became lunatic. The husband requested the trustees of the settlement to pay the annual income of the property to him to maintain his wife :—*Held :* the income might be paid to the husband, he undertaking to apply it for the support of his wife & children.—*Re* SPILLER (1860), 2 L. T. 71 ; 6 Jur. N. S. 386, L. JJ.

SECT. 7.—DEALINGS BY WIFE WITH HUSBAND'S PROPERTY.

See Married Women's Property Act, 1882 (c. 75), s. 10.

1204. Conversion to own use — While husband of unsound mind—Liability of wife's estate.]—Statement of claim alleged that W., having become insane, though not so found by inquisition, was confined in a lunatic asylum, & that during his confinement his wife took possession of his personal estate, & converted the same to her own use, such estate being much more than was required for W.'s support in the asylum, & for his wife's own maintenance. W. died an inmate of the asylum, having by his will bequeathed all his property & effects to his wife for life. On the wife's death this action was brought by pltf. as administrator, with the will annexed of W., against her exors., claiming an account of all moneys received by the wife during the insanity of W. Defts. demurred on the ground that the alleged cause of action arose during the husband's lifetime :—*Held :* the action was maintainable & the demurrer must be overruled.—*Re* WILLIAMS, WILLIAMS *v.* STRATTON (1881), 50 L. J. Ch. 495 ; 44 L. T. 600.

1205. Wife of tenant for life in possession of estate—Terminable interest—Production of husband—6 Ann. c. 72.]—The wife of a tenant for life, in possession of his estate by his authority, has an interest determinable upon life within 6 Anne, c. 72, and may therefore be called upon to produce her husband.—*Re* STEVENS (1886), 31 Ch. D. 320 ; 55 L. J. Ch. 433 ; 54 L. T. 80 ; 34 W. R. 268 ; 2 T. L. R. 261.

1206. Discharge of incumbrance on husband's estate—Gift not presumed.]—OUTRAM *v.* HYDE, No. 1195, *ante*.

Possession of husband's property—Presumption of gift.]—*See* Sect. 9, sub-sect. 2, *post*.

SECT. 8.—DISPOSITION BETWEEN HUSBAND AND WIFE.

SUB-SECT. 1.—CONTRACT.

See Part VIII., Sect. 5, *post*.

SUB-SECT. 2.—LIFE ASSURANCE POLICIES.

A. In General.

See, generally, INSURANCE.

1207. Insurable interest—Wife in husband's life.]—A wife making an insurance on her husband's life, need not prove that she was interested therein.—REED *v.* ROYAL EXCHANGE ASSURANCE CO. (1795), PEAKE, ADD. CAS. 70, N. P.
Annotation :—**Apld.** Griffiths *v.* Fleming, [1909] 1 K. B. 805.

1208. —— Husband in wife's life.]—GRIFFITHS *v.* FLEMING, No. 1224, *post*.

B. Under Married Women's Property Acts.

See, now, Married Women's Property Act, 1882 (c. 75), s. 11.

1209. Married Women's Property Act, 1870 (c. 93)—Policy effected before Act—New policy substituted after Act.]—A husband who, before the passing of Married Women's Property Act, 1870

PART VI. SECT. 7.

t. *Homestead—Purchased with husband's money—Sale by wife—Resulting trust in favour of husband.*]—The wife has received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, &, notwithstanding that, before completing the agreement for sale, he received notice from the husband's solrs. warning him, he did complete it :—*Held :* there was a resulting trust in favour of the husband.—DUDGEON *v.* DUDGEON & PARSONS (1907), 6 W. L. R. 346, 13 B. C. R. 179.—**CAN.**

PART VI. SECT. 8, SUB-SECT. 2.—A.

a. *Policy for benefit of wife & children—Wife's chose in action.*]—O. effected a policy of life assurance for $1,000 for sole use of his wife if living & her children, & if no children to the administrators of O. O. died Dec. 21, 1878, his wife one week later intestate. —*Held :* the policy was a chose in action of the wife's not reduced into possession by the husband & her administratrix was entitled to the money.—GILCHRIST *v.* MCPHEE (1880), 2 P. E. I. 356.—**CAN.**

b. —— *Accident insurance.*]—CORN- *v.* HALIFAX BANKING CO. (1902), S. C. R. 442.—**CAN.**

c. —— *Right of children of deceased children to share.*]—Notwithstanding that the policies had been declared by the insured to be for the benefit of his wife & children, the children of deceased children were held entitled to share.—*Re* STANDARD LIFE ASSURANCE CO. & KEEFER (1915), 8 O. W. N. 559 ; 9 O. W. N. 56 ; 42 D. L. R. 570 ; 34 O. L. R. 235.—**CAN.**

d. —— *Statutory distribution.*]—Under Ontario Insurance Act, R. S. O. 1914, c. 183, s. 178 (4), as amended by 6 Geo. V., c. 36, s. 5, the wife shares with the children, taking the same share as each—*Re* DICKENSON & NORTH AMERICAN LIFE ASSURANCE CO. (1920), 46 O. L. R. 380.—**CAN.**

e. *Policy for benefit of wife—Creation of statutory trust.*]—Deft. judgment debtor was named as sole beneficiary in the contract of insurance upon the life of her husband :—*Held :* the effect of Insurance Act, R. S. O., 1897, s. 159, was to create a statutory trust of the money payable under the policy in favour of the wife without restraint upon anticipation, but subject to be defeated upon the happening of either of two contingencies, the wife predeceasing her husband, or the revocation of her appointment as beneficiary & appointment of a child or children in her place as beneficiary. —DOULL *v.* DOELLE (1904), 4 O. W. R. 525 ; 5 O. W. R. 238, 253, 413 ; 6 O. W. R. 39 ; 10 O. L. R. 411.—**CAN.**

f. —— *Surrender of.*]—A policy effected by a married man upon his own life for behoof of his wife under Married Women's Policies of Assurance Act, 1880, s. 2, may be surrendered at any time by the trustee who holds it with concurrence of the wife.—SCHUMANN, ETC. *v.* SCOTTISH WIDOWS' FUND (1886), 13 R. (Ct. of Sess.) 678 ; 23 Sc. L. R. 474.—**SCOT.**

g. *Imperfect assignment from husband to wife—Whether trust created.*]—An imperfect assignment of a policy from a husband to a wife cannot be regarded as a declaration of trust in her favour.—BLISS *v.* ÆTNA LIFE INSURANCE CO. (1886), 7 R. & G. 363. —**CAN.**

PART VI. SECT. 8, SUB-SECT. 2.—B.

h. *Married Women's Property Act, 1870—Benefit of wife—Power of husband to assign interest—In wife's lifetime.*]—Where a trust is created by a policy of insurance expressed to be made by a husband for the benefit of his wife under Married Women's Property Act, 1870, s. 10, the interest of the husband in the policy is, subject to the trust in favour of the wife, an interest capable of assignment by the husband during the lifetime of the wife.—ROBB *v.* WATSON, [1910] 1 I. R. 243.—**IR.**

k. *Married Women's Property Act, 1882—Policy for benefit of husband—Husband predeceasing wife—Right of husband's executors to recover.*]—A wife effected a policy on her own life in favour of her husband, under Married Women's Property Act, 1882. By the policy the insurance co. promised to pay £1000 to the husband, or his exors., administrators, or assigns, on the death of the wife. The husband paid the premiums on the policy, & predeceased the wife :—*Held :* the trust

Sect. 8.—*Disposition between husband and wife: Sub-sect.* 2, *B.*]

(c. 93), had insured his life, & had paid one premium on the insurance, after the passing of the Act gave up the policy & received instead a policy at the same premium for a sum payable to the separate use of his wife if she survived him, & to him if he survived her. He was at the time in embarrassed circumstances, & soon afterwards came under liquidation by arrangement, & then died. His wife had separate income subject to a restraint on anticipation:—*Held:* (1) the insurance must be taken as affected after the passing of Married Women's Property Act, 1870 (c. 93), & whether the subsequent premiums were paid by the husband out of his own money or out of the income of the wife's separate estate, the money payable on the insurance did not go to the trustee under the bkpcy., but went to the widow by virtue of Married Women's Property Act, 1870 (c. 93), which modified Bkpcy. Act, 1869 (c. 71), s 91; (2) on the evidence, the premiums were paid out of the wife's separate estate, &, therefore, the trustee in bkpcy. would not receive out of the insurance money the amount of the premiums.—HOLT *v.* EVERALL (1876), 2 Ch. D. 266; 45 L. J. Ch. 433; 34 L. T. 599; 24 W. R. 471, C. A.

1210. —— Declaration by court of rights & interests of widow & children—On petition to appoint trustees.]—Upon a petition presented under sect. 10 of above Act, for the appointment of trustees to receive the moneys payable under a policy effected by a husband for the benefit of his wife & children, the ct. will declare the rights & interests therein of the widow & children of deceased.—*Re* MELLOR'S POLICY TRUSTS (1877), 6 Ch. D. 127; 47 L. J. Ch. 246; 26 W. R. 70.

Annotations:—**N.F.** *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525. **Folld. & Expld.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

1211. —— —— ——.]—A husband effected a policy for the benefit of his wife & children under above Act, & died insolvent. His wife & one child of the marriage predeceased him. Upon a petition by his surviving children, under sect. 10 of above Act, for the appointment of a trustee of the policy money & for a declaration as to the rights of the petitioners:—*Held:* (1) the ct. had, under the sect. no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for the wife for life with remainder to the children, or, in the alternative, for the wife & children as joint tenants, the order was directed to be prefaced with an expression of opinion that the wife took no interest, & that the surviving children took as joint tenants. (2) *Semble:* a policy effected by a husband under sect. 10 of above Act, "for the benefit of his wife & children" should be read in conjunction with that sect., & should, by virtue of the words "separate use" in the sect., be considered as giving the wife a life interest only, with remainder to the children.—*Re* ADAM'S POLICY TRUSTS (1883), 23 Ch. D. 525; 52 L. J. Ch. 642; 48 L. T. 727; 31 W. R. 810.

Annotations:—*As to* (1) **Folld.** *Re* Turnbull, Turnbull *v.* Turnbull, [1897] 2 Ch. 415; *Re* Kuyper's Policy Trusts, [1899] 1 Ch. 38. *As to* (2) **Dbtd.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511. **N.F.** *Re* Davies' Policy Trusts, [1892] 1 Ch. 90.

1212. —— Benefit of wife & children—Husband dying insolvent—Distribution as in intestacy.]—A husband effected a policy for the benefit of his wife & children under Married Women's Property Act, 1870 (c. 93). The husband died insolvent & the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her & the children, the money was distributed as if the husband had died intestate.—*Re* MELLOR'S POLICY TRUSTS (1877), 7 Ch. D. 200; 47 L. J. Ch. 246; 26 W. R. 309.

Annotations:—**Dbtd.** *Re* Adam's Policy Trusts (1883), 23 Ch. D. 525. **Expld.** *Re* Seyton, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511.

1213. —— As husband should appoint—Power not exercised.]—G., deceased, had in his lifetime effected a policy of assurance on his own life under sect. 10 of above Act. It was declared upon the face of the policy that his wife & children were to take such interests as he should appoint. He died without making any appointment:—*Held:* the wife & children were entitled to the policy money in equal shares.—*Re* EDWARDS' POLICY TRUSTS (1879), 41 L. T. 434; 28 W. R. 72.

1214. —— —— Widow & children as joint tenants.]—*Re* ADAM'S POLICY TRUSTS, No. 1211, *ante.*

1215. —— —— ——.]—A policy was taken out on the life of assured for the benefit of his wife & children:—*Held:* his widow & children took as joint tenants.—*Re* SEYTON, SEYTON SATTERTHWAITE (1887), 34 Ch. D. 511; L. J. Ch. 775; 56 L. T. 479; 35 W. R. 373; 3 T. L. R. 377.

Annotations:—**Folld.** *Re* Davies' Policy Trusts, [1892] 1 Ch. 90. **Apld.** *Re* Griffiths' Policy, [1903] 1 Ch. 739.

1216. —— —— ——.]—A policy was taken out on the life of the assured for the benefit of his wife & children, pursuant to above Act, sect. 10. The assured died leaving a widow & five children:—*Held:* the widow & children took the money payable under the policy as joint tenants.—*Re* DAVIES' POLICY TRUSTS, [1892] 1 Ch. 90; 61 L. J. Ch. 650; 66 L. T. 104.

1217. —— —— Children born before & after policy—Right of children by second marriage.]—A man who had a wife & four children effected a policy of assurance on his life under above Act. The policy was expressed to be "for the benefit of his wife, or if she be dead between his children in equal proportions." The wife died, having had four more children after the issue of the policy. The assured subsequently married again, & had one child by his second wife. On his death, leaving his widow & nine children him surviving:—*Held:* the widow was not entitled to participate in the policy moneys, but they went to the children of the first & second marriages in equal shares.—*Re* GRIFFITHS' POLICY, [1903] 1 Ch. 739; 72 L. J. Ch. 330; 88 L. T. 547.

Annotation:—**Consd.** *Re* Parker's Policies, [1906] 1 Ch. 526.

1218. "For separate use" of wife—Whether life interest to widow—With remainder to children.]—*Re* ADAM'S POLICY TRUSTS, No. 1211, *ante.*

1219. —— Insurance on life of husband—Intention

created by the policy & the Act in favour of the husband was not dependent on his surviving his wife, & the policy belonged to his exors. & not to his wife.—PRESCOTT *v.* PRESCOTT, [1906] 1 I. R. 155.—**IR.**

l. *Power of assured to apportion.*]—Testator bequeathed personal estate, including all moneys payable in respect of a life-insurance expressed to be for the benefit of his wife & children upon trust, in the first place to pay debts & as to the residue, as to two-thirds for his son & as to one-third for his daughter:—*Held:* (1) As by Married Women's Property Act, 1908, s. 16 (2), the policy formed no part of testator's estate, it could not be made available for the payment of debts; (2) testator had power to apportion the policy moneys amongst some or all of the beneficiaries named in the policy & had effectually done so.—*Re* MILSOM, [1920] N. Z. L. R. 505.—**N.Z.**

m. *Widower a "married* By Married Women's Policies of

tion to benefit wife—Declaration by husband.]—NEWMAN *v.* BELSTEN (1884), 28 Sol. Jo. 301, C. A.

1220. —— Insurance on life of wife—For benefit of children—Reference by recital to Act.]—In 1872, a married woman insured her life by a policy which contained a recital that she was desirous to effect an insurance in terms of the provisions of above Act for the benefit of her children. She survived her husband, & died in 1914, having by her will bequeathed the policy moneys to four of her children only:—*Held:* (1) the contract was with the married woman alone; (2) no interest passed to the children by reason merely of their being mentioned in the policy, & the four legatees were entitled to the policy moneys. —*Re* BURGESS'S POLICY (1915), 85 L. J. Ch. 273; *sub nom. Re* BURGES'S POLICY, LEE *v.* SCOTTISH UNION & NATIONAL INSURANCE CO., 113 L. T. 443; 59 Sol. Jo. 546.

Annotation:—**Refd.** *Re* Engelbach's Estate, Tibbetts *v.* Engelbach, [1924] 2 Ch. 348.

1221. —— Policy effected abroad—Benefit of wife & children—Insured domiciled in England.]—A policy of insurance on the life of a husband for the benefit of his wife & children was effected by an Englishman domiciled in England through the English branch of an insurance co. which carried on business in New York:—*Held:* the policy so far as it consisted of a settlement of the policy moneys, must be construed in accordance with the law of the domicil of the insuring party.—CROSLAND *v.* WRIGLEY (1895), 73 L. T. 327; 43 W. R. 673; 39 Sol. Jo. 705, C. A.

1222. —— Rights of widow by subsequent marriage.]—*Re* GRIFFITHS' POLICY, No. 1217, *ante*.

1223. —— —— Appointment to second wife—Widow entitled.]—A man, having a wife living, effected two policies on his life in accordance with the provisions of sect. 10 of above Act. The policy moneys were expressly made payable to his widow & children, or some or one of them, as he should by deed or will appoint. His wife died, he married again, & by deed appointed the policy moneys to his second wife if she should survive him & become his widow. He died leaving his second wife & children of both marriages surviving:—*Held:* (1) an after-taken wife is within above Act & the widow was entitled to the moneys. For this purpose there is no difference between sect. 10 of above Act, 1870, & Married Women's Property Act, 1882 (c. 75), s. 11; (2) on the construction of the policies, if the second wife were outside above Act, she would still have been entitled by virtue of the contract with the insurance co.—*Re* PARKER'S POLICIES, [1906] 1 Ch. 526; 94 L. T. 477; *sub nom. Re* PARKER'S POLICIES, PARKER *v.* PARKER, 75 L. J. Ch. 297; 54 W. R. 329; 22 T. L. R. 259; 50 Sol. Jo. 272.

See, also, No. 1227, *post*.

1224. Married Women's Property Act, 1882 (c. 75)—Joint policy in favour of survivor—Within Act.]—A husband has as such an insurable interest in his wife's life; & therefore it is not necessary in order to establish the validity of a policy of insurance effected by a husband upon the life of his wife to give affirmative evidence as to the existence & extent of a pecuniary interest of the husband in the life of his wife. The interest is presumed to the extent of the amount insured by the policy. A husband & his wife effected with an insurance association a policy whereby, in consideration of a premium of which each paid part, a sum of money was made payable upon the death of whichever of them should die first to the survivor. The wife having died, the husband brought an action upon the policy to recover the policy money:—*Held:* upon the footing that the policy was an insurance by the husband upon the life of the wife, notwithstanding Life Assurance Act, 1774 (c. 48), it was not necessary, in order to maintain the action, that pltf. should prove that he had any pecuniary interest in the life of his wife.

I am of opinion that this policy should be read distributively as an insurance by the wife on her own life expressed to be for the benefit of her husband contingently on his surviving her, & by the husband on his own life for the benefit of his wife contingently on her surviving him; & that such an insurance is perfectly legal; but inasmuch as the wife's insurance takes effect under Married Women's Property Act, 1882 (c. 75), s. 11, the husband would have to take out administration to her estate in order to comply with the sect. before he could give a valid receipt for the sum assured (FARWELL, L.J.).—GRIFFITHS *v.* FLEMING, [1909] 1 K. B. 805; 78 L. J. K. B. 567; 100 L. T. 765; 25 T. L. R. 377; 53 Sol. Jo. 340, C. A.

Annotation:—**Refd.** *Re* Bradley & Essex & Suffolk Accident Indemnity Soc., [1912] 1 K. B. 415.

1225. —— Policy with trust for wife & children—Option to convert or substitute at stated date—Assignment for benefit of creditors—Objects of trust entitled to benefit of option.]—By a policy effected by a husband on his own life, the insurance co. contracted to pay to E., the wife of the insured, for her sole use, if then living, &, if not living, to the children of the insured or their trustee for their use, or if there should be no such children surviving, then to the exors., administrators, or assigns of the assured, the sum of £1,000. On the back of the policy were various conditions, from which it appeared that the policy was issued on the semi-tontine plan; that the tontine dividend period expired on June 20, 1910; that no dividend was to be allowed unless the insured survived the completion of that period & the policy should be then in force; that the surplus or profits derived from semi-tontine policies not in force when their respective tontine dividend periods expired were to be apportioned among such as completed their periods; & that on June 20, 1910, the insured in question, if the policy was then in force, would have the option of (a) withdrawing in cash the policy's entire share of the assets; (b) of converting the same into a paid-up policy for an equivalent amount; (c) of withdrawing in cash the share of accumulated

---

Assurance (Scotland) Act, 1880, s. 2, a policy of assurance effected by any married man on his own life & expressed on the face of it to be for the benefit of his wife or of his children shall be deemed a trust for their benefit:—*Held:* a widower was a "married man" in the sense of the Act.—KENNEDY'S TRUSTEE *v.* SHARPE (1895), 23 . (Ct. of Sess.) 146; 33 Sc. L. R. 3 S. L. T. 186.—**SCOT.**

n. *Policy for benefit of wife—Whether part of husband's estate.*]—A. effected a policy of insurance on his life in favour of his wife, should she survive him, but in the event of her predeceasing him then the policy to revert to his exors., administrator, or assigns. A. died, survived by his wife, & leaving a trust-disposition & settlement by which he made provisions in his wife's favour to be accepted by her "as in full satisfaction of all *jus relictæ*, terce or other claim of any kind competent to her through my decease":—*Held:* the wife was the primary creditor under the policy of insurance; the sum due under the policy did not form part of A.'s estate at his death, & the widow was entitled to the sum in the policy as well as the provision in her favour.—HAY'S TRUSTS *v.* HAY (1904), 6 F. (Ct. of Sess.) 978; 41 Sc. L. R. 809.—**SCOT.**

o. —— *Endowment policy—Husband predeceasing wife.*]—A married man effected with a life assurance

Sect. 8.—*Disposition between husband and wife: Sub-sect.* 2, *B., C. & D.; sub-sect.* 3, *A.*]

surplus & continuing the policy on the ordinary plan; or (d) of continuing the assurance for the original amount & applying the entire dividend to the purchase of an annuity payable together with the annual dividends in cash to insured or his assigns. Insured's wife died before the completion of the dividend period, leaving one daughter. In 1905 insured assigned his property to a trustee for the benefit of his creditors, & the terms of the assignment were wide enough to include the policy if capable of assignment. On the expiration of the dividend period insured was still alive, & the trustee for his creditors claimed the right to exercise the first option & of receiving the entire assets for the creditors:—*Held:* (1) the options under the policy could only be exercised for the benefit of the persons for whom the trust was created; (2) so long as any objects of the trust remained unperformed the trusts could not be defeated; (3) the options must be exercised in the best manner for the benefit of those entitled, & (4) the proper course was for the insurance co. to issue a paid-up policy within the meaning of option (b) for the benefit of the child or children surviving the insured, & if there should be none the benefit of it would fall into his estate.—*Re* EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES POLICY & MITCHELL (1911), 27 T. L. R. 213.

1226. —— Policy for wife's benefit—Husband murdered by wife—Right of husband's executors to recover—Failure of trust for wife.]—The exors. of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding that his death was caused by a felonious act of his wife. The trust created by the policy in favour of the wife under sect. 11 of above Act, having become incapable of performance by reason of her crime, the insurance money becomes part of the estate of the assured, & as between his legal representatives & the insurers no question of public policy arises to afford a defence to the action.—CLEAVER *v.* MUTUAL RESERVE FUND LIFE ASSOCN., [1892] 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 56 J. P. 180; 40 W. R. 230; 8 T. L. R. 139; 36 Sol. Jo. 106, C. A.

Annotations:—**Apld.** *Re* Burgess's Policy (1915), 85 L. J. Ch. 273; *Re* Engelbach's Estate, Tibbetts *v.* Engelbach, [1924] 2 Ch. 348. **Refd.** *In the Estate of* Hall, Hall *v.* Knight & Baxter, [1914] P. 1. **Mentd.** Yates *v.* Kyffin-Taylor & Wark, [1899] W. N. 141; Gordon *v.* Metropolitan Police Chief Comr., [1910] 2 K. B. 1080; *In the Goods of* Crippen (1911), 80 L. J. P. 47.

1227. Policy for benefit of wife & children—Right of widow by subsequent marriage—Jointly with children of both marriages.]—A man, who had a wife & children, effected a policy of assurance on his life under sect. 11 of above Act. The policy was expressed to be for the benefit of his wife & children. The wife died & the man married again, & had a child by his second wife. On his death:—*Held:* the widow & her child were entitled to participate jointly with the children of the first marriage.—*Re* BROWNE'S POLICY, BROWNE *v.* BROWNE, [1903] 1 Ch. 188; 72 L. J. Ch. 85; 87 L. T. 588; 51 W. R. 364; 19 T. L. R. 98.

Annotations:—**Distd.** *Re* Griffith's Policy, [1903] 1 Ch. 739. **Folld.** *Re* Parker's Policies, [1906] 1 Ch. 526. **Mentd.** *Re* Coley, Hollinshead *v.* Coley, [1903] 2 Ch. 102.

Compare Nos. 1217, 1223, *ante.*

1228. —— "On his own life"—Endowment policy for benefit of wife.]—A husband effected a life or twenty years' endowment policy with an insurance society, the money being payable on his death or on his surviving the twenty years. The policy was expressed to be for the benefit of his wife if he died within the twenty years leaving her surviving, otherwise for the benefit of himself or his estate. The husband died within the twenty years leaving his wife surviving:—*Held:* (1) the policy though immediately payable if the husband survived the twenty years was a policy effected "on his own life" within sect. 11 of above Act; (2) in the event that had actually occurred a valid trust for the wife was created within that sect.—*Re* IOAKIMIDIS' POLICY TRUSTS, IOAKIMIDIS *v.* HARTCUP, [1925] Ch. 403; 133 L. T. 796; 41 T. L. R. 486; 69 Sol. Jo. 662.

Construction of policy.]—*See, generally,* INSURANCE.

Effect of bankruptcy of husband.]—*See* BANKRUPTCY, Vol. V., p. 680, Nos. 6010–6012.

C. Appointment of Trustees.

See Married Women's Property Act, 1870 (c. 93), s. 10; Married Women's Property Act, 1882 (c. 75), s. 11.

1229. Jurisdiction to appoint—Unpaid premiums due to husband's incapacity—Exchange by trustees for fully-paid policy.]—Deft. effected a policy on his life for the benefit of his wife & children under Married Women's Property Act, 1870 (c. 93), s. 10. He became bkpt. & mentally deranged, & was unable to pay the premiums. By the rules of the insurance society the policy could be exchanged for a fully paid up policy of smaller value, & thus preserved from lapsing. The wife & only child of deft. brought this action, claiming the appointment of a trustee of the policy, & that such trustee might be authorised to exchange the policy for one fully paid up:—*Held:* the ct. under its general jurisdiction had power to appoint two trustees; & judgment was given to that effect, & otherwise as claimed.—SCHULTZE *v.* SCHULTZE (1887), 56 L. J. Ch. 356; 56 L. T. 231.

1230. Mode of application—Petition.]—Application for the appointment of trustees of a policy of life assurance, effected under Married Women's Property Acts, for the benefit of the wife & children of the assured, may be made by petition.—*Re* ATKINSON'S POLICY TRUSTS (1895), 13 R. 285.

1231. How intituled—Policy under Married Women's Property Act, 1870 (c. 93).]—A petition, presented since the coming into operation of Married Women's Property Act, 1882 (c. 75), for the appointment of trustees of the proceeds of a life policy effected by a husband, under Married Women's Property Act, 1870 (c. 93), for the benefit of his wife & children, ought to be entitled in the matter of the Act of 1882.—*Re* SOUTAR'S POLICY TRUSTS (1884), 26 Ch. D. 236; 54 L. J. Ch. 256; 50 L. T. 262; 32 W. R. 701.

Annotations:—**Consd.** *Re* Turnbull, Turnbull *v.* Turnbull, [1897] 2 Ch. 415. **N.F.** *Re* Kuyper's Policy Trusts, [1899] 1 Ch. 38.

1232. —— ——.]—A widow, whose husband

society a policy of assurance, described as an "endowment bond." The society undertook, in the event of the husband's death, before the expiry of twenty years, to pay the principal sum assured to his widow, whom failing, to the husband's exors., administrators or assigns. The husband having died within the twenty years, survived by his widow, & his estate having been sequestrated:—*Held:* the policy was "for the benefit of his wife" within Married Women's Policies of Assurance (Scotland) Act, 1880, s. 2, & the proceeds fell to the widow & not to the husband's creditors.—CHRYSTAL'S TRUSTEE *v.* CHRYSTAL, [1912] S. C. 1003.—**SCOT.**

died in 1898, petitioned for the appointment of trustees to receive payment of the money secured by a policy of assurance effected by him in 1874, under above Act, & expressed to be for her benefit: —*Held:* the petition was properly entitled only in the matter of above Act.—*Re* KUYPER'S POLICY TRUSTS, [1899] 1 Ch. 38; 68 L. J. Ch. 10; 79 L. T. 486; 47 W. R. 238.

1233. Necessity for appointment — Husband dying after Married Women's Property Act, 1882 (c. 75)—Policy under Married Women's Property Act, 1870 (c. 93).]—A policy for the benefit of a wife & children effected under Married Women's Property Act, 1870 (c. 93), s. 10, by a husband who dies after the commencement of Married Women's Property Act, 1882 (c. 75), does not vest in the legal personal representatives of the husband in trust for the beneficiaries as provided by Married Women's Property Act, 1882 (c. 75), s. 11, but a trustee must be appointed under Married Women's Property Act, 1870 (c. 93), s. 10.—*Re* TURNBULL, TURNBULL *v.* TURNBULL, [1897] 2 Ch. 415; 66 L. J. Ch. 719; 77 L. T. 47; 46 W. R. 3; 13 T. L. R. 546; 41 Sol. Jo. 677.

Annotation:—**Folld.** *Re* Kuyper's Policy Trusts, [1899] 1 Ch. 38.

D. Payment of Premiums by Husband.

1234. Pre-nuptial policy on own life by wife—Assignment by husband & wife—Husband's lien for premiums.]—A husband paid the premiums on a policy on the life of his wife taken out by her before marriage. The policy was assigned by the husband & wife to secure an obligation of the husband. The wife survived:—*Held:* the husband's estate had no lien on the policy for the premiums.—*Re* LESLIE, LESLIE *v.* FRENCH (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

Annotations:—**Consd.** Strutt *v.* Tippett (1890), 62 L. T. 475. **Refd.** Leigh *v.* Dickeson (1883), 12 Q. B. D. 194; Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 90 L. T. 266; *Re* Pearce, [1909] 2 Ch. 492; *Re* McKerrell, McKerrell *v.* Gowans (1912), 82 L. J. Ch. 22; *Re* Jones Settlmt. Stunt *v.* Jones, [1915] 1 Ch. 373. **Mentd.** *Re* Winchilsea's Policy Trusts (1888), 39 Ch. D. 168; The Ripon City, [1898] P. 78; Kenrick *v.* Mountsteven (1899), 48 W. R. 141; *Re* Phillips, [1914] 2 K. B. 689; *Re* Stokes, *Ex p.* Mellish, [1919] 2 K. B. 256.

1235. Policy on own life by husband—Assignment for benefit of wife & children—Rights of creditors on husband's bankruptcy.]—The payment of a premium on a life policy is not to be regarded as securing a certain part of the money assured by the policy. The whole of the premiums are paid to keep up the policy, & no proportionate part of the money payable under it is represented by the payment of any particular premium. Consequently, where the owner of a policy on his life by a post-nuptial settlement in 1877 assigned it to trustees for his wife & children, & he himself continued to pay the premiums voluntarily, being under no covenant with the trustees to do so, & in 1899 became bkpt. & died: —*Held:* no part of the payments of premiums during the ten years preceding the bkpcy. was a "settlement" within Bankruptcy Act, 1883 (c. 52), s. 47, so as to entitle the trustee in bkpcy. to any proportionate part of the policy moneys. —*Re* HARRISON & INGRAM, *Ex p.* WHINNEY, [1900] 2 Q. B. 710; 69 L. J. Q. B. 942; 83 L. T. 189; 49 W. R. 2; 16 T. L. R. 530; 44 Sol. Jo. 673; 7 Mans. 378, C. A.

See, generally, INSURANCE.

SUB-SECT. 3.—EQUITY OF EXONERATION.

A. When Arising.

1236. General rule.]—(1) The question whether a married woman who charges her property with money for the purpose of paying her husband's debts is entitled to have her property indemnified by him against the charge is a matter of inference to be drawn from the circumstances of each particular case, & where it appears that the debts, though legally the debts of the husband, were contracted to pay the expenses of the extravagant mode of living of both the wife & the husband, no inference of a right to indemnify will be drawn in her favour.

This doctrine applies in a case where the charge is made by the order of the ct. under sect. 39 of Conveyancing Act, 1881 (c. 41); & the silence of such an order as to the wife's right to indemnify is not necessarily fatal to her right, though it is one of the circumstances to be taken into consideration.

(2) In cases where orders have been made under sect. 39 of the Act, it is the order of the ct. which binds the estate of the wife, & not what she does when the restraint on anticipation is removed.

(3) Costs of resps. on an unsuccessful appeal by a married woman, pltf. in the action, ordered to be paid out of property of hers, subject to a restraint on anticipation under Married Women's Property Act, 1893 (c. 63), s. 2.—PAGET *v.* PAGET, [1898] 1 Ch. 470; 67 L. J. Ch. 266; 78 L. T. 306; 46 W. R. 472; 14 T. L. R. 315; 42 Sol. Jo. 378, C. A.

Annotations:—*As to* (1) **Apld.** *Re* Shaw, Shaw *v.* Jones (1905), 94 L. T. 93. **Consd.** Hall *v.* Hall, [1911] 1 Ch. 487. *Generally,* **Mentd.** Barron *v.* Willis, [1899] 2 Ch. 578; *Re* Bentinck, Bentinck *v.* Bentinck (No. 2) (1899), 80 L. T. 71; Dixon *v.* Steel (1901), 70 L. J. Ch. 794.

1237. Encumbrance of wife's property—For benefit of husband—Recoupment out of husband's estate.]—A. joined with B. her husband in making a mtge. for years of her inheritance, to raise money to buy a place. B. covenanted in the mtge. to pay the money, & on payment thereof by the proviso the term was to cease. The mtge. was afterwards assigned, & the proviso was that on payment by them, or either of them, the term was to be assigned as they or either of them should direct. B. by letter soon after the mtge., promised his wife to apply the profits to pay it off. He paid off the mtge. & took an assignment in trust for himself, & by will gave it to a second wife; the

---

PART VI. SECT. 8, SUB-SECT. 2.—D.

p. *Policy on own life by husband—In favour of wife & her heirs—Rights of creditors on husband's bankruptcy.*]—A husband who had executed no ante-nuptial marriage contract, took a policy of insurance on his own life in favour of his wife & her heirs, executors or assignees & paid the annual premium from his own funds. A few weeks before his death he was sequestrated:—*Held:* the policy had been taken as a provision for his wife, & was not to be regarded as a donation & so was not revoked by the husband's sequestration: & therefore his creditors were not entitled to the sum contained in it.—GALLOWAY *v.* CRAIG (1861), 23 Dunl. (Ct. of Sess.) 12; 4 Macq. 267; 33 Sc. Jur. 649, H. L.—**SCOT.**

q. —— *Assignment to wife without consideration—Wife predeceasing husband—Assignment to second wife.*]—A husband who had made no ante-nuptial provision for his wife, assigned to her a policy of assurance upon his life payable at his death. The assignation bound the husband to pay the premiums, which in fact he did. The wife predeceased the husband. The husband married again, & granted an assignation of the same policy in indentical terms in favour of his second wife. The second wife survived him:—*Held:* in the absence of evidence that the assignation in favour of the first wife was an onerous transaction, it must be presumed that it was intended merely as a provision for her in the event of her survivance, & as she had not survived, the proceeds of the policy did not form part of her estate; & claim for the second wife sustained.—PIRIE *v.* PIRIE, [1921] S. C. 781; 58 Sc. L. R. 538.—**SCOT.**

Sect. 8.—*Disposition between husband and wife: Sub-sect.* 3, *A.*]

son & heir brought a bill to have the mtge. assigned to him. The ct. would not relieve him, but on payment of principal, interest & costs; but this decree was reversed upon an appeal to the House of Lords.—HUNTINGTON (EARL) *v.* HUNTINGTON (COUNTESS) (1702), 2 Vern. 437; 2 Bro. Parl. Cas. 1; 2 Eq. Cas. Abr. 672; 23 E. R. 881, H. L.

Annotations:—**Folld.** Pocock *v.* Lee (1707), 2 Vern. 604. **Consd.** Tate *v.* Austin (1714), 1 P. Wms. 264; Kinnoul *v.* Money (1767), 3 Swan. 202, n. **Refd.** Jackson *v.* Innes (1819), 1 Bli. 104 Paget *v.* Paget, [1898] 1 Ch. 470 Hall *v.* Hall, [1911] 1 Ch. 487.

1238. —— ——.] & his wife mortgaged the wife's estate, & A. covenanted to pay the money, but the equity of redemption was reserved to them & their heirs. A. died & his wife survived:—*Held:* the mtge. should be discharged out of the husband's estate.

The husband having had the money, is in equity the debtor (*per* CUR.).—POCOCK *v.* LEE (1707), 2 Vern. 604; 23 E. R. 995.

Annotations:—**Refd.** Jackson *v.* Parker (1770), Amb. 687. **Mentd.** Rouse *v.* Jones (1844), 4 L. T. O. S. 129 A.

1239. —— —— ——.]—The wife joined with her husband in a fine to raise £400 by mtge. of her own estate, to buy a place for her husband. Husband died:—*Held:* the mtge. should be paid out of the husband's personal estate, if there was enough to pay all his other debts.

All the husband's debts, though by simple contract, shall be preferred to the mtge.—TATE *v.* AUSTIN (1714), 1 P. Wms. 264; 2 Vern. 689; 24 E. R. 382, L. C.

Annotations:—**Consd.** Clinton *v.* Hooper (1791), 1 Ves. 173; Hudson *v.* Carmichael (1854), Kay, 613. **Refd.** Kinnoul *v.* Money (1767), 3 Swan. 202, n.

1240. —— —— —— **Mortgage before marriage.**]—A covenant to pay the mtge. money not suable in equity, unless covenantor receives the money; as where a *feme sole*, seized of lands subject to a mtge., married B. & the mtge. is assigned, & B. in the deed of assignment covenants to pay the money & dies, his personal estate not liable in equity to pay the mtge. money.—BAGOT *v.* OUGHTON (1717), 1 P. Wms. 347; 24 E. R. 420, L. C.

Annotations:—**Consd.** Clinton *v.* Hooper (1791), 3 Bro. C. C. 201; Pitt *v.* Pitt (1823), Turn. & R. 180; Gee *v.* Smart (1857), 8 E. & B. 313. **Refd.** Leman *v.* Newnham (1747), 1 Ves. Sen. 51; Kinnoul *v.* Money (1767), 3 Swan. 202, n.; Twedell *v.* Twedell (1786), 2 Bro. C. C. 101; Clarendon *v.* Barham (1842), 1 Y. & C. Ch. Cas. 688; Nelson *v.* Booth (1857), 27 L. J. Ch. 110.

1241. —— —— ——.]—A husband has a mtge. upon his estate, the wife joins with him in charging her own, if she survives, her estate shall be looked on only as a pledge, & she is intitled to be satisfied out of his estate, as standing in the mtgee.'s place.—PARTERICHE *v.* POWLET (1742), 2 Atk. 383; 26 E. R. 632, L. C.

Annotations:—**Refd.** Hudson *v.* Carmichael (1854), Kay, 613. **Mentd.** Stowell *v.* Robinson (1837), 3 Bing. N. C. 928.

1242. —— —— ——.]—Regularly where the wife joins with the husband in mortgaging her estate, & the husband covenants for payment of the money, this ct. looks upon the husband as debtor, & it is presumed, that the wife meant only by joining in the security to make the creditor safe. Otherwise it is where the mtge. is made at the same time as the settlement, & the husband covenanted for payment for the satisfaction of the creditors; for it is then presumed the whole was but one transaction, & the estate should be charged, & especially if done to pay any of the wife's debts or charges upon her estate; & though more money was raised than sufficient for that purpose, as the transaction was single, I must suppose the parties had an uniform intention; & in the present case it appears that it was intended that the wife's estate should be charged, & I hold that the husband shall only keep down the interest for life (LORD THURLOW, C.).—LEWIS *v.* NANGLE (1752), 1 Cox, Eq. Cas. 240; Amb. 150; 2 Ves. Sen. 431; 29 E. R. 1146, L. C.

Annotations:—**Consd.** Kinnoul *v.* Money (1767), 3 Swan. 202, n.; Clinton *v.* Hooper (1791), 3 Bro. C. C. 201; Jackson *v.* Innes (1819), 1 Bli. 104. **Refd.** Dawson *v.* Bank of Whitehaven (1877), 6 Ch. D. 218; Paget *v.* Paget, [1898] 1 Ch. 470; Hall *v.* Hall, [1911] 1 Ch. 487. **Mentd.** Anon. (1789), 1 Ves. 29; Boyse *v.* Rossborough (1854), 3 De G. M. & G. 817.

1243. —— —— ——.]—Where a wife's estate is mortgaged for the benefit of the husband, she has a right to stand as a creditor; but this may be repelled by evidence to show her intention to the contrary.

If the heir will tell the exor. to pay the legacies, & that he will not press him for the exoneration of the estate, & the exor. pays on that assurance, the exor. shall not be called on afterwards, or the legatees be obliged to refund. . . . . In this case she has by her declaration to the exor. clearly disclaimed her right (LORD THURLOW, C.).—CLINTON *v.* HOOPER (1791), 3 Bro. C. C. 201; 1 Ves. 173; 1 Hov. Supp. 65; 29 E. R. 490, L. C.

Annotations:—**Consd.** Hudson *v.* Carmichael (1854), Kay, 613; Hall *v.* Hall, [1911] 1 Ch. 487. **Refd.** Ruscombe *v.* Hare (1818), 6 Dow. 1; Thomas *v.* Thomas (1855), 2 K. & J. 79; Paget *v.* Paget, [1898] 1 Ch. 470.

1244. —— —— ——.]—A wife who pledges her separate property for the debt of her husband, is entitled to have his property comprised in the same security first applied as between the wife & husband & his general assignee. Where a wife has an adequate settlement to her separate use, she is not entitled to a further provision out of a life interest to her, which the husband takes *jure mariti*, except in case of his desertion or insolvency. A *feme covert* may file her bill to avoid an annuity charged upon her separate property, without offering to repay the consideration; nor is there any lien for the consideration upon her separate property.—AGUILAR *v.* AGUILAR, LOUSADA (1820), 5 Madd. 414; 56 E. R. 953.

Annotations:—**Refd.** Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; *Re* Trueman, *Ex p.* Trueman (1872), 42 L. J. Bcy. 1; Giacometti *v.* Prodgers (1873), 8 Ch. App. 338; London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572; Nicholson *v.* Carline (1874), 22 W. R. 819. **Mentd.** Mansfield *v.* Ogle (1855), 24 L. J. Ch. 150.

1245. —— —— ——.]—Husband & wife mortgage the wife's estate, for the benefit of the husband; after the husband's death, the wife, being his personal representative, pays the interest of the mtge. during her life: her devisees are entitled to have the mtge. redeemed out of the real assets of the husband.—WILKINSON *v.* BEALE (1823), 1 L. J. O. S. Ch. 89.

1246. —— —— ——.]—In 1772 a husband & wife mortgaged their respective estates for securing a debt of the husband. The husband died in 1776, & in 1782 the produce of his estate was brought into ct. & accumulated. The wife died in 1805, & in 1832, the husband's mtge. creditor, neglecting to prosecute his claim against the husband's assets, obtained payment out of the produce of the wife's estate. In 1840, the heir of the husband petitioned for payment out of ct. of the accumulated fund arising from the husband's estate, & a reference was made to ascertain the incumbrances thereon. An unpaid judgment creditor of the wife carried in a claim, which having been disallowed, as founded on a mere equity, he, in 1841, filed a bill against the heir of the husband

& the representative of the wife, to establish his claim against the fund:—*Held:* the husband's debt having been paid out of the wife's estate, her estate had a right to be recouped out of the estate of the husband.—LANCASTER *v.* EVORS (1846), 10 Beav. 154; 16 L. J. Ch. 8; 50 E. R. 541; *affd.* (1848), 10 Beav. at p. 168, L. C.

Annotation:—**Mentd.** Drew *v.* Lockett (1863), 32 Beav. 499.

1247. —— —— ——.]—A married woman, entitled to property under a settlement to her separate use, concurred with her husband in raising money upon mtge. of it by a deed, which expressed that the money was borrowed by & paid to herself & her husband, but contained a covenant by the husband for repayment:—*Held:* the presumption was that the money was received by the husband, but that this presumption might be rebutted by extrinsic evidence.

In the absence of such evidence, the wife was only a surety for the husband, & was, after his death, entitled as against his other creditors to all the rights incident to that relation, & therefore had a right to have the debt paid off as a specialty debt, out of the husband's assets. If the mtge. be of the wife's freehold estate not settled to her separate use, she is still a surety, & has all the rights of a surety, except perhaps as against her husband's other creditors.

Qu.: whether, in this last case, if her estate has paid off the mtge., she has only a right to be repaid out of her husband's assets after all his other creditors by simple contract.—HUDSON *v.* CARMICHAEL (1854), Kay, 613; 2 Eq. Rep. 1077; 23 L. J. Ch. 893; 23 L. T. O. S. 168; 18 Jur. 851; 2 W. R. 503; 69 E. R. 260.

Annotations:—**Distd.** *Re* Smallpeice, *Ex p.* Smallpeice (1857), 30 L. T. O. S. 262. **Folld.** Hall *v.* Hall, [1911] 1 Ch. 487. **Refd.** Paget *v.* Paget, [1898] 1 Ch. 470; Dixon *v.* Steel (1901), 70 L. J. Ch. 794. **Mentd.** Ferguson *v.* Gibson (1872), L. R. 14 Eq. 379; Barron *v.* Willis, [1899] 2 Ch. 578.

1248. —— —— —— **Mortgaged property out of jurisdiction.**]—If pltf. who is domiciled in this country sues a British subject here in respect of, or to have the foreign real estate of the pltfs. exonerated by deft. from a money demand, & such deft. appears to the suit, this ct. will entertain it, although deft. may be actually residing abroad, & the whole subject-matter of the suit, *ultra* the mere personal claim of pltf., may be in a foreign country & out of the jurisdiction of the ct.

A Scotswoman was married, according to the law of Scotland, to X., whose domicil of origin was English. The husband & wife then joined in executing two Scottish instruments, purporting to charge the wife's reversionary interest in her Scottish realty with the payment of a debt due from the husband to a Scottish creditor. The wife was divorced by the law of Scotland, on the ground of her adultery; after which she was married to Y., a domiciled Englishman. The wife's reversionary interest fell into possession; & she & her second husband then filed a bill in this ct. against X., who was residing out of its jurisdiction, but who appeared to the suit, praying a decree for the payment of the debt, or for the exoneration by him of the wife's Scottish realty therefrom:—*Held:* pltfs. were entitled to the relief which they sought.—DRUMMOND *v.* DRUMMOND (1868), 37 L. J. Ch. 811; 18 L. T. 896; 17 W. R. 6.

1249. —— **Part proceeds for husband's benefit—Recoupment pro tanto.**]—There are many cases in equity where, money having been borrowed on the security of the wife's estates, for the discharge of the husband's debt, relief has been given & the wife's estate exonerated, at least until the husband's debt has been exhausted . . . & the rule appears to have been applied where the money borrowed was in part only for the discharge of the husband's debt, & in part for that of the wife's, contracted before marriage. There the wife's estate will be exonerated in part; for that part she will be considered to have been his creditor; & for the remainder her estate will be liable. The same principle seems clearly applicable in the converse case, where the object of the proceeding is to charge the personal estate of the husband, primarily, & exoneration is sought for that, by throwing the primary charge upon the wife's estate, on the ground of the covenant having been only for a discharge of her debt (COLERIDGE, J.).—GEE *v.* SMART (1857), 8 E. & B. 313; 26 L. J. Q. B. 305; 29 L. T. O. S. 278; 3 Jur. N. S. 1056; 5 W. R. 761; 120 E. R. 116.

1250. —— **Property not for separate use—Right not affected.**]—HUDSON *v.* CARMICHAEL, No. 1247, *ante*.

1251. —— **Restrained property charged by order of court—Silence of order as to right to recoup—Right not prejudiced.**]—PAGET *v.* PAGET, No. 1236, *ante*.

1252. Husband's right against wife's estate—Covenant by husband to repay—Mortgage not benefiting husband.]—GRAY *v.* DOWMAN, No. 1269, *post*.

1253. Mortgage of husband's & wife's property—Mortgage debt paid out of wife's property—Right to interest.]—Husband & wife mortgaged their respective estates for securing the husband's debt. Both estates were sold & conveyed free from the mtge., & in 1832 the debt was paid out of the produce of the wife's estate. In 1841 a bill was filed to have the amount recouped out of the produce of the estate of the husband which was in ct.:—*Held:* the representative of the wife was not entitled to interest on the amount paid.—LANCASTER *v.* EVORS (1847), 10 Beav. 266; 16 L. J. Ch. 308; 50 E. R. 585.

Annotation:—**Refd.** Hudson *v.* Carmichael (1854), 2 Eq. Rep. 1077.

1254. Exercise of joint power of appointment—By way of mortgage for husband's benefit—Wife entitled to moiety in default—No equity raised.]—(1) By a post-nuptial settlement in 1832, three estates, the property of the husband, were limited to the husband for life, remainder to such uses as husband & wife should jointly appoint for the purpose of raising money by way of mtge. or otherwise, & in default of such appointment to a trustee for a term of years upon trust to raise sums not exceeding £600, to pay debts of the husband, remainder to the wife for life, remainder as to one moiety to the husband in fee, & as to the other moiety to such uses as the wife should appoint, & subject thereto to herself in fee. In 1835 the joint power of appointment was exercised to raise two sums of £600 & £400 to pay debts of the husband:—*Held:* the wife's moiety was not entitled to be indemnified to the extent of these sums out of the husband's moiety; the property being absolutely in the hands of a mtgee. in priority to these limitations, & not having been conveyed by the wife, but having been appointed merely in exercise of a joint power: & the wife's estate having been expressly limited to her in default of execution of the power.

(2) Three estates, when put into settlement, were subject two of them to two mtgees. amounting to £2,400, & the third to a third for £3,000. The husband being tenant for life, became insolvent in 1841. In 1840 a judgment was recovered against him & duly registered. From 1841, the

Sect. 8.—Disposition between husband and wife: Sub-sect. 3, A. & B. (a) & (b), C. & D.]

interest on the £3,000 fell into arrear, whilst the mtgees. of the £2,400 entered & received rents in excess of interest:—*Held:* the tenant for life was not entitled to have the benefit of the excess on the one estate until he had kept down the interest on the other.

(3) But, inasmuch as, when the judgment was recovered, no sum had been paid by the tenant for life in discharge of principal, & he had become insolvent before any part of the profits received by the mtgees. could be applied in part payment of the principal, the judgment creditor was held to be subject to the same equities as affected the tenant for life; & the appointee of the wife's moiety was held entitled to have the arrears during the life of the tenant for life set off against the accumulations before the judgment creditor was entitled to stand as an incumbrancer against the wife's moiety. It being alleged by the judgment creditor that no loss to the wife's estate was sustained by letting the interest fall into arrear, the principal & arrears of interest being more than the value of the estate an inquiry was directed.—SCHOLEFIELD *v.* LOCKWOOD (1863), 4 De G. J. & Sm. 22; 3 New Rep. 177; 33 L. J. Ch. 106; 9 L. T. 400; 9 Jur. N. S. 1258; 12 W. R. 114; 46 E. R. 832, L. C.

1255. Equity against mortgagee—Mortgage of reversionary interest—Trust to pay husband's debt—Right to surplus.]—A., a married woman, who was entitled, for her separate use, to a reversionary interest in personalty, joined with her husband in assigning same to trustees for a banking co., upon trust to receive same, & thereout in the first place to pay costs, & then to retain & pay to the co. the moneys due from the husband. The husband also assigned a policy of assurance upon his wife's life, to be held on same trusts. There was no proviso for redemption or power of sale in the deed; but the husband covenanted to pay the moneys secured. At the instance of the co., the usual foreclosure decree was made; but the Lord Chancellor, considering that the wife was in the position of a surety, reversed this, as the co. could have no claim against her reversionary interest beyond what the trusts of the deed prescribed; viz., to retain, out of the reversionary interest when it fell in, the moneys secured. —STAMFORD, SPALDING & BOSTON BANKING CO. *v.* BALL (1862), 4 De G. F. & J. 310; 31 L. J. Ch. 143; 5 L. T. 594; 8 Jur. N. S. 420; 10 W. R. 196; 45 E. R. 1203, L. C.

1256. Release of dower to facilitate mortgage—Insufficient to raise equity.]—A wife married before Dower Act, 1833 (c. 105), joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate, to secure his debt. By the mtge. deed the equity of redemption was reserved to the husband:—*Held:* (1) the wife's right to dower was extinguished in equity as well as at law, & she had no right to redeem the estate. (2) as she had pledged no estate recognised by a ct. of equity, & had undertaken no personal liability on behalf of her husband, she had no right in the character of a surety for his debt to have the value of her dower made good after his death out of the surplus proceeds of sale of the property which had been during his life sold by the mtgee. under a power of sale contained in the mtge deed.—DAWSON *v.* BANK OF WHITEHAVEN (1877), 6 Ch. D. 218; 46 L. J. Ch. 884; 37 L. T. 64; 26 W. R. 34, C. A.

Annotation:—As to (1) **Distd.** Meek *v.* Chamberlain (1881), 8 Q. B. D. 31.

1257. —— ——.]—The owner in fee of certain lands died intestate, leaving a widow entitled to dower thereout. The heir-at-law executed a mtge. of the lands to secure a sum of money advanced to him by a building society. The widow was a party to the mtge. deed, by which, "for the purpose of extinguishing her right to dower," she granted & released the lands to the mtgees., the trustees of the building society. It was provided by the deed that, upon repayment of the money secured thereby, a receipt should be endorsed thereon on the form given by 6 & 7 Will. 4, c. 32, to the intent that the deed should be vacated & the property comprised therein be revested in the person or persons for the time being interested in the equity of redemption therein. The moneys secured by the deed having been repaid, & the statutory receipt indorsed thereon:—*Held:* the widow was, notwithstanding. the release of her dower contained in the mtge. deed, entitled to have dower assigned to her out of the premises comprised in the deed.—MEEK *v.* CHAMBERLAIN (1881), 8 Q. B. D. 31; 51 L. J. Q. B. 99; 46 L. T. 344; 30 W. R. 228, D. C.

1258. —— Mortgage of settled estate—Charged for wife's jointure.]—The owner of certain estates, part of which were settled & part of which were unsettled, mortgaged them. His wife, who had a charge upon the settled estates for her jointure, joined in the mtge. The mtgor., with the concurrence of the mtgees., sold a portion of the unsettled estates, & part of the purchase money was paid to the mtgees. in reduction of the mtge. debt, & the balance was paid to the mtgor. The wife claimed as against the mtgees. that the balance should have been paid to her to recoup her for anything which was thrown on the settled estates:—*Held:* whatever equity she might have against her husband, the mtgor., she had none against the mtgees.—NOYES *v.* POLLOCK (1886), 32 Ch. D. 53; 55 L. J. Ch. 513; 54 L. T. 473; 34 W. R. 383, C. A.

B. Benefit to Husband.

(a) When Presumed.

1259. General rule—Presumption of benefit.]—If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use; & the ct. will direct an inquiry as to this fact.—THOMAS *v.* THOMAS (1855), 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. N. S. 1160; 4 W. R. 135; 69 E. R. 701.

Annotations:—**Mentd.** Pelly *v.* Bascombe (1863), 4 Giff. 390; Wall *v.* Stanwick (1887), 34 Ch. D. 763; Tinker *v.* Rodwell (1893), 69 L. T. 591; *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40; Corea *v.* Appuhamy, [1912] A. C. 230; Muttunayagam *v.* Brito, [1918] A. C. 895.

1260. Wife's property mortgaged—Covenant by husband to repay.]—LEWIS *v.* NANGLE, No. 1242, *ante.*

1261. —— ——.]—HUDSON *v.* CARMICHAEL, No. 1247, *ante.*

1262. —— Money expressed as paid to husband—On face of deed.]—Where a wife concurs with her husband in mortgaging her property, & it appears on the face of the mtge. deed that the money was paid to the husband, or, before 1883, to the husband & wife, the ct. infers, subject to rebutting evidence, that the debt is the debt of the husband, & that the wife's property is a surety for it. By way of rebuttal it may be shown either that the money was in fact paid to the wife in such a way as to become her separate property, or that it was applied by the husband

for her benefit.—HALL *v.* HALL, [1911] 1 Ch. 487; 80 L. J. Ch. 340; 104 L. T. 529.

Rebuttal of presumption.] —*See* Sub-sect. 3, B. (*b*), *post.*

(*b*) *Rebuttal of Presumption.*

1263. Mortgage before marriage—No benefit to husband—Husband covenanting to pay on transfer.] —BAGOT *v.* OUGHTON, No. 1240, *ante.*

1264. Mortgage to discharge ante-nuptial debts—More money raised than required for debts—Surplus received by husband.]—LEWIS *v.* NANGLE, No. 1242, *ante.*

1265. —— Husband tenant by curtesy.] —A woman, being entitled to some estates in possession, & to others in reversion on the decease of her mother, settled them previous to her marriage, to the use of trustees for ninety-nine years to secure pin money, remainder to herself & her intended husband for their joint lives; & in case she should survive, remainder to her for life; with remainder as to the estates in reversion, to the first & other sons of the marriage in tail male, remainder to such uses as she, notwithstanding coverture, should appoint, & in default of appointment, remainder to her in fee; with remainder, as to the estates in possession, after her death, to such persons as she should appoint, with like remainder in default of appointment; & by the marriage articles it was agreed, that if the husband would have been entitled to be tenant by the curtesy, in case of no settlement, he should enjoy the lands as if no settlement had been made. The husband became entitled to be tenant by the curtsey; after the marriage, a sum of £2,500 for paying debts of the wife due prior to the marriage, was raised by mtge. of the estates, the husband joining & covenanting for payment of the mtge. money; & a further sum of £4,500 was raised on a like security; & afterwards a sum of £1,000 for paying interest on the former sums; the wife died without issue surviving her, having by her will devised the estates to her husband for life, with a limitation of them after his decease, "subject to such incumbrances as they were then subject to:" on a bill by the husband, an inquiry was directed into the application of the money raised, & the husband was held discharged from so much as was applied to the wife's use, except that as tenant for life he ought to keep down the interest; but the will of the wife was construed not to charge the estates with the whole sum, in exoneration of the husband.—KINNOUL (EARL) *v.* MONEY (1767), 3 Swan. 202; cited in 1 Ves. at p. 186; 36 E. R. 830, L. C.

Annotations:—**Consd.** Clinton *v.* Hooper (1791), 3 Bro. C. C. 201; Hudson *v.* Carmichael (1854), Kay, 613; Hall *v.* Hall, [1911] 1 Ch. 487. **Refd.** Paget *v.* Paget, [1898] 1 Ch. 470.

1266. Mortgage contemporaneous with settlement—One transaction presumed—Discharge of wife's debts.]—LEWIS *v.* NANGLE, No. 1242, *ante.*

1267. Mortgage partly for husband's benefit—Exoneration pro tanto.]—GEE *v.* SMART, No. 1249, *ante.*

1268. Money borrowed for wife's benefit—Extrinsic evidence.]—HUDSON *v.* CARMICHAEL, No. 1247, *ante.*

1269. —— ——.]—A husband & wife joined in mortgaging the wife's separate estate, & the husband covenanted to secure the repayment of the debt:—*Held:* parol evidence might be admitted to show that the money so borrowed was for the benefit of the wife; the husband's joining in the mtge. deed was only by way of suretyship; & his estate would be indemnified by the separate estate of his wife.—GRAY *v.* DOWMAN (1858), 27 L. J. Ch. 702; 31 L. T. O. S. 279; 6 W. R. 571.

1270. —— Inquiry.]—THOMAS *v.* THOMAS, No. 1259, *ante.*

1271. —— Sufficiency of evidence.] —HALL *v.* HALL, No. 1262, *ante.*

1272. Debts due to extravagance—Of husband & wife.]—PAGET *v.* PAGET, No. 1236, *ante.*

C. Priority between Wife and Husband's Creditors.

1273. Whether wife's claim postponed—To simple contract creditors.] —TATE *v.* AUSTIN, No. 1239, *ante.*

1274. —— ——.] —HUDSON *v.* CARMICHAEL, No. 1247, *ante.*

1275. —— To trustee in bankruptcy.] —AGUILAR *v.* AGUILAR, LOUSADA, No. 1244, *ante.*

1276. —— ——.]—Devise of a freehold estate to A., a married woman, in fee. A. joined with her husband in a mtge. of this estate to secure an advance made to him, & which, by the deed, he covenanted to repay. The re-conveyance was, by the terms of the deed, to be made to the husband in fee; & in the event of a sale by the mtgees. the surplus, if any, was to be paid to him, his exors., etc., for his & their own use & benefit. By an agreement executed a month afterwards, but which it was sworn was entered into at the time of, & was the inducement to A. to execute the mtge. deed, it was agreed that, as between A. & her husband, his estate was to be primarily liable to the payment of the mtge. debt, interest & costs, & that, in the event of a sale by the mtgees., the surplus if any, should be paid to her. Upon the bkpcy. of the husband the estate was sold, with the concurrence of the assignees, but failed to realise sufficient to satisfy the mortgagees:—*Held:* having parted with her estate to her husband by executing the mtge. deed, it became his, & consequently, she was not entitled to be recouped out of the assets the value of such estate as against the creditors of the husband.—*Re* SMALLPEICE, *Ex p.* SMALLPEICE (1857), 30 L. T. O. S. 262.

1277. —— ——.]—Mrs. T., as co-heiress with her sister of certain freeholds & copyholds of their mother, made a partition & settlement of her one equal moiety thereof to such uses as she & her then husband should jointly appoint, & subject thereto to the separate use of Mrs. T. for life, remainder to the survivor of Mr. & Mrs. T. for life, remainder to the uses of any deed or will which Mrs. T., whether *covert* or *sole*, should execute, with ultimate remainder to Mrs. T. in fee. Mtges. for the husband's benefit for sums amounting altogether to £5,250 were made in exercise of the joint power of appointment, & the husband afterwards made a general assignment of all his estate on trust for his creditors:—*Held:* the mtges. being substantially of the wife's estate, the wife's claim as surety to the extent of the mtges. was prior to the claim of the creditors' trustees, who were directed to convey the premises to a purchaser, it appearing upon the mutual admissions of counsel on both sides that the mtges. exhausted the amount of the purchase money.—*Re* TRUEMAN, *Ex p.* TRUEMAN (1872), 42 L. J. Bcy. 1; 21 W. R. 105.

Loans made by wife to husband—Priority in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 481 *et seq.*

D. Waiver.

1278. Disclaimer to husband's executors.] —CLINTON *v.* HOOPER, No. 1243, *ante.*

Sect. 8.—*Disposition between husband and wife: Sub-sects.* 4 *&* 5. *Sect.* 9: *Sub-sect.* 1, *A.*]

SUB-SECT. 4.—JOINT MORTGAGE.

1279. Wife's property—Equity reserved to husband—Right of wife to redeem.]—A man marries a jointress of houses which are burnt down, & they borrow £1,500 to rebuild, & levy a fine *sur concess*, & by deed between the husband & conusee the equity of redemption is reserved to the husband & his heirs; he lays out £3,000 in building & dies. Decreed the wife & not the heir to redeem.—BREND *v.* BREND (1683), 1 Vern. 213; 1 Eq. Cas. Abr. 62, 316; 23 E. R. 421.

Annotations:—**Consd.** Jackson *v.* Innes (1819), 1 Bli. 104. **Refd.** Jackson *v.* Parker (1770), Amb. 687; Clinton *v.* Hooper (1791), 1 Ves. 173; Ruscombe *v.* Hare (1818), 6 Dow. 1. **Mentd.** Trulock *v.* Robey (1847), 2 Ph. 395.

1280. Copyholds.]—Husband & wife mortgaged the wife's freeholds for one thousand years, reserving the power to redeem to them, or either of them, & covenanted to levy a fine to the mtgee. for the term, &, subject thereto, to the husband in fee: they also surrendered the wife's copyholds to the mtgee. in fee, reserving the power to redeem to the husband & his heirs; the husband afterwards released his equity of redemption, as to both estates, to the mtgee. in fee: the mtgee. entered into possession, & the husband afterwards died:—*Held:* the wife was entitled to redeem the copyholds, but not the freeholds.—REEVE *v.* HICKS (1825), 2 Sim. & St. 403; 4 L. J. O. S. Ch. 85; 57 E. R. 400.

Annotations:—**Consd.** Raffety *v.* King (1836), 1 Keen, 601. **Refd.** Whitbread *v.* Smith (1854), 3 De G. M. & G. 727.

1281. —— —— ——.]—N. being entitled to certain lands as issue in tail, conveyed them in 1749 by lease & release to a mtgee. in fee to secure £800 borrowed, & levied a fine of the lands pursuant to covenant for the purpose of perfecting the security. In 1762 N. borrowed £450 & charged it upon the same lands by deed poll. N. died in 1764, leaving the charge upon the lands of the aggregate sum of £1,250, with an arrear of interest, & he by his will devised all his lands to M. his wife. In 1766, M. having married A. B., they by lease & release reciting the mtge., & that A. B. had paid the interest, granted & confirmed the mtged. lands to the mtgee., reserving the equity of redemption to A. B. his heirs, etc. By a deed in 1789, £300 an arrear of interest, was added to the principal, & the aggregate sum of £1,550 was charged on the lands, subject to redemption as by the former deed. M. died in 1794, leaving R. H., a son by the first husband, her heir-at-law. In 1797 A. B. sold part of the mtged. lands, & in consideration of £2,000 principal & interest, paid to the mtgee., & £600 paid to A. B. he & the mtgee. conveyed such part of the lands to R. R., the purchaser. The rest of the lands was conveyed by the mtgee. to A. B. who died in 1799. Under these circumstances the heir-at-law of M. filed a bill in the Exch. to redeem the lands, & the ct. decreed that he was entitled to redeem on payment of the principal money due upon the mtge., & interest calculated from the death of A. B. Upon appeal to the House of Lords the decree was affirmed, the House being of opinion that the representative of the husband was not entitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife.—RUSCOMBE *v.* HARE (1828), 2 Bli. N. S. 192; 4 E. R. 1103, H. L.

Annotations:—**Expld.** Jackson *v.* Innes (1810), 1 Bli. 104. **Consd.** Anson *v.* Lee (1831), 4 Sim. 364; Heather *v.* O'Neil (1858), 2 De G. & J. 399. **Refd.** Plowden *v.* Hyde (1852), 2 De G. M. & G. 684; Whitbread *v.* Smith (1854), 23 L. J. Ch. 611; Atkinson *v.* Smith (1858), 3 De G. & J. 186.

1282. Lands in settlement—Instrument effective as charge only—Notwithstanding equity reserved to either party.]—Where lands are in settlement, & the husband & wife join in a mtge. of them, if the deed creating the security is no more in effect than a simple charge upon the lands, & does not alter the limitations further than is necessary to create the charge, the right of redemption, although it be reserved by the deed to the husband & wife, or either of them, their or either of their heirs, etc., belongs only to those who are entitled under the settlement, & not to the heirs of the husband, if he survive the wife.

But where the lands of A. upon her marriage were settled to the use of husband & wife successively for life, remainder in strict settlement, remainder to the wife & her heirs, with a power of revocation & appointment of new uses; & she joined with her husband in a mtge., & by the deed to lead the uses of a fine which the husband & wife afterwards levied, according to covenant, the lands after the determination of the term, created to secure the repayment of the money borrowed, were limited to the husband & wife, & survivor for life, remainder in tail special; remainder, for default of such issue, to the right heirs of the survivor of husband & wife: The wife having died, without issue, leaving the husband survivor:—*Held:* this was more than a mere mtge. transaction; there was evidence of an intention to effect a change of the beneficial interest; & there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; & consequently the husband & his heirs, & not the heirs of the wife, were entitled to the equity of redemption.—JACKSON *v.* INNES (1819), 1 Bli. 104; 4 E. R. 38, H. L.

Annotations:—**Apld.** Reeve *v.* Hicks (1825), 2 Sim. & St. 403. **Consd.** Clark *v.* Burgh (1845), 2 Coll. 221; Whitbread *v.* Smith (1854), 3 De G. M. & G. 727; Atkinson *v.* Smith (1858), 3 De G. & J. 186; Dawson *v.* Bank of Whitehaven (1877), 6 Ch. D. 218 Jones *v.* Davies (1878), 8 Ch. D. 205. **Refd.** Plowden *v.* Hyde (1852), 2 De G. M. & G. 684; Eddleston *v.* Collins (1853), 3 De G. M. & G. 1; Walker *v.* Armstrong (1856), 21 Beav. 284; Heather *v.* O'Neill (1858), 27 L. J. Ch. 512; Hastings *v.* Astley (1861), 30 Beav. 260; Plomley *v.* Felton (1888), 14 App. Cas. 61. **Mentd.** Hipkin *v.* Wilson (1850), 15 L. T. O. S. 559.

Effect as to equity of exoneration.]—*See* Subsect. 3, *ante.*

See, generally, MORTGAGE.

SUB-SECT. 5.—GIFTS.

See Sect. 9, *post.*

SECT. 9.—GIFTS BETWEEN HUSBAND AND WIFE.

SUB-SECT. 1.—REQUISITES FOR VALIDITY.

A. In General.

See Conveyancing Act, 1881 (c. 41), s. 50.

1283. Necessity for irrevocable act—Beneficial interest divested.]—Testator having proved the

PART VI. SECT. 9, SUB-SECT. 1.—A.

r. *Gift of chose in action—Whether intervention of trustee necessary.*]—Since Married Women's Property Act, 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.—SHERRATT *v.* MERCHANTS

value of annuities, secured to the separate use of his wife, as a debt under the bkpcy. of the grantors, his assets were charged with the dividends only, upon the foot of that transaction, not with the annuities, as subsisting. A claim by testator's widow to dividends, to which he was entitled under a bkpcy., as a gift by him to her separate use, failed; the evidence not even affording a sufficient ground for directing an issue.

Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear & distinct act of his, by which he divested himself of his property, & engaged to hold it as a trustee for the separate use of his wife. If I were to admit declarations of intention or of disposition of his property to the use of his family, I should let in a sort of evidence, & upon a principle, that would have a most extensive effect (*per* CUR.). —M'LEAN *v.* LONGLANDS (1799), 5 Ves. 71; 31 E. R. 477.

Annotations:—**Consd.** Walter *v.* Hodge (1818), 2 Swan. 92. **Refd.** Mews *v.* Mews (1852), 15 Beav. 529.

1284. -.]—A gift by a husband to his wife, either as a *donatio mortis causa*, or as a *donatio inter vivos* to her separate use, must be established by evidence beyond suspicion: a claim of that nature negatived. *Qu.:* deft. by her answer having claimed a gift from her husband as an absolute *donatio inter vivos* to her separate use, whether evidence can be received to establish it as a *donatio mortis causa*.

The single question therefore in applying this doctrine to a particular subject, would be, whether the claimant had satisfactorily established a clear distinct act of the husband by which he dvested himself of the property & agreed to hold it as trustee for his wife (PLUMER, M.R.).—WALTER *v.* HODGE (1818), 2 Swan. 92; 1 Wils. Ch. 445; 36 E. R. 549.

Annotations:—**Consd.** Price *v.* Price (1851), 18 L. T. O. S. 131. **Distd.** Grant *v.* Grant (1865), 34 Beav. 623. **Refd.** Edwards *v.* Jones (1835), 7 Sim. 325; Mews *v.* Mews (1852), 15 Beav. 529; Hoyes *v* Kindersley (1854), 2 Sm. & G. 195. **Mentd.** Ashworth *v.* Outram (1877), 5 Ch. D. 923.

1285. -.]—A gift may be made by a husband to his wife, which, though bad in law, will be supported in equity. Though the property does not pass at law, yet, in equity, a husband, being the legal owner, may become a trustee for his wife, & if by clear & irrevocable acts he has made himself a trustee, the gift to his wife will be conclusive.

To constitute a gift between husband & wife, there must either be a clear irrevocable gift to a trustee for the wife, or some clear & distinct act of the husband, by which he divested himself of his property, & engaged to hold it as a trustee for the separate use of his wife. If a man were to deposit money with bankers, directing them to hold it for his wife, that would probably be sufficient. A farmer's wife, with his knowledge & sanction, deposited the produce of the surplus butter, eggs, & poultry with a firm in her own name, & he called it "her money," On his deathbed he gave his exor. directions to remove the money, & to do the best he could with it for his wife:—*Held:* the evidence was not sufficient to establish a gift between them, & the hüsband had neither made the firm nor himself trustees for his wife. —MEWS *v.* MEWS (1852), 15 Beav. 529; 51 E. R. 643.

Annotations:—**Expld. & Distd.** Grant *v.* Grant (1865), 34 Beav. 623. **Consd.** Parker *v.* Lechmere (1879), 12 Ch. D. 256. **Refd.** Williams *v.* Mercier (1882), 51 L. J. Q. B. 594.

1286. When gift presumed—Sufficiency of evidence.]—Gift by a *feme covert* of her separate property to her husband not inferred without clear evidence nor on the other hand against the husband a gift to her separate use. Husband a trustees for the separate use of his wife.—RICH *v.* COCKELL, RICH *v.* HULL (1804), 9 Ves. 369; 32 E. R. 644, L. C.

Annotations:—**Consd.** Gardner *v.* Gardner (1859), 1 Giff. 126; *Re* De Burgh Lawson, De Burgh Lawson *v.* De Burgh Lawson (1885), 55 L. J. Ch. 46; *Re* Harris, Leacroft *v.* Harris, [1909] 2 Ch. 206. **Refd.** Walter *v.* Hodge (1818), 2 Swan. 92; Caton *v.* Rideout (1849), 2 H. & Tw. 33; Darkin *v.* Darkin (1853), 17 Beav. 578; Haddon *v.* Fladgate (1858), 1 Sw. & Tr. 48; Smith *v.* Harding (1865), 6 New Rep. 333; Carnegie *v.* Carnegie (1874), 30 L. T. 460; *Re* Curtis, Hawes *v.* Curtis (1885), 52 L. T. 244; Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385; *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663. **Mentd.** Schroder *v.* Schroder (1854), Kay, 578; *Re* Flamank, Wood *v.* Cock (1889), 40 Ch. D. 461.

—— **Husband & wife.**]—*See* Sub-sect. 2, A., *post.*

—— **Wife to husband.**]—*See* Sub-sect. 3, B., *post.*

1287. Necessity for acceptance.] — By the marriage settlement of A. & B. it was provided among other things that, out of Bank of Ireland Stock, belonging to B., the wife, an amount equal to £10,000 should be transferred into their joint names in trust for B. for her sole & separate use. A. & B. lived together during the marriage from 1874 to 1887, when A., the husband, died, & the income of the £10,000 was received by A. The capital was realised by A. in his lifetime & applied to his own use. The evidence showed that B. wished to give the £10,000 to A., but he refused it & always spoke of the sum as B.'s £10,000. In 1888 B. made an affidavit verifying a schedule of A.'s debts, & stated that he had no other debts. The schedule did not include the £10,000. B. had no independent advice. By his will, made on Nov. 3, 1884, A. gave a legacy of £10,000 to B. together with the use during her life of all the property of which he should be possessed at the date of his death. Then he gave a series of legacies. B. took out a summons to determine certain points under the will, & claimed to prove as a creditor against the estate for £10,000, being moneys belonging to her for her separate use:—*Held:* there was no evidence of acceptance by A. of the gift from B. & the evidence was not sufficiently cogent to destroy the trust; therefore B. was entitled to rank as creditor against A.'s estate for £10,000 with interest at 4 per cent. since his death.—*Re* BLAKE, BLAKE *v.* POWER (1889), 60 L. T. 663; 37 W. R. 441.

—— **Presumption in absence of disclaimer.**]—*See, generally,* GIFTS, Vol. XXV., pp. 518–520, Nos. 130–134.

Declaration of trust.]—*See* Sub-sect. 1, B., *post.*

Gift of chattels.]—*See* Sub-sect. 1, C., *post.*

Gifts impeachable by creditors.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 149 *et seq.*

BANK OF CANADA (1894), 21 A. R. 475. —**CAN.**

s. *Necessity for deed or delivery of possession.*]—A gift may be made by a husband to his wife &, unless creditors can assert the Bills of Sale Act, such gift is valid. But there cannot be a gift unless there is a deed or an actual delivery of possession.—KINGSMILL *v.* KINGSMILL (1918), 41 O. L. R. 238; 13 O. W. N. 252.—**CAN.**

t. *Proof of gift—Nature of evidence required.*]—In order to establish a gift or sale between husband & wife evidence must be unequivocal & beyond suspicion.—SULLIVAN *v.* SCHOOL TRUSTEES (1920), 53 D. L. R. 724.—**CAN.**

Sect. 9.—*Gifts between husband and wife: Sub-sect.* 1, *B. & C.; sub-sect.* 2, *A.* (*a*).]

B. Where Made by Declaration of Trust.

Beneficial interest must be divested.]—*See* Nos. 1283–1285, *ante*

1288. Declaration must be clear & irrevocable.]—MEWS *v.* MEWS, No. 1285, *ante.*

1289. ——.]—Gifts of chattels by a husband to his wife supported. A husband may constitute himself a trustee for his wife; the declaration need not be in writing, but the words must be clear, unequivocal & irrevocable.—GRANT *v.* GRANT (1865), 34 Beav. 623; 6 New Rep. 347; 34 L. J. Ch. 641; 12 L. T. 721; 11 Jur. N. S. 787; 13 W. R. 1057; 55 E. R. 776.

Annotations:—**Consd.** *Re* Breton's Estate, Breton *v.* Woollven (1881), 17 Ch. D. 416. **Refd.** Browne *v.* Collins (1872), 21 W. R. 222. Baddeley *v.* Baddeley (1878), 9 Ch. D. 113; Williams *v.* Mercier (1882), 51 L. J. Q. B. 594. **Mentd.** Moore *v.* Moore (1874), L. R. 18 Eq. 474.

1290. —— **Words of present intention insufficient.**]—*Re* BRETON'S ESTATE, BRETON *v.* WOOLLVEN, No. 1299, *post.*

1291. —— **Necessity for corroborative evidence.**]—*Re* WHITTAKER, WHITTAKER *v.* WHITTAKER, No. 699, *ante.*

1292. What amounts to—Conveyance to trustees—To avoid forfeiture.]—A. plotting for the King in Cromwell's time, took counsel's advice & conveyed certain lands to trustees to hold as his wife should, without his interference, dispose. But he himself drew the rents of the lands until his death. The widow sued his exors. for an account & satisfaction of such profits received by the husband, but on a bill by the exor. for relief, it was decreed in his favour.—HARVEY *v.* HARVEY (LADY) (1686), 2 Cas. in Ch. 180; 22 E. R. 901, L. C.; *previous proceedings, sub nom.* HARVEY *v.* MOUNTAGUE (1682), 1 Vern. 122.

Annotation:—**Mentd.** Fitzgerald *v.* Fauconberge (1729), Fitz-G. 207.

1293. —— **Effect of incomplete assurance—Deed poll.**]—A. being seized in fee, executed a deed poll, whereby he voluntarily granted it to his wife as her sole & absolute property for ever: —*Held:* this was an imperfect voluntary gift; the relation of trustee & *cestui que trust* had not thereby been created, & a ct. of equity would not interfere to assist either party.—PRICE *v.* PRICE (1851), 14 Beav. 598; 21 L. J. Ch. 53; 18 L. T. O. S. 131; 51 E. R. 414; *on appeal* (1852), 1 De G. M. & G. 308, L. JJ.

1294. —— —— ——.]—A husband by deed poll recited as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled," & continued as follows: "I do hereby settle, assign, transfer, & set over unto my wife as though she were a single woman," several leasehold houses & the ground rents thereof. The deed was voluntary:—*Held:* this deed was not void as being an intended assignment from husband to wife, but operated as a declaration of trust.—BADDELEY *v.* BADDELEY (1878), 9 Ch. D. 113; 48 L. J Ch. 36; 38 L. T. 906; 26 W. R. 850.

Annotations:—**Consd.** Fox *v.* Hawks, Hawks *v.* Fox (1879), 13 Ch. D. 822; *Re* Breton's Estate, Breton *v.* Woollven (1881), 17 Ch. D. 416.

1295. —— —— **Leaseholds assigned on trusts—Trustees not appointed.**]—A husband, being about to leave England for a residence in India, executed an assignment by deed to his wife, who was to remain in England, of a leasehold dwelling-house, "to hold the same unto" the wife, "her exors., administrators, & assigns, as her separate estate." No trustees were appointed: the husband & wife being the only parties to the deed. The title deeds were allowed to remain in the possession of the wife:—*Held:* the deed of assignment operated as a valid declaration of trust in favour of the wife.—FOX *v.* HAWKS, HAWKS *v.* FOX (1879), 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 656.

Annotation:—**Consd.** *Re* Breton's Estate, Breton *v.* Woollven (1881), 17 Ch. D. 416.

Compare GIFTS, Vol. XXV., p. 537, No. 259.

1296. —— **Sufficiency of verbal declaration.**]—GRANT *v.* GRANT, No. 1289, *ante.*

1297. —— ——.]—On a marriage it was verbally agreed between the husband & the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name; & she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property: —*Held:* there had been a gift of the money by the husband to the wife after the marriage; he had become a trustee of it for her as her separate property; &, consequently, it did not pass to the trustee in his liquidation.—*Re* WHITEHEAD, *Ex p.* WHITEHEAD (1885), 14 Q. B. D. 419; 52 L. T. 597; *sub nom. Re* WHITEHEAD, *Ex p.* ROUTH, 54 L. J. Q. B. 240; 33 W. R. 471, C. A.

—— —— **Statute of Frauds, s. 7.**]—*See, now,* Law of Property Act, 1925 (c. 20), ss. 53, 55, &, *generally,* TRUSTS AND TRUSTEES.

1298. —— **Promissory note to wife—For money lent.**]—The husband allowed his wife, who had a separate estate, to keep a separate banking account, & to draw cheques in her own name. He was in the habit of borrowing money of her, &, at the end of the year, of giving her a promissory note for the whole balance due to her. The husband died:—*Held:* the promissory note might be construed as a valid declaration of trust. —MURRAY *v.* GLASSE (1853), 1 Eq. Rep. 541; L. J. Ch. 126; 22 L. T. O. S. 35; 17 Jur. 816.

C. Chattels.

See Conveyancing Act, 1881 (c. 41), s. 50.

1299. Necessity for delivery—Gift of letter—Furniture in husband's possession.]—A husband, by three letters written & signed by him & handed to his wife, gave her furniture & other articles for her sole & absolute use. He afterwards made his will, bequeathing certain legacies & making other dispositions of his property, & giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture & other articles were at the time of the husband's death in the house which had been occupied by him & his wife, & the whole had been used by them in the ordinary way:—*Held:* the

PART VI. SECT. 9, SUB-SECT. 1.—B.

a. *What amounts to endorsement on contract of assurance.*]—Deceased had contracted for the issue to him of a policy by which £200 should be payable upon his death to his exors., administrators, or assigns. Upon his death the following endorsement was found on the back of the policy, admittedly signed by deceased & duly witnessed:—"Know all men by these presents that the within contract of assurance has been effected by me for the benefit of my wife":—*Held:* the endorsement was a valid declaration of trust in favour of the wife of deceased. —PUBLIC TRUSTEE *v.* SHEPHERD (1913) 32 N. Z. L. R. 643.—**N.Z.**

PART VI. SECT. 9, SUB-SECT. 1.—C.

b. *Gift prohibited at common law.*]—The husband had purchased a piano, & had made a present of it to his wife by putting it in the house where they

furniture, etc., formed part of the husband's estate.

Words importing a present intention on the part of a husband to make a gift to his wife cannot be held to operate as a declaration of trust. There is no difference in this respect between an intended gift to a wife & an intended gift to a stranger.—*Re* BRETON'S ESTATE, BRETON *v.* WOOLLVEN (1881), 17 Ch. D. 416; 50 L. J. Ch. 369; 44 L. T. 337; 29 W. R. 777.

Annotation:—**Distd.** *Re* Whittaker, Whittaker *v.* Whittaker (1882), 21 Ch. D. 657.

1300. —— Husband to wife—Burden of proof on wife.]—BASHALL *v.* BASHALL (1894), 11 T. L. R. 152, C. A.

Annotation:—**Mentd.** Larner *v.* Larner (1905), 74 L. J. K. B. 797.

1301. —— —— Motor car remaining registered in husband's name.]—Pltf.'s husband, who taught motor car driving, gave her a car, which afterwards continued to be on the husband's premises & to be used for the business.

Pltf. & her husband subsequently separated & pltf. took the car & placed it in deft.'s garage.

The car was still registered in the husband's name & defts. gave it up to him on demand. In an action by pltf. against defts. for the return of the car or its value:—*Held:* after the gift no change had taken place in the custody of the car, & there had been no valid gift because there had been no actual or constructive delivery, & therefore the action failed.—VALIER *v.* WRIGHT & BULL, LTD. (1917), 33 T. L. R. 366.

When effected by declaration of trust.] — *See* Sub-sect. 1, B., *ante*.

When void against creditors.]—*See* Sub-sect. 2, B., *post*.

. Presumption of gift—Chattels in wife's possession.]—*See* Sub-sect. 2, A. (*d*), *post*.

SUB-SECT. 2.—GIFTS BY HUSBAND.

A. When Presumed.

(*a*) *Property in Wife's Name.*

1302. Purchase in wife's name—Advancement.]—(1) Purchase by a man in the joint names of himself & his wife, if he was a trader at the time & he afterwards becomes bkpt., is void against the creditors, within 1 Jac. 1, c. 15, s. 5. So, if the purchase was made with the wife's money, if previously received & disposable by him as his own; not bound by any agreement with a trustee; & the receipt not connected with the purchase.

(2) Purchase in the name of a wife on which ordinarily not a resulting trust, being considered an advancement.—GLAISTER *v.* HEWER (1803), 8 Ves. 195; 32 E. R. 329, L. C.

Annotations:—*As to* (1) **Refd.** Wombwell *v.* Laver (1828), 2 Sim. 360; Ryland *v.* Smith (1836), 1 My. & Cr. 53; Barrack *v.* M'Culloch (1856), 3 K. & J. 110. *As to* (2) **Refd.** Drew *v.* Martin (1864), 2 Hem. & M. 130.

1303. —— ——.]—Purchase in the name of another, not a child or wife, a trust for the person advancing the money; unless the presumption from that circumstance is repelled by evidence.

Under a covenant upon marriage by the husband with the trustees, in case his wife should survive him, to pay her a sum of money, she is a creditor within the statute against Fraudulent Conveyances, 13 Eliz. c. 5.—RIDER *v.* KIDDER (1805), 10 Ves. 360; 32 E. R. 884, L. C.

Annotations—**Consd.** Barrack *v.* M'Culloch (1856), 3 K. & J. 110; Ayerst *v.* Jenkins (1873), L. R. 16 Eq. 275. **Refd.** George *v.* Howard & Bank of England (1819), 7 Price, 646; Dummer *v.* Pitcher, Pitcher *v.* Dummer (1833), 2 My. & K. 262; Freeman *v.* Tatham (1846), 5 Hare, 329; Phillips *v.* Probyn (1899), 68 L. J. Ch. 401; *Re* Policy No. 6402 of Scottish Equitable Life Assce. Soc., [1902] 1 Ch. 282. **Mentd.** Sims *v.* Thomas, Strachan *v.* Thomas (1840), 12 Ad. & El. 536.

1304. —— ——.]—The dividends of stock purchased during coverture in the name of the wife, out of funds placed at her disposal for family purposes by her husband, then an aged person, were paid into a bank to her account & by her applied for domestic expenses. The wife dying in the husband's lifetime, in a suit to administer the husband's estate:—*Held:* the presumption that the stock was a gift to the wife, arising from the purchase being made in her name, was rebutted by the mode of dealing with the dividends.

The transfer of stock into the name of the wife is *prima facie* evidence of a gift to the wife but is rebutted by evidence tending to show that no gift was intended (STUART, V.-C.).—HOYES *v.* KINDERSLEY (1854), 2 Sm. & G. 195; 65 E. R. 362.

1305. —— —— Not dependent on continuance of marriage—Effect of nullity decree.]—Where a husband takes a conveyance in the name of his wife, the presumption of advancement does not depend on the marriage continuing until the death of either of the parties. Accordingly, the presumption obtains though the marriage has been declared null & void.—MCNAUGHT *v.* MCNAUGHT (1909), 54 Sol. Jo. 135.

1306. —— —— As between husband & wife—Notwithstanding intention to defraud creditors.]—A husband took a lease of land in his wife's name & built a house upon it with his own money. He used his wife's name in the transaction with her knowledge & connivance because he was in debt, & was desirous of protecting the property from his creditors. In an action by him against his wife

A. (a).

1302 i. *Purchase in wife's name—Advancement.*]—A purchase by a husband in the name of his wife is presumed to be an advancement to the wife, & the presumption will not be rebutted by the fact of the husband devising the property by will. — LEONARD *v.* LEONARD (1898), 1 N. B. Eq. Rep. 576. —**CAN.**

1302 ii. —— ——.]—Where a husband purchases property & has the conveyance taken in the name of his wife, the presumption is that he intended to make a gift by way of an advancement to her.—ELFORD *v.* ELFORD, [1921] 2 W. W. R. 963; 14 Sask. L. R. 363.—**CAN.**

1302 iii. —— ——.]—Moneys were paid by the husband in connection with lands belonging to the wife before her death, but all the payments were made by the husband on his own motion & without the knowledge or consent of the wife:—*Held:* the payments were voluntary, being made without any request from the wife, express or implied, & it must be assumed that he intended them as gifts to his wife.—*Re* MONTGOMERY, LUMBERS *v.* MONTGOMERY (1911), 17 W. L. R. 77; 20 Man. L. R. 444.—**CAN.**

1302 iv. —— ——.]—A husband purchased a house & took the disposition from the seller directly to his wife. She was not infeft. The wife kept a shop during her marriage, from the profits of which she materially contributed to the support of the family. The husband having become bankrupt, his trustee claimed the house:—*Held:* in the circumstances of the family, & there being no allegation that the husband was insolvent at the date of purchase, it was a reasonable & onerous provision to the wife, & was not revocable by the husband or any one in his right.—RUST *v.* SMITH (1865), 3 Macph. (Ct. of Sess.) 378; 37 Sc. Jur. 182.—**SCOT.**

c. —— *Conveyance by husband without consideration.*]—Where a husband deeds property to his wife without consideration, no presumption of trust arises, but the presumption is that a gift is intended.—GARNETT *v.* GARNETT (1918), 45 N. B. R. 466.—**CAN.**

Sect. 9.—Gifts between husband and wife:
2, *A.* (*a*)

for a declaration that she held the property as trustee for him :—*Held :* he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, & she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.—GASCOIGNE *v.* GASCOIGNE, [1918] 1 K. B. 223 ; 87 L. J. K. B. 333 ; 118 L. T. 347 ; 34 T. L. R 168, D. C.

1307. —— Realty purchased with wife's money —No trust declared in writing—Statute of Frauds, s. 7.]—If a married woman allowed her husband to invest her money in the purchase of real estate & failed to take a declaration of trust in writing, she could not afterwards claim the property, Stat. Frauds being an answer to her claim against her husband or those claiming under him (KEKEWICH, J.).—WILLIAMS *v.* HUDSON (1889), 5 T. L. R. 576.

See, now, Law of Property Act, 1925 (c. 20), ss. 53, 55.

1308. —— Direction to transfer stock—Death of husband before completion.]—Testator a few days before his death bought through a broker on the Stock Exchange certain stocks & shares. On the day before his death, this being also "name day" on the Stock Exchange, in accordance with testator's instructions, his wife's name was passed as the transferee of the stocks & shares. Testator died before the transfers were executed :—*Held :* the gift of the stocks & shares was complete.—*Re* SMITH, BULL *v.* SMITH (1901), 84 L. T. 835 ; 17 T. L. R. 588 ; 45 Sol. Jo. 596.

Compare No. 1328, *post.*

1309. Deposit in bank in wife's name.]—MEWS *v.* MEWS, No. 1285, *ante.*

1310. ——.]—A legacy, to which a married woman was entitled under a will, was paid by the exors. by means of a cheque for £995, drawn to the order of the husband & wife. The husband & wife indorsed the cheque, & then went together to the husband's bankers, when the wife handed the cheque to the manager, &, in the presence & with the assent of the husband, told the manager to open an account in her own sole name, & to place to the credit of it £800, part of the £995, & to credit the residue to the husband's current account. This was done, & the wife afterwards, from time to time, drew cheques on the amount in her sole name. The husband never interfered with the account. The wife drew various cheques, for amounts varying from £20 to £50, in favour of the husband, for the purpose of those sums being employed by him in his business. Part of the money was, by the wife's directions, invested by the bankers in the purchase of some bonds, they sending her a memorandum which stated they held the bonds as her property. The husband afterwards asked the wife to sign a memorandum charging her money & securities with the payment of the overdrawn balance of his account with the bankers, but she refused to do so :—*Held :* the legacy had never been reduced into possession by the husband.—*Semble :* even if it had been reduced into possession, there had been a gift of the £800 by the husband to the wife.—PARKER *v.* LECHMERE (1879), 12 Ch. D. 256 ; 41 L. T. 152 ; 28 W. R. 48.

1311. ——.]—*Re* WHITEHEAD, *Ex p.* WHITEHEAD, No. 1297, *ante.*

1312. Proceeds of trading—Treated as wife's money — Loaned to husband.] — SLANNING *v.* STYLE, No. 738, *ante.*

1313. —— —— Executors directed to apply for wife's benefit.]—MEWS *v.* MEWS, No. 1285, *ante.*

1314. —— Given for household purposes—Investment by wife in own name.]—BARRACK *v.* M'CULLOCH, No. 730, *ante.*

1315. Savings from household allowance—Invested by wife in own name.]—BARRACK *v.* M'CULLOCH, No. 730, *ante.*

1316. Onus of proof on wife—Transaction impeached by creditors.]—BARRACK *v.* M'CULLOCH, No. 730, *ante.*

1317. Rebuttal of presumption—Money applied to domestic expenses.]—HOYES *v.* KINDERSLEY, No. 1304, *ante.*

1318. —— Wife acting as husband's agent.]—A wife being extrix. of her father paid money she received as such into a bank to an account in her

1309 i. *Deposit in bank in wife's name.*]—Subsequently to Married Women's Property Act, R. S. O. 1887, c. 132, a married woman, on the day of entering into a money bond, deposited in her own name in a savings bank a sum of money, which had been given to her by her husband, but of which, as against him, she had the absolute disposal by his consent & wish :—*Held :* this was sufficient on which to found a proprietary judgment against her.—SWEETLAND *v.* NEVILLE (1891), 21 O. R. 412.—**CAN.**

1315 i. *Savings from household allowance—Invested by wife in own name.*]—If a wife purchases land with her husband's money, or with money saved by her out of sums given to her by him for domestic purposes, the land so purchased belongs to the husband, & if the title thereto has been taken in name of the wife without his consent the ct. may order it to be transferred to the husband.—WAKSHINSKY *v.* WAKSHINSKY, [1924] 2 W. W. R. 1174 ; 4 D. L. R. 231.—**CAN.**

1315 ii. —— ——.]—Where a man pays to his wife his surplus earnings, out of which she defrays all household expenses & invests the balance in her own name with his privity & consent, a presumption is raised that it was the object of the husband to make an advancement for his wife.—RAYMOND *v.* RAYMOND (1911), 31 N. Z. L. R. 69. —**N.Z.**

d. *Purchase by wife—Instalments of purchase money paid by husband.*]—Pltf. purchased in 1911, a parcel of land on L. Island. She borrowed the money for the cash payment which was secured by a mortgage on a property in K. & the first instalment was paid by money borrowed on the security of another property in K. The three remaining instalments on coming due & the taxes were paid by her husband, & the property was registered in pltf.'s name. On the mortgages coming due the husband paid them & they were assigned under his direction to his agent, who later assigned them to the husband. Pltf. did not pay & was not charged with interest on the mortgages, after the assignment to the husband's agent. The husband died in 1916, & by his will gave an immediate legacy of $5000 to his wife, & an annuity of $5000 p.a. A former action by the exors. under the husband's will to recover from the wife the amount of the instalments paid by the husband on the L. Island property was dismissed. In an action for a declaration that deceased had made a gift of the amount of the mortgages to pltf. :—*Held :* there was no gift to pltf.—ROPER *v.* HULL & ROYAL TRUST CO. (1921), 30 B. C. R. 405.—**CAN.**

e. *Payment by husband of calls on wife's shares.*]—*Re* JOSEPH (1904), 24 N. Z. L. R. 645.—**N.Z.**

f. *Surplus of husband's income handed to wife.*]—A husband had made a practice of handing over to his wife the surplus of his income, & had never received back any part of the moneys so handed to her, nor made any part of them available for his business or for household necessities :—*Held :* they were an absolute gift to her.—PUBLIC TRUSTEE *v.* STEVEN, [1921] N. Z. L. R. 441.—**N.Z.**

g. *Disclaimer of interest in wife's money.*]—A husband, who had no marriage-contract, after his marriage went to S., where he carried on business, leaving his wife in this country with the control of £3,000 which she had inherited from her father, & disclaiming any personal interest therein. On one of his visits to this country he expressed his strong disapproval of an investment his wife had made in bank stock, saying he had nothing to do with it :—*Held :* he had made a donation to her of her fortune, which, though he was entitled to revoke, he had not revoked.—WRIGHT'S EXECUTORS *v.* CITY OF GLASGOW BANK (1880), 7 R. (Ct. of Sess.) 527 ; 17 Sc. L. R. 333.—**SCOT.**

h. *Money standing at wife's credit—In private cash-book kept by husband.*]—SMITH *v.* SMITH'S TRUSTEES (1884), 12 R. (Ct. of Sess.) 186 ; 22 Sc. L. R. 145.—**SCOT.**

k. *Onus of proof.*]—THOMPSON *v.* DOYLE, 16 C. L. T. Occ. N. 286.—**CAN.**

l. —— *Husband establishing motive other than advancement.*]—Applt. bought land in Burma, & having caused it to be conveyed to his wife, resp.,

own name as extrix. Her husband paid money of his own to this account, & the wife had drawn cheques upon the account for payment of debts due by the husband & for payment of household expenses. The husband died:—*Held:* upon the facts of the case, the wife was merely the agent of the husband, & the money remaining in the bank belonged to his estate & not to the wife's.—LLOYD *v.* PUGHE (1872), 8 Ch. App. 88; 28 L. T. 250; 21 W. R. 346; *sub nom.* LLOYD *v.* PUGHE, EVANS *v.* PUGHE, 42 L. J. Ch. 282, L. C. & L.JJ.

Annotations:—**Distd.** *Re* Eykyn's Trusts (1877), 6 Ch. D. 115. **Refd.** Parker *v.* Lechmere (1879), 12 Ch. D. 256.

1319. —— Not effected by dissolution of marriage.]—MCNAUGHT *v.* MCNAUGHT, No. 1305, *ante*. *Compare* No. 1339, *post*.

1320. —— Wife's name used to defraud creditors—Wife party to fraud—No rebuttal in husband's favour.]—GASCOIGNE *v.* GASCOIGNE, No. 1306, *ante*.

(*b*) *Property in Joint Names.*

1321. Presumption of advancement.]—A. purchases a walk in a chase, & takes the patent to himself & to his wife & J. S. during their lives, & the life of the survivor; the husband dies indebted.

This is an advancement to the wife, who was entitled to the benefit of the patent during her life, though A. had not left assets to pay his debts, but after her death, J. S. to be a trustee for the exor.—KINGDON *v.* BRIDGES (1688), 2 Vern. 67; 23 E. R. 653.

Annotations:—**Consd.** Soar *v.* Foster (1858), 4 K. & J. 152. **Refd.** Dyer *v.* Dyer (1788), 2 Cox, Eq. Cas. 92; Batstone *v.* Salter (1874), L. R. 19 Eq. 250.

1322. ——.]—A. purchases a copyhold in his own, his wife, & daughter's names, & afterwards surrenders it for the securing a debt to J. S. J. S. not entitled to any part of the lands, it being an advancement for the wife & daughter, & the husband & wife taking one moiety thereof by entireties.—BACK *v.* ANDREWS (1690), Prec. Ch. 1; 2 Vern. 120; 24 E. R. 1.

Annotation:—**Refd.** Green d. Crew *v.* King (1778), 2 Wm. Bl. 1211.

1323. —— Marriage must be valid.]—H. married, in 1840, R., the sister of a deceased wife. He afterwards invested parts of the savings of his income in a sum of Consols in their joint names. It did nor appear that R., the reputed wife, had at the time of performing the ceremony of marriage any property of her own. In 1845 H. died, leaving his reputed wife surviving:—*Held:* she was a trustee of the stock, & it formed part of the estate of H.

No intention of advancement in cases of a purchase in joint names will be presumed, except in the case of a lawful wife, or a person to whom the purchaser stands in *loco parentis*.

In all other cases the *onus* of proving the intention to advance is thrown on the person claiming the advancement, & such a circumstance as the performance of the ceremony of marriage, where the parties knew it to be inoperative, will not be regarded.—SOAR *v.* FOSTER (1858), 4 K. & J. 152; 31 L. T. O. S. 381; 4 Jur. N. S. 406; 6 W. R. 265; 70 E. R. 64.

Annotation:—**Refd.** Tucker *v.* Burrow (1865), 2 Hem. & M. 515.

1324. Right of wife as survivor—Subsequent mortgage by husband—Equity of redemption in husband or wife.]—Husband after marriage purchases a term to himself & wife, & the survivor & the exors., administrators & assigns of such survivor; husband assigns the term in mtge., proviso to be void on payment of the money by him or wife, or the exors. of him or wife. Proviso that the husband, his exors. or administrators shall till default of payment quietly enjoy. Husband after seven years, contracts debts & dies. Decreed that this settlement of the term being after marriage, in the power of the husband, & the equity of redemption being reserved to him as well as to his wife, & being also in the case of creditors, was assets to pay debts.—WATTS *v.* THOMAS (1726), 2 P. Wms. 364; 24 E. R. 767.

1325. —— Other assets insufficient for legacies.]—A husband, before making his will, transferred two sums of 4 per cent. & 5 per cent. stock, then forming the whole of his funded property, into the joint names of himself & his wife. By his will he gave the rents of his leasehold houses & the interest of all his funded property or estate of whatsoever kind, upon trust for his wife for life, &, after her decease, upon trusts to pay divers legacies of 4 per cent. stock, the aggregate amount of which fell short by £50 only of the amount of stock of that description, so formerly transferred by him. He afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself & his wife, & died in her lifetime, leaving no funded property except the 4 per cents. & 5 per cents before mentioned; exclusive of which, his assets were wholly insufficient to pay his legacies:—*Held:* all the sums of stock then standing in the joint names of the husband & wife, & whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife.—DUMMER *v.* PITCHER, PITCHER *v.* DUMMER (1833), Coop. *temp.* Brough. 257; 2 My. & K. 262; 39 E. R. 944, L. C.

Annotations:—**Consd.** *Re* Eykyn's Trusts (1877), 6 Ch. D. 115. **Distd.** *Re* Carpenter, Carpenter *v.* Disney (1884), 51 L. T. 773. **Refd.** Lloyd *v.* Pughe (1872), L. R. 14 Eq. 241. **Mentd.** Dixon *v.* Samson (1837), 2 Y. & C. Ex. 566; Shuttleworth *v.* Greaves (1838), 4 My. & Cr. 35; Allen *v.* Anderson (1846), 5 Hare, 163; Laurie *v.* Clutton (1852), 15 Beav. 131; Bothamley *v.* Sherson (1875), L. R. 20 Eq. 304; *Re* Harris, Leacroft *v.* Harris, [1909] 2 Ch. 206.

1326. —— Attempted disposition by husband's will—Wife put to her election.]—Testator bequeathed £2,200 stock, his property, standing in the joint names of himself & wife, to trustees, upon trust to pay the interest & dividends to his wife for her life, &, after her decease, to distribute the capital amongst his grandchildren by name; & he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate & effects:—*Held:* the stock was the absolute property of the wife surviving, & she must elect between this & the other benefits bequeathed to her by testator's will.—COATES *v.* STEVENS (1834), 1 Y. & C. Ex. 66; 160 E. R. 28.

1327. —— —— ——.]—Testator, after making certain bequests, & giving his wife a legacy of

---

erected houses upon it at his expense. Both husband & wife were born in India of English parents, but had resided during their whole lives in India save for occasional visits to England. Applt. sued resp. in Burma for a declaration that she held the houses as his *benamidar* & for an order that they be conveyed to him:—*Held:* the rights of the parties were to be determined according to the law applied by the Ct. of Ch. in England, whereby resp. being applt.'s wife, there was a rebuttable presumption that the transaction was intended for her advancement; but applt. had discharged the *onus* upon him, since he had established with reasonable clearness that he had other specific motives for his action.—KERWICK *v.* KERWICK (1920), L. R. 47 Ind. App. 275.—**IND.**

PART VI. SECT. 9, SUB-SECT. 2.—A. (b).

1321 i. *Presumption of advancement.*]—TALBOT *v.* CODY (1875), 10 I. R. Eq. 138.—**IR.**

1321 ii. ——.]—*Re* CONDRIN, COLOHAN *v.* CONDRIN, [1914] 1 I. R. 89.—**IR.**

Sect. 9.—Gifts between husband and wife: Sub-sect. 2, A. (b), (c) & (d).]

£3,000 gave all the residue of his estate & effects, "including therein the money in my banking account in the Bank of England, & money in the public funds, & whether standing in my name alone, or jointly with my said wife," & all his shares & interest in any public co., & other effects, to his wife for her life, & after her decease to other persons.

At the date of the will, & at the time of the testator's death, there was only one sum, viz. £7,110 Consols standing in the joint names of himself & his wife.

This stock had by a previous will been bequeathed to the wife, subject to two executory gifts over, which did not take effect, one in favour of her children, if any, & the other of her husband, if he survived. The stock had been received by testator, & by him transferred into their joint names.

After testator's death his wife received the income of all the residuary estate, including the £7,110 Consols, but made no attempt to deal with the stock as her own property. There was, however, no evidence to show that she knew what her rights were. She subsequently died, & her representatives claimed the stock.

The question was, whether they were bound, under the doctrine of election, to compensate the residuary legatees, who would be disappointed by their taking the stock, to any & what extent: —*Held:* testator intended the stock to pass, & was not dealing only with his right of survivorship; he affected to give property belonging to his wife, & consequently the doctrine of election applied both to the wife & her representatives claiming under her; & her representatives could only take the stock upon the terms of compensating the disappointed residuary legatees to the extent of the legacy of £3,000, & of the amount actually received by the wife in respect of her life interest in testator's own property.—*Re* CARPENTER, CARPENTER *v.* DISNEY (1884), 51 L. T. 773.

1328. —— Husband dying before transaction completed—Transfer of stock.]—A. B. gave directions to his bankers to invest a sum of money in the joint names of himself & wife, & their brokers accordingly made the purchase. A. B. died after the contract, but before the transfer had been completed:—*Held:* the wife was entitled to the stock by survivorship.—VANCE *v.* VANCE (1839), 1 Beav. 605; 48 E. R. 1076.

Annotation:—**Mentd.** Thomas *v.* Thomas (1859), 1 L. T.

1329. Purchase money unpaid.] An agreement for the purchase of land was entered into in the names of husband & wife, & the husband died before the whole of the purchase-money had been paid. Upon an inquiry in an administration suit as to the real property of the husband:—*Held:* it did not include the purchased estate; the purchase enured for the benefit of the widow, & the unpaid purchase-money was payable out of the husband's personal estate.—DREW *v.* MARTIN (1864), 2 Hem. & M. 130; 3 New Rep. 637; 33 L. J. Ch. 367; 10 L. T. 291; 10 Jur. N. S. 356; 12 W. R. 547; 71 E. R. 411.

Annotation:—**Refd.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

Compare No. 1308, *ante.*

1330. —— Transfer as provision for wife—Stock.]—(1) A husband transferred money in the funds into the joint names of himself & wife, for the purpose of making a provision for her; & by his will he bequeathed to his wife a life interest in "all his property that he was in possession of":—*Held:* the stock did not pass.

(2) Testator directed his widow "to be in possession of all his furniture, plate, glass & books, & for the time of her natural life, to receive the yearly interest & profits of all his property that he was in possession of at his death":—*Held:* the widow took a life interest only in the furniture, etc.—LOW *v.* CARTER (1839), 1 Beav. 426; 48 E. R. 1005.

Annotation:—*Generally*, **Mentd.** Waller *v.* Barrett (1857), 24 Beav. 413.

1331. —— —— ——.]—A. transferred certain railway debentures into the names of himself & his wife & a stranger who was one of the three trustees of his marriage settlement. He also transferred certain railway stock into the names of himself & his wife & two strangers, who were both trustees of the settlement:—*Held:* the two investments were neither intended as an augmentation of the settlement fund, nor were they to form part of his residuary estate, but were advancements for the benefit of the wife; & the strangers in each case were trustees for her upon her surviving her husband.—*Re* EYKYN'S TRUSTS (1877), 6 Ch. D. 115; 37 L. T. 261.

1332. —— —— Joint account at bank.]—Money deposited in a bank by a husband, in the joint names of himself & his wife, as a provision for her in case of his death, upon his death becomes the absolute property of the wife.—WILLIAMS *v.* DAVIES, *In the Goods of* WILLIAMS (1864), 3 Sw. & Tr. 437; 4 New Rep. 301; 33 L. J. P. M. & A. 127; 10 L. T. 583; 28 J. P. 664; 161 E. R. 1344.

1333. —— Stock invested in joint names—Part sold in lifetime of husband.]—A wife with the knowledge & approval of her husband, invested money belonging to the latter in the purchase of Government stock in their joint names. Subsequently, under the authority of a power of attorney given to her by the husband, she sold a portion of the stock & kept the money in her custody, & it so remained at the husband's death: —*Held:* the stock remaining in the joint names of the husband & wife survived to her, but there being no evidence of an intention on the part of the husband to make an absolute gift to the wife, that the proceeds of sale of the stock formed part of the husband's general assets.—*Re* GADBURY (1863), 32 L. J. Ch. 780; 11 W. R. 895.

1334. —— —— Purchased from joint banking account.]—*Re* YOUNG, TRYE *v.* SULLIVAN, No. 1093, *ante.*

1335. —— Banking account in joint names—Deposit account.]—WILLIAMS *v.* DAVIES, *In the Goods of* WILLIAMS, No. 1332, *ante.*

1336. —— —— To facilitate management.] The husband of pltf. being in failing health transferred his banking account from his own name into the joint names of himself & his wife, & directed the bankers to honour cheques drawn either by himself or his wife; & he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by pltf. at the direction of her husband, & the proceeds were applied in payment of household & other expenses. The husband never explained to pltf. what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself & his wife. After the death of her husband, which took place a few months after the transfer, pltf. claimed to be entitled to the balance:—

Held : the transfer of the account was not intended to be a provision for pltf., but merely a mode of conveniently managing her husband's affairs ; & consequently she was not entitled.—MARSHAL *v.* CRUTWELL (1875), L. R. 20 Eq. 328 ; 44 L. J Ch. 504 ; 39 J. P. 775.

Annotations :—**Distd.** *Re* Eykyn's Trusts (1877), 6 Ch. D. 115 ; *Re* Harrison, Day *v.* Harrison (1920), 90 L. J. Ch. 186. **Refd.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683 ; *Re* Warwick, Warwick *v.* Chrisp (1912), 56 Sol. Jo. 253.

1337. —— ——.]—Sums placed by testator to a joint account of himself & wife held on testator's death to pass to his widow.—*Re* PATTINSON, GRAHAM *v.* PATTINSON (1885), 1 T. L. R. 216.

1338. —— —— Wife ignorant of account.]—A husband, in 1879, transferred the money standing to a current rent account at his bank in his own name into the joint names of himself & his wife. He did not inform his wife of the joint account, & always drew cheques on the account himself. He died in Nov. 1919. The wife never drew any cheque on the account until shortly before his death, when he was in failing health & unable to attend to business. The bank manager then informed her of the joint account, & advised her to draw a cheque, which she did. The husband had also from time to time made deposits in the joint names of himself & his wife, & in Aug. 1919, consolidated them into one deposit in the joint names. The wife never knew of this deposit until after her husband's death. There was then found among his papers an envelope endorsed with the wife's initials & containing the deposit receipt & a document in which he said : "I would like this paying away at once if possible as under," with a list of names with amounts against them : —*Held :* the moneys standing to the credit of both the current account & the deposit account belonged to the wife as survivor, & the document did not raise any presumption that the husband regarded the deposit as his own property.—*Re* HARRISON, DAY *v.* HARRISON (1920), 90 L. J. Ch. 186.

1339. —— Not defeated by declaration of nullity.]—In 1896, pltf., then Miss W., was married to deft. In 1897 deft. bought a house for £654, which was conveyed to him & his wife as joint tenants. Deft. paid £354 out of his own money & borrowed the remaining £300, on the security of a mtge. of the house. This mtge. was executed by both husband & wife & was in the ordinary form of a mtge. by joint tenants. In 1898 pltf. & deft. separated. In 1905 deft. paid off the £300 mtge. debt & the house was reconveyed to him & pltf. In 1907 pltf. instituted proceedings for a declaration of nullity of marriage & in October, 1908, a decree absolute was made whereby the marriage was declared "to have been & to be absolutely null & void." Pltf. brought this action for a declaration that she was entitled to the house as joint tenant in fee with her late husband :—*Held :* (1) at the date of the purchase the husband intended the house to be an advancement for his wife ; (2) there was no implied condition that the marriage should continue ; & pltf. was entitled to the declaration she claimed.—DUNBAR *v.* DUNBAR, [1909] 2 Ch. 639 ; 79 L. J. Ch. 70 ; 101 L. T. 553 ; 26 T. L. R. 21.

Annotation :—*As to* (1) **Refd.** McNaught *v.* McNaught (1909), 54 Sol. Jo. 135.

See, also, No. 1305, *ante.*

Money advanced on joint account.]—*See* Subsect. 2, A. (*c*), *post.*

(*c*) *Money Advanced on Joint Account.*

1340. Right of wife as survivor—Mortgage in joint names—Other assets sufficient for husband's debts.]—Husband lends out money in the names of himself & his wife, upon mtges. & bonds & dies. The wife is entitled to this by survivorship, if there are assets sufficient without this money to pay debts.—CHRIST'S HOSPITAL *v.* BUDGIN (1712), 2 Vern. 683 ; 1 Eq. Cas. Abr. 70 ; 23 E. R. 1043.

Annotations :—**Refd.** Stileman *v.* Ashdown (1742), 2 Atk. 477 ; Dummer *v.* Pitcher (1833), Coop. *temp.* Brough. 257. **Mentd.** Soar *v.* Foster (1858), 4 Jur. N. S. 406.

1341. —— Promissory note transferred to joint names.]—A., holding a promissory note from B. for a debt, directed B. to transfer it in his books to the names of A. & his wife, expressing an intention to benefit his wife, & he cancelled the note & took a fresh one to him & his wife. A. died, leaving his wife surviving him :—*Held :* the debt belonged to the wife & did not form part of testator's general personal estate.—GOSLING *v.* GOSLING (1855), 3 Drew. 335 ; 61 E. R. 931.

1342. —— No evidence as to who provided money.]—In the case of a transfer of mtge. to a husband & his wife after Married Women's Property Act, 1882 (c. 75), the money was stated to have been advanced by them on a joint account, but there was no evidence as to how it was found :—*Held :* even assuming that the husband advanced part out of his money & the wife part out of hers, the case was the same as if the whole of the money were an advance by the husband, & the wife surviving him, her estate was entitled to the money paid off.—*Re* SCOTT, *Re* SCOTT, PALMER *v.* VICKERS (1907), 97 L. T. 537.

1343. —— Moiety from wife's estate—Half of interest received by wife.]—A husband & his wife advanced sums on mtges., expressed to be out of moneys belonging to them on a joint account. There was clear evidence that half of the respective loans belonged to the separate estate of the wife. The mtge. interest was during the husband's life collected & paid to him, & he paid a half of the sums so received to her. The husband died leaving his wife surviving :—*Held :* the presumption in favour of advancement was not rebutted, & the widow was entitled to the mtges. by survivorship :—*Re* HICKS, HICKS *v.* HICKS (1917), 117 L. T. 360.

See, generally, MORTGAGE.

(*d*) *Chattels in Wife's Possession.*

1344. Personal ornaments—Given after marriage.]—COWPER'S (COUNTESS) CASE (*circa* 1720), cited 3 Atk. 393 ; cited 1 Ves. Sen. 539 ; 26 E. R. 1026.

Annotations :—**Consd.** Graham *v.* Londonderry (1746), 3 Atk. 393. **Refd.** Lucas *v.* Lucas (1738), 1 Atk. 270 ; Ridout *v.* Plymouth (1740), 2 Atk. 104 A.-G. *v.*

1337 i. *Right of wife as survivor—Banking account in joint names.*]—A husband deposited money with a savings co. & caused an account to be opened in the name of himself & his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor" ; money of hers went into the account & both drew from it indiscriminately :—*Held :* she was entitled as survivor to the whole fund.—*Re* RYAN (1900), 32 O. R. 224.

1337 ii. —— ——.]—Money was placed by a man on deposit in a bank in the names of himself & his wife, but it was payable to him or his wife, or the survivor. Shortly before his death he indorsed & handed the deposit receipt to a clergyman, for charitable purposes, who cashed it forthwith. —*Held :* deceased gave to himself or his wife the power to withdraw the money, & this was a reservation of a power to revoke the gift which he was entitled to make.—M'DOWELL *v.* M'NEILLY, [1917] 1 I. R. 117.—**IR.**

m. *Deposit in joint names.*]—Husband & wife deposited the earn-

Sect. 9.—*Gifts between husband and wife: Sub-sect.* 2, *A.* (*d*), *B.* & *C.*; *sub-sect.* 3, *A.* (*a*).]

Whorwood (1750), 1 Ves. Sen. 534; Walter *v.* Hodge (1818), 2 Swan. 92.

1345. —— —— Rights of creditors.]—CAMPION *v.* COTTON, No. 1191, *ante*.

1346. —— To be worn as ornament only—Paraphernalia.]—Where a husband expressly gives a thing to a wife to be worn as ornaments of her person only, they are to be considered merely as *paraphernalia*.—GRAHAM *v.* LONDONDERRY (1746), 3 Atk. 393; 26 E. R. 1026.

Annotations:—**Consd.** Williams *v.* Mercier (1882), 51 L. J. Q. B. 594; Tasker *v.* Tasker, [1895] P. 1. **Refd.** Masson, Templier *v.* De Fries, [1909] 2 K. B. 831. **Mentd.** Teynham *v.* Webb (1751), 2 Ves. Sen. 198; Loder *v.* Loder (1754), 2 Ves. Sen. 530; White *v.* White (1804), 9 Ves. 554; Windham *v.* Graham (1826), 1 Russ. 331; *Re* Stawell's Trust, Poole *v.* Riversdale (1909), 101 L. T. 49.

1347. Furniture—Given after marriage—Rights of creditors.]—CAMPION *v.* COTTON, No. 1191, *ante*.

1348. —— In wife's house—Gift presumed.]—BARRACK *v.* M'CULLOCH, No. 730, *ante*.

1349. —— —— ——.]—BEECHER *v.* MAJOR, No. 718, *ante*.

1350. Wearing apparel—Agreed to remain property of husband.]—A husband is bound to provide his wife with necessary apparel, but is not bound to give it to her. He may make the provision either by giving it to her in accordance with the common practice, or by lending it to her. Therefore an agreement between husband & wife that all articles of wearing apparel used or worn by the wife were to be purchased by the husband in his own name & on his credit & were to be his absolute property & that he was to be entitled to dispose of them as & when & how he pleased, his wife having no right or title to them except to wear them during his pleasure, is valid in law, & effectual as against the execution creditors of the wife.—RONDEAU, LEGRAND & Co. *v.* MARKS, [1918] 1 K. B. 75; 87 L. J. K. B. 215; 117 L. T. 651; 34 T. L. R. 8; 62 Sol. Jo. 24, C. A.

Necessity for delivery.]—*See* Sub-sect. 1, C., *ante*.

Effect of husband's bankruptcy.]—*See* BANKRUPTCY, Vol. V., p. 676, Nos. 5679–5681.

B. Gifts in Fraud of Creditors.

See Married Women's Property Act, 1882 (c. 75), s. 10.

1351. Deed of gift of furniture—Remaining in husband's house—Not in reputed ownership.]—Judgment creditors, who had levied execution at the judgment debtor's house, were met by a claim on behalf of the debtor's wife that the goods, on which execution was proposed to be levied, belonged to her under a post-nuptial deed of gift, executed by the debtor in her favour for natural love & affection. The deed was not registered under the Bills of Sale Act, 1878 (c. 31), & the goods conveyed by the deed remained in debtor's house in which he & his wife continued to live together after the execution of the deed, as they were doing when the deed was executed: —*Held*: the deed was not invalid under Married Women's Property Act, 1882 (c. 75), s. 10, as there was no evidence that the furniture after the gift remained in the order & disposition or reputed ownership of the husband, & the judgment creditors were not entitled to levy execution on the goods.—FRENCH *v.* GETHING, [1922] 1 K. B. 236; 91 L. J. K. B. 276; 126 L. T. 394; 38 T. L. R. 77; 66 Sol. Jo. 140; [1922] B. & C. R. 30, C. A.

1352. Gift impeachable by creditors—Surrender of life interest in settlement—Post-nuptial deed.]—By an ante-nuptial settlement made in 1900 debtor settled investments in certain railway & other stocks upon trust (*inter alia*) for bkpt. for life. In 1913 arrangements were made by debtor which resulted in the income from the investments comprised in the marriage settlement being thenceforward paid to the wife. In Mar. 1914, debtor & his wife agreed to separate, & in order to insure to the wife the continued payment of the income, debtor in Mar. 1915, executed a post-nuptial deed under which debtor's life interest under the marriage settlement was surrendered to the wife, & she was given a power of appointment which might act in derogation of debtor's ultimate reversion to the property. There was no agreement by the wife that she would not take proceedings against debtor for maintenance. In July, 1917, debtor committed an act of bkpcy., & in Jan. 1918, an order of adjudication was made against him. It was not proved that at the time of executing the deed of Mar. 1915, debtor was able to pay all his debts without the aid of the property comprised in it:—*Held*: upon the facts the true inference to be drawn was that the wife was not a purchaser for valuable consideration within Bankruptcy Act, 1914 (c. 59), s. 42 (1), & that instead of a voluntary allowance to his wife the debtor substituted a voluntary settlement; & as in these circumstances there was no consideration given for it, the deed of Mar. 1915, was void so far as was necessary for the payment of the debts owing by debtor & the costs of the bkpcy.—*Re* MACDONALD, *Ex p.* MCCULLUM, [1920] 1 K. B. 205; 122 L. T. 316; *sub nom. Re* MACDONALD, *Ex p.* TRUSTEE, 88 L. J. K. B. 1226; [1918–19] B. & C. R. 240.

——.]—*See, also*, EXECUTION, Vol. XXI., pp. 498 *et seq.*

Chattels remaining in apparent possession of husband.]—*See* BILLS OF SALE, Vol. VII., p. 115, Nos. 672–674.

Chattels in wife's possession.]—*See* Sub-sect. 2, A. (*d*), *ante*.

C. Pin Money.

1353. Definition of pin money—Not ordinary debt.]—If [pin money] is not an ordinary debt: it is not a gift from the husband to the wife out & out . . . it is meant for the wife's expenditure on her person, it is to meet her personal expenses & to deck her person suitably to her husband's dignity (LORD LYNDHURST, C.).—HOWARD *v.* DIGBY (EARL) (1834), 2 Cl. & Fin. 634: 8 Bli. N. S. 224; 5 Sim. 330; 6 E. R.

of both in a bank to an account, kept in the names of both as a joint account:—*Held*: the ownership of the husband's money was not transferred to his wife.—RIOUX *v.* RIOUX (1922), 53 O. L. R. 152.—**CAN.**

PART VI. SECT. 9, SUB-SECT. 2.—B.

n. *Absence of consideration.*]—The purchase of property in the name of the wife & ostensibly for her benefit, with money belonging to the husband, where no consideration is given by the wife, is sufficient evidence of intention to defraud the husband's creditors.—WEST *v.* AMES HOLDEN & Co. (1897), 3 Terr. L. R. 17.—**CAN.**

o. *Transfer of shares—Husband liable under guarantee.*]—In an action by judgment creditors of deceased husband of deft. to set aside assignments made by deceased to deft. of co. shares, with intent, as alleged, to defeat creditors, the judgment recovered by pltfs. was founded on an agreement of guarantee, which was in existence at the time of the impeached transfers:—*Held*: the guarantee was a liability which might become a debt; & if the husband really owned the shares, an intention on his part to defeat or delay creditors might be inferred.—TORONTO CARPET CO. *v.* WRIGHT (1912), 21 W. L. R. 304; 22 Man. L. R. 294; 3 D. L. R. 725.—**CAN.**

1293, H. L.; *revsg.* S. C. *sub nom.* DIGBY (EARL) *v.* HOWARD (1831), 4 Sim. 588.

Annotations:—**Refd.** *Ex p.* Holden (1863), 13 C. B. N. S. 641; Dixon *v.* Dixon (1878), 9 Ch. D. 587; Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385. **Mentd.** Leach *v.* Way (1835), 5 L. J. Ch. 100; Wentworth *v.* Tubb (1842), 12 L. J. Ch. 61; Molton *v.* Camroux (1848), 2 Exch. 487; Lea *v.* Grundy (1855), 24 L. T. O. S. 287; Rowley *v.* Unwin (1855), 2 K. & J. 138; Moore *v.* Barber (1865), 5 Giff. 43; *Re* Rhodes, Rhodes *v.* Rhodes (1890), 44 Ch. D. 94; *Re* J., [1909] 1 Ch. 574.

1354. —— Not absolute gift from husband.]—HOWARD *v.* DIGBY (EARL), No. 1353, *ante.*

1355. —— Allowance for wife's personal expenditure.]—HOWARD *v.* DIGBY (EARL), No. 1353, *ante.*

1356. Expenditure of pin money—Implied obligation on wife.]—There is annexed to wife's pin money an implied duty of applying it towards her personal dress, decoration & ornament.—JODRELL *v.* JODRELL (1845), 9 Beav. 45; 15 L. J. Ch. 17; 6 L. T. O. S. 186; 9 Jur 1022; 50 E. R. 259; *subsequent proceedings* (1851), 14 Beav. 397.

1357. Effect of wife's misconduct—Elopement & adultery.]—If a lady has pin-money secured by a term, & runs away & lives in adultery, & the trustees proceed at law to recover the term, it seems they will be restrained; for pin-money was never designed to make women independent of their husbands, & support them in vice. But if she left him by ill usage, or other reasonable grounds, or the husband acquiesced in her departure, equity will not interpose.—MOORE *v.* SCARBOROUGH (1737), Coop. *temp.* Cott. 538; 47 E. R. 989; *sub nom.* MOORE *v.* MOORE, 1 Atk. 272; West *temp.* Hard. 35; *sub nom.* MORE *v.* SCARBOROUGH (EARL), 2 Eq. Cas. Abr. 156 L. C.

Annotation:—**Refd.** Lee *v.* Lee (1758), 1 Dick. 321.

1358. —— ——.]—Where the wife sues the husband for a specific performance of her marriage articles, & that he may settle such & such lands on her for her jointure; it is no bar to her demand, that she has eloped with an adulterer; much less if this be not by the husband put in issue in the cause.—SIDNEY *v.* SIDNEY (1734), 3 P. Wms. 269; 2 Eq. Cas. Abr. 29; 24 E. R. 1060, L. C.

Annotations:—**Expld.** Wheeler *v.* Trotter (1737), 3 Swan. 174, n.; Legard *v.* Johnston (1797), 3 Ves. 352. **Consd.** Jee *v.* Thurlow (1824), 2 B. & C. 547. **Expld.** Duncan *v.* Campbell (1842), 12 Sim. 616. **Refd.** Clark *v.* Periam, Periam *v.* Clark (1742), 1 Coop. *temp.* Cott. 541, n.; Seagrave *v.* Seagrave (1807), 13 Ves. 439; Evans *v.* Carrington (1860), 2 De G. F. & J. 481; Fearon *v.* Aylesford (1884), 14 Q. B. D. 792. **Mentd.** Watkyns *v.* Watkyns (1740), 2 Atk. 96; Horton *v.* Bott (1857), 2 H. & N. 249.

1359. —— ——.]—Bill by a married woman, claiming under a bond by her husband to a trustee for a separate maintenance, admitted to have been destroyed by them on the ground of subsequent incontinence. The bill retained, with liberty to bring an action.—SEAGRAVE *v.* SEAGRAVE (1807), 13 Ves. 439; 33 E. R. 358.

Annotations:—**Refd.** Jee *v.* Thurlow (1824), 2 B. & C. 547; Walrond *v.* Walrond (1858), John. 18; Fearon *v.* Aylesford (1884), 14 Q. B. D. 792. **Mentd.** Pearce *v.* Creswick (1843), 2 Hare, 286.

1360. —— Elopement without adultery.]—By marriage settlement in 1707 the husband conveyed lands to trustees for ninety-nine years if he should so long live in trust to pay £100 per annum for the separate use of the wife. Owing to disputes the wife in 1728 left her husband & went to live in France. In 1734, the annuity being in arrear the trustees brought ejectment. Later in the same year the husband sued in the ecclesiastical ct. for restitution of conjugal rights, & after sentence against his wife for non-appearance, brought his bill to restrain the ejectment action. By his bill he offers to receive his wife again & in that case to pay her the annuity:—*Held:* this being a case of mere elopement, without incontinency, & having regard to the continued payment of the annuity for some time afterwards, & the delay in instituting the suit in the ecclesiastical ct., the ct. of Ch. would not interfere with the legal rights of the trustees.—MOORE *v.* MOORE (1737), 1 Atk. 272; West *temp.* Hard. 35; 26 E. R. 174; *sub nom.* MOORE *v.* SCARBOROUGH, Coop. *temp.* Cott. 538; *sub nom.* MORE *v.* SCARBOROUGH (EARL), 2 Eq. Cas. Abr. 156, L. C.

Annotation:—**Refd.** Lee *v.* Lee (1758), 1 Dick. 321.

Savings out of pin money.]—*See* Part IV., Sect. 10, sub-sect. 3, A., *ante.*

SUB-SECT. 3.—GIFTS BY WIFE.

A. Validity.

(a) In General.

1361. Undue influence—Presumption from relationship of parties.]—(1) There is no presumption that a voluntary deed executed by a wife in her husband's favour, & prepared by her husband's solicitor, is invalid.

(2) The *onus probandi* lies on the person who impugns the instrument & not on the person who supports it.—BARRON *v.* WILLIS, [1899] 2 Ch. 578; 68 L. J. Ch. 604; 81 L. T. 321; 48 W. R. 26; 15 T. L. R. 469; 43 Sol. Jo. 707; *revsd.* on other grounds, [1900] 2 Ch. 121, C. A.; *sub nom.* WILLIS *v.* BARRON, [1902] A. C. 271, H. L.

Annotations:—*As to* (1) **Apprvd.** Howes *v.* Bishop, [1909] 2 K. B. 390. **Consd.** Bank of Africa *v.* Cohen, [1909] 2 Ch. 129; Bank of Montreal *v.* Stuart, [1911] A. C. 120. **Refd.** Wright *v.* Carter, [1903] 1 Ch. 27; Moody *v.* Cox & Hatt (1917), 116 L. T. 740; Westen *v.* Fairbridge, [1923] 1 K. B. 667.

1362. —— —— Large benefit conferred.]—F., who was indebted to B., obtained from his wife, deft., a guarantee in favour of B. to cover his debts then due to B., a present advance of £500 & future credits, the total liability being limited to £1,500. Deft. was a trader on her own account, & had on previous occasions given F. small amounts of financial aid. Deft. was aware of F.'s financial position & of his indebtedness to B. B., B.'s solr., F., & deft. were the only persons present when the guarantee was signed, & deft. had no independent advice. The guarantee, a very complicated document, was twice read over by the solr., who suggested to B. that deft. should be separately represented:—*Held:* (1) deft. did not sufficiently understand the nature of the guarantee; (2) the relationship of husband & wife was one where in the case of a large voluntary benefit influence was presumed to exist; (3) the transaction being challenged the burden was on the donee to prove that the giving of the guarantee was free from the influence of the husband, &, in the absence of independent advice, this had not been discharged; (4) B. was sufficiently put on inquiry to be affected with the equitable flaws in the transaction.—BISCHOFF'S TRUSTEE *v.* FRANK

PART VI. SECT. 9, SUB-SECT. 2.—C.

1357 i. *Effect of wife's misconduct—Elopement & adultery.*]—Adultery by the wife, no bar to the specific performance of articles executed previous to marriage, providing a jointure for her. Jointure not forfeited at law by elopement or adultery; the same rule in equity where jointure secured by articles.—BUCHANAN *v.* BUCHANAN (1809), 1 Ball & B. 203.—**IR.**

PART VI. SECT. 9, SUB-SECT. 3.—A. (a).

1361 i. *Undu influence—Presumption from relationship of parties.*]—In the case of an absolute gift from wife to husband, the relationship does not of itself raise any presumption of undue influence.—ROBERTS *v.* BROWN & BEATTIE, [1924] N. Z. L. R. **N.Z.**

Sect. 9.—Gifts between husband and wife: Sub-sect. 3, A (a) & (b), B. (a) i.]

(1903), 89 L. T. 188; *on appeal*, cited in [1911] 1 K. B. at pp. 863, 864, C. A.

Annotations:—*As to* (1) & (2) **Folld.** Chaplin *v.* Brammall, [1908] 1 K. B. 233. **Consd.** Howes *v.* Bishop, [1909] 2 K. B. 390. **Refd.** Talbot *v.* Von Boris, [1911] 1 K. B. 854; Shears *v.* Jones (1922), 128 L. T. 218. *As to* (3) **Refd.** Talbot *v.* Von Boris, [1911] 1 K. B. 854.

1363. Understanding transaction.] (1) Pltf. having obtained judgment against a debtor, it was agreed that the judgment debtor & the two defts. in the present action, who were husband & wife, should give pltf. a joint & several promissory note, payable by instalments, for the amount of the judgment. The husband, who had business relations with the judgment debtor, procured his wife's signature to the promissory note, the jury finding that the transaction was sufficiently explained to her & that she knew that the document she was signing was a promissory note, & that she also knew she was incurring a possible liability for the benefit of the judgment debtor in so signing; they also found that her signature was procured by the influence of her husband, but could not agree as to whether it was procured by his undue influence. Default having been made by the judgment debtor in payment of the instalments of the promissory note, the present action was brought against the husband & wife to recover the balance of the instalments of the promissory note. The husband allowed judgment to go by default:—*Held:* notwithstanding the absence of independent advice, the wife was liable upon the promissory note.

(2) There is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband & wife, so as to throw on the husband, or on the person who is suing the wife, the *onus* of disproving an issue of undue influence (LORD ALVERSTONE, C.J., FLETCHER-MOULTON, L.J.).

(3) The relation of husband & wife does not come within the equity laid down in *Huguenin* v. *Baseley*, (1807), 14 Ves. 273.—HOWES *v.* BISHOP, [1909] 2 K. B. 390; 78 L. J. K. B. 796; 100 L. T. 826; 25 T. L. R. 533, C. A.

Annotations:—*As to* (2) **Consd.** Shears *v.* Jones (1922), 128 L. T. 218. **Refd.** Talbot *v.* Von Boris, [1911] 1 K. B. 854. *As to* (3) **Refd.** Shears *v.* Jones (1922), 128 L. T. 218.

1364. Trustees dissenting—Where assent not required—Not evidence of coercion—Grant of annuity.]—Grant of an annuity by a married woman out of her separate property established; notwithstanding notice to pltf. by the trustees, that they would pay to herself only on account of complaints of her husband's conduct, in consequence of her refusing to join him in raising money; the transaction, though for the benefit of her husband, upon the evidence being her deliberate act, aware of what she was doing & a free agent.

A married woman can bind her separate property without the trustees; unless their assent is rendered necessary by the instrument giving her that property. Their dissent cannot have any effect, where their assent is not necessary; & their declaration that she was unwilling cannot be evidence of the fact that she parted with her property by coercion (GRANT, M.R.).—ESSEX *v.* ATKINS (1808), 14 Ves. 542; 33 E. R. 629.

Annotation:—**Refd.** Glyn *v.* Baster (1827), 1 Y. & J. 329.

1365. Instrument prepared by husband's solicitor—Not read over on execution—Executed unwillingly.]—By a will, the income of certain trust funds was given to a wife for her separate use, for life, with power for her by any will or instrument in writing, to be by her duly executed, to bequeath & dispose of one moiety of the trust funds. By an indenture, duly executed, she appointed the moiety to her husband absolutely. In a suit by her against her husband she sought to set aside the appointment, on the ground that she had executed it in ignorance of its contents & purport, & without professional advice; & it was in evidence that the deed was prepared by the husband's solr., & was executed by the wife at her husband's house, without its having been read over to her at that time; & that she was agitated & distressed at the time, & signed it in a reluctant manner:—*Held:* the appointment was not invalid; & it was sustained. An appointment made in exercise of a power by a wife in favour of her husband is to be considered good, unless the wife shows that it was executed in circumstances sufficient to invalidate it. The *onus probandi* lies on the party impeaching the instrument.—NEDBY *v.* NEDBY (1852), 5 De G. & Sm. 377; 21 L. J. Ch. 446; 19 L. T. O. S. 294; 64 E. R. 1161.

Annotations:—**Consd.** Bischoff's Trustee *v.* Frank (1903), 89 L. T. 188; Howes *v.* Bishop, [1909] 2 K. B. 390; Bank of Montreal *v.* Stuart, [1911] A. C. 120; **Refd.** Barron *v.* Willis, [1899] 2 Ch. 578.

1366. —— No presumption of undue influence.]—BARRON *v.* WILLIS, No. 1361, *ante*.

1367. —— Duty of solicitor.]—BANK OF MONTREAL *v.* STUART, No. 1378, *post*.

See, further, SOLICITORS.

1368. Wife not independently advised—Property charged to benefit husband — False recital.] — Money which had been bequeathed to a married woman for her separate use was, during the coverture, by her husband, at her request, lent on mtge. The mtge. deed was prepared by the solr. of the mtgor. from instructions given by him & the husband, & it recited untruly that the money belonged to the wife before marriage, & was not comprised in any settlement & it was made payable to the husband & wife, & to the survivor of them, his or her exors., or administrators, or their, his, or her assigns. The wife had no separate solr., & executed the deed without its being read over to her. The husband deserted his wife, & was subsequently, on her petition, divorced from her on the grounds of adultery & cruelty. Upon bill by the wife, by her next friend, against her husband, & the mtgor., the deed was declared to be void, so far as it purported to be a settlement on the husband of the £2,000, & a new deed was ordered to be executed in favour of the wife alone.—KNIGHT *v.* KNIGHT (1865), 5 Giff. 26; 12 L. T. 699; 11 Jur. N. S. 617; 66 E. R. 908.

1369. —— —— Concealment of material facts.] —*Held:* applts. could not enforce a charge on respt.'s share in her father's estate, obtained through their agent who was also exor. & trustee for her under her father's will, by pressure through her husband, whose debts were to be thereby secured, concealment of material facts, & without independent advice.—TURNBULL & CO. *v.* DUVAL, [1902] A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521, P. C.

Annotations:—**Folld.** Chaplin *v.* Brammall, [1908] 1 K. B. 233. **Expld. & Distd.** Howes *v.* Bishop, [1909] 2 K. B. 390. **Refd.** Bischoff's Trustee *v.* Frank (1903), 89 L. T. 188; Shears *v.* Jones (1922), 128 L. T. 218.

1370. —— Guarantee for husband.]—BISCHOFF'S TRUSTEE *v.* FRANK, No. 1362, *ante*.

1371. —— —— Nature of transaction not explained.]—Pltfs., having agreed to supply goods to deft.'s husband on credit if his wife would

guarantee payment by him of their price, sent to the husband a form of guarantee, in order that he might obtain his wife's signature to it, leaving the matter entirely to him. The husband obtained his wife's signature to the guarantee, without sufficiently explaining to her the nature of the document, which she did not understand when she signed it. Goods having been supplied by pltfs. to deft.'s husband, the price of which was not paid, pltfs. sued deft. on the guarantee:—*Held:* the action was not maintainable.—CHAPLIN & CO., LTD. *v.* BRAMMALL, [1908] 1 K. B. 233; 77 L. J. K. B. 366; 97 L. T. 860, C. A.

Annotations:—**Distd.** Howes *v.* Bishop, [1909] 2 K. B. 390. **Refd.** Shears *v.* Jones (1922), 128 L. T. 218.

1372. Knowledge of effect of transaction.]—H. wrote to his niece informing her of his intention "to request her acceptance of £10,000, to be settled as might be most agreeable to herself & her husband." No formal settlement was made of the money, which was paid in to an account which she had separately from her husband.

Subsequently she wrote to her bankers, at her husband's instance, requesting them to transfer the fund from her account to that of her husband; but she always received the interest. In her evidence she deposed that she thought she had a right to the income, but had no power to deal with the capital except by will:—*Held:* the money belonged to her for her separate use, & she had not abandoned her rights.

To enable a husband to claim separate estate against his wife, it must be clearly proved that the wife knew what her rights were, & intended to give them up.—CARNEGIE *v.* CARNEGIE (1874), 31 L. T. 7; 22 W. R. 783, L. JJ.

1373. Duress.]—A deed executed by a married woman as security for her husband's debts, obtained by pressure & without independent advice by the husband & the wife's trustee, who was the creditor's agent, & also by concealment of material facts, set aside.—TURNBULL & Co. *v.* DUVAL, [1902] A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521, P. C.

Annotations:—**Folld.** Chaplin *v.* Brammall, [1908] 1 K. B. 233. **Expld. & Distd.** Howes *v.* Bishop, [1909] 2 K. B. 390. **Refd.** Bischoff's Trustee *v.* Frank (1903), 89 L. T. 188; Shears *v.* Jones (1922), 128 L. T. 218.

1374. —— Promissory note.]—To an action against a wife upon joint & several promissory notes of her husband & herself, signed by her as surety for the repayment of sums advanced by pltf. to her husband, deft. pleaded that she was induced to sign the notes by duress on the part of her husband, & that pltf. knew of that duress. At the trial evidence was given by deft. of the duress so alleged, & the jury found that there was such duress. No evidence, however, was given on deft.'s part to show that pltf. knew of the duress, but on the contrary she stated in evidence that she did not think that the pltf. knew of it. Pltf. was not called as a witness, &, consequently, did not give evidence to negative his knowledge of the duress:—*Held:* the *onus* of proof with regard to knowledge of the duress by pltf. lay upon deft. & was not shifted by Bills of Exchange Act, 1882 (c. 61), s. 30, upon pltf., &, therefore, pltf. must succeed.—TALBOT *v.* VON BORIS, [1911] 1 K. B. 854; 80 L. J. K. B. 661; 104 L. T. 524; 27 T. L. R. 266; 55 Sol. Jo. 290, C. A.

Necessity for deed acknowledged.]—*See, now,* Law of Property Act, 1925 (c. 20), s. 167.

(b) Onus of Proof.

1375. On party impugning instrument.]—NEDBY *v.* NEDBY, No. 1365, *ante.*

1376. ——.]—BARRON *v.* WILLIS, No. 1361, *ante.*

1377. ——.]—HOWES *v.* BISHOP, No. 1363, *ante.*

1378. ——.]—(1) In the case of transactions between husband & wife the burden of proving undue influence lies upon those who allege it, but it is not necessary in every case to show that the wife had independent advice.

Where a wife, who was possessed of large separate estate, gave a guarantee to a bank in order to help her husband & a co. in which he was largely interested, which was in pecuniary difficulties, alleging that she acted of her own free will, without any pressure having been put upon her, & that she would not have taken advice from anyone, but it appeared that she acted in passive obedience to her husband's directions, & would have signed anything that he asked her to sign & had no means of forming an independent judgment is she had desired to do so:—*Held:* the transaction could not stand.

(2) In such a case it is the duty of the husband's solr. to advise the wife, & to lay the consequences of her action fully before her, & if she rejects his advice he should insist on her being separately advised.—BANK OF MONTREAL *v.* STUART, [1911] A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117, P. C.

Annotations:—*As to* (1) **Refd.** Westen *v.* Fairbridge, [1923] 1 K. B. 667. *Generally,* **Mentd.** Noeton *v.* Ashburton, [1914] A. C. 932.

Onus in case of negotiable instruments, *see* BILLS OF EXCHANGE, Vol. VI., p. 175, Nos. 1094–1123.

1379. Proof of independent advice—Whether onus discharged.]—BISCHOFF'S TRUSTEE *v.* FRANK, No. 1362, *ante.*

1380. —— ——.]—BANK OF MONTREAL *v.* STUART, No. 1378, *ante.*

B. When Presumed.

(a) Income.

i. *Received by Husband.*

1381. Liability to account.]—Where husband receives interest of wife's separate property, no account against his representatives.—SQUIRE *v.* DEAN (1793), 4 Bro. C. C. 326; 29 E. R. 916, L. C.

1382. —— Receipt authorised by wife.]—Under marriage articles £15,000 was vested in trustees

PART VI. SECT. 9, SUB-SECT. 3.—A. (b).

p. *Upon party supporting gift.*]—BUTLER *v.* STANDARD FIRE INSURANCE CO. (1879), 4 A. R. 391.—**CAN.**

q. ——.]—In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such course of dealing between the husband & wife as shows that the money was so paid to him as a gift.—ELLIOTT *v.* BUSSELL (1890), 19 O. R. 413.—**CAN.**

r. ——.]—D'ALBEDYHLL *v.* D'ALBEDYHLL (1886), 5 N. Z. L. R. 24 (S. C.).—**N.Z.**

s. ——.]—ROBERTS *v.* BROWN & BEATTIE, [1924] N. Z. L. R. 851.—**N.Z.**

PART VI. SECT. 9, SUB-SECT. 3.—B. (a) i.

1382 i. *Liability to account—Receipt authorised by wife.*]—Where a wife living with her husband permits him to retain the interest of money settled to her separate use & charged on his estate, she cannot recover more than one year's arrears, & though a demand by her on her trustee requiring him to proceed to recover the interest may negative the inference that her husband retained it with her assent the demand must be *bonâ fide* & followed up by proceedings if uncomplied with in order to enable her to recover as against his creditors more than one year's arrears.—CORBALLY *v.* GRAINGER (1854), 4 I. Ch. R. 173.—**IR.**

1382 ii. —— ——.]—If husband & wife are living together & the wife permits the husband to receive & spend her income, in the absence of

Sect. 9.—Gifts between husband and wife: Sub-sect. 3, B. (a) i.

on trust together with £5,000 covenanted by the husband to be paid, to be laid out in land, to be settled subject to such powers, limitations & provisions as the husband & wife or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee:—*Held:* husband was not to account for the income of his wife's separate estate, which she permitted him to receive.—SMITH *v.* CAMELFORD (LORD), CAMELFORD (LORD) *v.* SMITH (1795), 2 Ves. 698; 30 E. R. 848, L. C.; *previous proceedings, sub nom.* PITT *v.* JACKSON (1786), 2 Bro. C. C. 51.

Annotations:—**Refd.** Bartlett *v.* Gillard (1827), 3 Russ. 149; Digby *v.* Howard (1831), 4 Sim. 588. **Mentd.** Thellusson *v.* Woodford (1798), 4 Ves. 227; Thornton *v.* Bright (1836), 2 My. & Cr. 230; Monypenny *v.* Dering (1847), 16 M. & W. 418; Lee *v.* Head (1855), 1 K. & J. 620.

1383. —— ——.]—An annuity given to the separate use of the wife is discharged by payments made to the use of her husband & sums allowed him in account; the circumstances of the transactions being such as to satisfy the ct., that the mode of dealing between the person who was bound to pay the annuity & the husband was with the acquiescence of the wife, or with her authority, either express or implied.—BARTLETT *v.* GILLARD (1827), 3 Russ. 149; 6 L. J. O. S. Ch. 19; 38 E. R. 532, L. C.

Annotations:—**Refd.** Rowe *v.* Rowe (1848), 2 De G. & Sm. 294. **Mentd.** Edmunds *v.* Low (1857), 3 K. & J. 318; Atkinson *v.* Littlewood (1874), L. R. 18 Eq. 595; Fairer *v.* Park (1876), 3 Ch. D. 309.

1384. —— ——.]—Under a marriage settlement a wife was entitled to the income of the trust property for life, for her separate use, without power of anticipation. The settlement contained a power to the wife to appoint £10,000, & the trustees were empowered to invest in the purchase of lands. It appeared from the evidence that after the marriage the wife contemplated a gift of capital to her husband, & from the first she permitted her husband to receive the income of the whole trust property. In pursuance of the power in the settlement, the wife appointed that a sum of East India Stock, of the value of £10,000, should be transferred to her husband & herself, for his & her own absolute use & benefit. This sum of stock was sold by the husband at four different times; the wife joined in the transfers of the stock; the husband received the proceeds of sale, & applied them to his own purposes. The husband subsequently borrowed two sums of £8,000 & £5,696 from the trustees of the settlement, to enable him to make purchases of real property; these sums were secured by a deposit of title deeds. The husband also rebuilt a house on the property in settlement, with the consent of the trustees, & sought to have £2,000 in respect of such improvements allowed in account as against the sum of £8,000 due from him. In an action against the husband & the trustees, commenced by the wife & continued by her executors:—*Held:* (1) the husband was not accountable for the income of his wife's separate estate, which she permitted him to receive; (2) there was a gift to the husband of the £10,000, when it came into his hands without the exertion of undue influence over his wife; (3) the £2,000 expended in building could not be considered as sanctioned by the power to invest in land; & the two sums of £8,000 & £5,696 must be repaid, but without interest; (4) the exors. of the wife were not debarred from obtaining the restitution of the trust funds by the alleged acquiescence of the wife in the breaches of trust.—HALE *v.* SHELDRAKE (1889), 60 L. T. 292; 5 T. L. R. 276.

1385. —— ——.]—AYTOUN *v.* AYTOUN (1892), 8 T. L. R. 586.

1386. —— —.] — Where husband & wife are living together in amity, & the husband, with the wife's consent, receives her separate income, he is, in the absence of an agreement express or to be inferred from the circumstances, taken to receive it in his capacity as head of the family & is entitled to deal with it as he pleases & is not liable to account for it to his wife or to repay any part of it to her. It is a question of fact whether an agreement has been arrived at which rebuts the presumption arising from the receipt of the wife's money by the husband. A wife's separate income was, with her consent, received by her husband:—*Held:* on the evidence, the money was only paid to the husband for the purpose of investment, & it remained the wife's property.—*Re* YOUNG, YOUNG *v.* YOUNG (1913), 29 T. L. R. 391.

1387. —— **Term bequeathed to wife—No trustees appointed.**]—Testator gave leasehold premises to his daughter for life, if his term or terms & interest therein should so long subsist, for her sole & separate use, notwithstanding her present or future coverture; & after her decease to her children equally, their exors., etc., during all the remainder of the estate, term or terms & interest therein, which should be then to come & unexpired. No trustees being interposed:—*Held:* the husband having possession was accountable according to the uses of the will, both as to the original leases, & also as to reversionary leases, granted to him, as the person entitled under the will of the former tenant, upon favourable terms; & the equity was established against a purchaser from him with notice.—PARKER *v.* BROOKE (1804), 9 Ves. 583; 32 E. R. 729.

Annotations:—**Distd.** *Re* Ellis, *Ex p.* Green (1832), 2 Deac. & Ch. 113. **Consd.** Dixon *v.* Dixon (1878), 9 Ch. D. 587. **Mentd.** Logan *v.* Wienholt (1833), 7 Bli. N. S. 1.

1388. —— **No demand made by wife—Annuity charged on stranger's estate—Rents received by husband.**]—A married woman being entitled to an annuity charged on an estate belonging to A., but of which her husband was, as she knew, in receipt of the rents, under a power of attorney from A., made no demand in respect on the annuity for several years. The husband being indebted to A. in respect of his receipts becomes bkpt.:—*Held:* as the wife had lived with her husband, & enjoyed the benefit of his expenditure, she had no claim upon A. or his estate in respect of the arrears of the annuity.—CARTER *v.* ANDERSON (1830), 3 Sim. 370; 8 L. J. O. S. Ch. 91; 57 E. R. 1036.

1389. —— —— **Presumption of agreement.**]—(1) Where a wife is living with, & is maintained by her husband, the ct. will not grant an account of the arrears of the income of her separate estate, which, in the absence of a demand by her, have been paid to her husband. The ct. proceeds, in such case, on the assumption that some arrangement has been made between the husband & wife; but in the case of the wife being a lunatic,

evidence to the contrary, the ct. will assume that it is a gift; but this implied authority is withdrawn when the parties are at arm's length & from that time the husband must account for the income.—D'ALBEDYHLL *v.* D'ALBEDYHLL (1886), 5 N. Z. L. R. 24 (S. C.).—**N.Z.**

1382 iii. —— ——.]—A married woman may make an effectual gift of her separate income to her husband, but has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bonâ fide* consumed. The wife's consent to give need not be in writing, nor in terms express but may be matter

her acquiescence could not be presumed, the account was refused.

(2) Where there is a clause against anticipation, & trustees pay the income to a married woman in advance, they are liable to pay it over again, & are not entitled to be reimbursed out of the subsequent income.—LEACH *v.* WAY (1835), 5 L. J. [illegible]

1390. [illegible].]—The property of a lady was settled, upon her marriage, to her separate use. She allowed her husband to receive the rents during his life without objection or interference. The rents were paid into a separate bank, distinct from the husband's usual bank, & were applied by him, partly in paying incumbrances on the property; but the greater portion was accumulated:—*Held:* the wife having permitted her husband to exercise entire control over the rents, an agreement by her must be presumed that the fund should be at his absolute disposal, & the accumulations at his death would form part of his personal estate.—BERESFORD *v.* ARMAGH (ARCHBP.) (1844), 13 Sim. 643; 13 L. J. Ch. 235; 8 Jur. 262; 60 E. R. 250.

Annotation:—**Refd.** Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385.

1391. —— —— ——.]—AYTOUN *v.* AYTOUN (1892), 8 T. L. R. 586.

1392. —— Unauthorised dealing with stock.]—The trustee of a sum of stock for the separate use of a married woman having improperly transferred it into the joint names of her husband & himself, the husband for six years received the dividends after which the trustee died, & the husband, without his wife's knowledge, sold out the stock, & applied the proceeds to his own use. Some time afterwards he left her:—*Held:* though the wife might have been presumed to have assented to the husband's actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, & she was entitled to recover, as against her husband & the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced.—DIXON *v.* DIXON (1878), 9 Ch. D. 587; 27 W. R. 282.

Annotations:—**Consd.** Aytoun *v.* Aytoun (1892), 8 T. L. R. 586. **Refd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663.

1393. —— Interest on capital — Capital converted to own use.]—A married woman being entitled to a sum of money for her separate use under the will of a testatrix, a mtge. for a larger sum held in trust for testatrix was transferred in the year 1867 by the married woman & another person, as exors. of the trustee, to the husband of the married woman, he paying out of his own money to the exor. of testatrix the amount of the difference between the two sums. In 1869 the husband as mtgee. sold the mortgaged property, & his wife & the other exor. of the original mtgee. as such exors. concurred in the assignment to the purchaser, the execution of the assignment by the wife being procured by the husband. The husband received the purchase-money & applied it to his own use. The husband & wife lived together in amity until his death, & no proceedings were ever taken against him by her in respect of her money so received, nor did she receive any income thereof. There was no issue of the marriage. The husband died in 1885, having by his will, made in 1860, given his wife a life interest in his property. After his death she claimed to rank as a creditor against his estate for the sum received by him in 1867 with subsequent interest. She denied that she ever gave him any authority to receive the money, & there was some evidence that she objected to his receiving it. In the transactions in reference to the mtge. she did not appear to have had any separate advice:—*Held:* (1) those who claimed under the husband had not discharged the burden which lay upon them of proving a gift of the capital sum by the wife to the husband, & her claim in respect thereof must be allowed; (2) as to the interest accruing during the life of the husband the claim must be disallowed.—*Re* FLAMANK, WOOD *v.* COCK (1889), 40 Ch. D. 461; 58 L. J. Ch. 518; 60 L. T. 376; 37 W. R. 502.

Annotations:—*As to* (1) **Refd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663. *As to* (2) **Refd.** *Re* Hawes, *Re* Burchell, Burchell *v.* Hawes (1892), 62 L. J. Ch. 463.

1394. Husband one of trustees—Income paid into separate account—Receipt not as trustee.]—A married woman entitled for her separate use to the dividends of certain stock standing in the names of trustees, of whom her husband was one, permitted these dividends for a number of years to be paid to the husband's bankers to his separate account: it appeared also, by the evidence, that he made use of these funds as his own property:—*Held:* a course of dealing was proved, as existing between the husband & wife, which showed that the money was paid to the husband, as husband & not as trustee; & this being done with the assent & acquiescence of the wife, disentitled her from claiming any part of the money as against the estate of the husband.—CATON *v.* RIDEOUT (1849), 1 Mac. & G. 599: 2 H. & Tw. 33; 15 L. T. O. S. 497; 41 E. R. 1397, L. C.

Annotations:—**Distd.** Smith *v.* Harding (1865), 6 New Rep. 333. **Consd.** Dixon *v.* Dixon (1878), 9 Ch. D. 587. **Apld.** *Re* Lulham, Brinton *v.* Lulham (1884), 53 L. J. Ch. 928. **Apprvd.** Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385. **Consd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663. **Apld.** *Re* Flamank, Wood *v.* Cock (1889), 40 Ch. D. 461; *Re* Hawes, *Re* Burchell, Burchell *v.* Hawes (1892), 62 L. J. Ch. 463. **Consd.** *Re* Dixon, Heynes *v.* Dixon, [1900] 2 Ch. 561. **Distd.** Hunt *v.* Hunt (1908), 25 T. L. R. 132. **Refd.** Darkin *v.* Darkin (1853), 17 Beav. 578; *Re* Curtis, Hawes *v.* Curtis (1885), 52 L. T. 244; Hale *v.* Sheldrake (1889), 60 L. T. 292; Hood Barrs *v.* Heriot, [1896] A. C. 174; Howes *v.* Bishop, [1909] 2 K. B. 390; *Re* Young, Young *v.* Young (1913), 29 T. L. R. 391. **Mentd.** Dilkes *v.* Broadmead (1860), 2 De G. F. & J. 566.

1395. —— Subsequently sole trustee.]—By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband; with this difference, that by Scotch law she has the privilege of revoking the donation, even after her husband's death, & reclaiming the subject of her gift in so far as it has not been consumed. The same circumstances which are in England held to imply donations between husband & wife are sufficient to sustain a similar inference in Scotland. A married woman living with her husband in Scotland was entitled to the income of a fund settled for her separate use, which stood in the names of trustees of whom her husband was one; & he also acted as factor of the trust. Payments of

of inference from the circumstances of the case or the conduct of the spouses.—EDWARD *v.* CHEYNE (1888), 15 R. (Ct. of Sess.) 37; 25 Sc. L. R. 424, H. L.—**SCOT.**

t. —— *Expenditure for joint purposes.*]—On the facts:—*Held:* that income from the wife's separate estate received by the husband was presumably expended for their joint purposes & that he was not accountable for the same.—RICE *v.* RICE (1899), 31 O. R. 59; 27 A. R. 121.—**CAN.**

a. *Income from wife's separate property—Paid to husband by wife's directions.*]—SILVER *v.* SILVER (*circa* 1871), R. E. D. 159.—**CAN.**

b. *Furniture bought by husband out of wife's income—With wife's consent.*]—Before Married Women's Property

Sect. 9.—Gifts between husband and wife: Sub-sect. 3, B. (a) i., ii. & iii., (b) i.]

income were at first lodged in a bank to the credit of the wife's separate account, then to the credit of an account in the names of both husband & wife; but for many years previous to the husband's death, both before & after he became sole trustee, the income was paid into the husband's private banking account, & mixed with his own funds:—*Held:* these circumstances inferred a complete gift; &, in respect it had not been revoked by the wife, her representatives were not entitled to an account of the husband's intromissions with her separate estate.—EDWARD *v.* CHEYNE (No. 2) (1888), 13 App. Cas. 385, H. L.

Annotations:—**Apld.** Hale *v.* Sheldrake (1889), 60 L. T. 292. **Distd.** Hunt *v.* Hunt (1908), 25 T. L. R. 132. **Refd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663; Hood Barrs *v.* Heriot, [1896] A. C. 174; *Re* Dixon, Heynes *v.* Dixon, [1899] 2 Ch. 561; *Re* Young, Young *v.* Young (1913), 29 T. L. R. 391.

Compare Nos. 1405, 1406, *post.*

1396. Rebuttal of presumption—Receipt for specified purpose—Management during coverture.]—*Feme covert* by deed directed rents & profits, her separate property, to be paid during her life to her husband for his own proper use & benefit: the intention being only to give him the administration during coverture without account, the widow is entitled after his death to the future rents, & to those accrued in his life, & not received. If her interest had passed, it must upon the circumstances of the transaction have been set aside.—MILNES *v.* BUSK, BUSK *v.* MILNES (1794), 2 Ves. 488; 30 E. R. 738, L. C.

Annotations:—**Refd.** Bartlett *v.* Gillard (1827), 3 Russ. 149. **Mentd.** Sperling *v.* Rochfort (1803), 8 Ves. 164; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494.

1397. —— —— **Investment.**]—*Re* YOUNG, YOUNG *v.* YOUNG, No. 1386, *ante.*

1398. —— **Money loaned by wife.**]—A ct. of equity has established the independent personalty of a *feme covert* with respect to property settled to her separate use; & although the bare advance by the wife of a sum of money, part of the income of her separate estate, to the husband, would not raise an *assumpsit* for the repayment, yet if any portion of such income be advanced to him upon a contract of loan, the wife may sue her husband in respect of it.—WOODWARD *v.* WOODWARD (1863), 3 De G. J. & Sm. 672; 8 L. T. 749; 9 Jur. N. S. 882; 11 W. R. 1007; 46 E. R. 797, L. C.

Annotation:—**Refd.** Butler *v.* Butler (1885), 14 Q. B. D. 831.

1399. —— **Sale of stock—Without wife's knowledge.**]—DIXON *v.* DIXON, No. 1392, *ante.*

ii. *Retention of Income Due from Husband.*

1400. Pin money—Part retained by husband—Promise to pay arrears.]—A. had £300 *per annum* pin-money, the husband for several years before his death paid her £200 only, but promised her she should have the whole at last. If the wife accepts less, or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to submit to such a method. But where the pin money is paid to her *eo nomine*, her agreement with the husband relating to her separate estate amounts not to a new agreement, & his promising she should have it at last is an undertaking to pay the arrears.—RIDOUT *v.* LEWIS (1738), 1 Atk. 269; West *temp.* Hard. 302; 26 E. R. 171, L. C.; *subsequent proceedings, sub nom.* RIDOUT *v.* PLYMOUTH (EARL) (1740), 2 Atk. 104, L. C.

Annotation:—**Expld. & Distd.** Thrupp *v.* Harman (1834), 3 My. & K. 513.

1401. —— —— ——.]—A wife cannot recover more than a year's arrears of pin money after long acquiescence in the receipt of it by her husband, notwithstanding claims made by the wife during the husband's lifetime, & a promise made by the husband that she should have an equivalent, such promise not, under the circumstances, amounting to an undertaking to pay the arrears.—THRUPP *v.* HARMAN (1834), 3 My. & K. 513; 40 E. R. 195.

——.]—*See, generally,* Sect. 9, sub-sect. 2, C., *ante.*

1402. Annuity—Charged on husband's estate—Payment not enforced by trustee.]—A wife was entitled to an annuity for her separate use, which was payable out of a mtge. on her husband's estate. The wife lived with her husband & was maintained by him. The wife's trustee neglected to enforce payment of the mtge. & interest, was held liable for the breach of trust:—(1) as between the husband & wife, the interest applied to their mutual benefit must be taken in discharge of her annuity, & the trustee, as against the wife, was entitled to the benefit of the same equity; (2) the accruing payment of the annuity could not be set off against a prior existing debt of the husband.—PAYNE *v.* LITTLE (1858), 26 Beav. 1; 53 E. R. 796.

Annotation:—*As to* (1) **Consd.** Dixon *v.* Dixon (1878), 9 Ch. D. 587.

1403. —— **Granted by husband before marriage—Arrears accrued during marriage.**]—AYTOUN *v.* AYTOUN (1892), 8 T. L. R. 586.

1404. Capital borrowed by husband from wife's trustees—Non-payment of interest for long period—Parties separated.]—(1) Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—*Held:* stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts of the settlement as corpus, & the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds.

(2) Wife entitled for life to income of settled property for her separate use, without power of anticipation. The trustees allowed the husband to use £1,000, part of the trust funds, for four years. Shortly after which period, the wife separated from her husband, & then for the first time claimed interest on the £1,000 for the four years. She admitted she had allowed her husband to receive her income so long as he behaved to her as a husband ought to do:—*Held:* the wife was not entitled to the interest claimed.—ROWLEY *v.* UNWIN (1855), 2 K. & J. 138; 69 E. R 726.

Annotations:—*As to* (1) **Apld.** *Re* Malam, Malam *v.* Hitchens [1894] 3 Ch. 578. *As to* (2) **Consd.** Hood Barrs *v.* Heriot, [1896] A. C. 174. **Refd.** Edward *v.* Cheyne (No. 2) (1888), 13 App. Cas. 385.

1405. —— —— **Parties living in amity.**]—Where a married woman was under a will entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mtge. of two freehold houses, & the husband & wife had lived together in amity for a period of more than twenty years after the date of the mtge., & during

Act, 1884, where furniture was bought with the income of a wife's separate estate, & mixed by the husband with other furniture & used as his own with his wife's consent, slight evidence was sufficient to establish a gift of the furniture to the husband.—STRACHAN *v.* MURRAY (1886), 5 N. Z. L. R. 55 (S. C.).—**N.Z.**

that time the husband had never paid any interest on the mtge. debt, or given any written acknowledgment of the mtge. to the mtgee.-trustee for the wife:—*Held:* the husband retained the interest as a gift from the wife; it was the same hand to pay & to receive; therefore, no payment over was requisite; &, consequently, Stat. Limitations did not run, & the mtge. was still subsisting.—*Re* HAWES, *Re* BURCHELL, BURCHELL *v.* HAWES (1892), 62 L. J. Ch. 463; 67 L. T. 756; 41 W. R. 173; 3 R. 133.

Annotation:—**Refd.** *Re* Dixon, Heynes *v.* Dixon (1900), 83 L. T. 129.

1406. ·]—By a marriage settlement dated in 1847, a fund belonging to the wife was vested in trustees in trust for investment "on real or personal securities bearing interest," with power of varying investments with the written consent of the husband & wife or the survivor, & to pay the income to the wife for her separate use without power of anticipation, then to the husband for life, & after the death of the survivor, as to the capital, upon the trusts therein mentioned.

In 1852, the trustees, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. *per annum* six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months.

The husband & wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 & the husband in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—*Held:* the bond debt was not barred by Stat. Limitations on the grounds that the bond, being a penalty bond, was an interest bearing security carrying interest, though not mentioned beyond the date fixed for payment of the debt; that as the husband & wife had lived together in amity it was unnecessary, in order to prevent the statute from running, to go through the formality of the husband paying the interest to the trustees, the trustees paying it to the wife, & the wife paying it to the husband; & that, as the husband took with full notice that the money lent was trust money & liable to investment on interest-bearing security, he was in the position of an express trustee.

In equity when a wife living in amity with her husband allows him to retain money which she might have insisted on having paid to her for her separate use, she is assumed to have given to him all arrears of income (RIGBY, L.J.).—*Re* DIXON, HEYNES *v.* DIXON, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 665; 44 Sol. Jo. 515, C. A.

Annotations:—**Apld.** *Re* Eyre Williams, Williams *v.* Williams, [1923] 2 Ch. 533. **Refd.** *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781.

iii. *Accumulations.*

1407. Investment in husband's name—Purchase of land—With savings of separate estate.]—DARKIN *v.* DARKIN, No. 721, *ante.*

1408. —— —— Premises for school conducted by wife.]—*Re* DEARMER, JAMES *v.* DEARMER, No. 705, *ante.*

1409. —— —— Presumption of resulting trust.]—In 1883 deft. married M. They kept a joint banking account almost entirely composed of the wife's income, & both husband & wife drew on this account. In 1891 they bought some land, which was paid for out of the joint account & was conveyed to the husband. He died intestate in 1901, & his heir-at-law claimed the land:—*Held:* Mrs. M. had not made a gift of the purchase-money to her husband, & the land belonged to her.

There is no distinction in principle between the presumption of a resulting trust in favour of the wife which arises when her income has been applied to a purchase in her husband's name & that which arises when the payment has been made out of her capital.

In the case of the receipt by a husband of the separate property of his wife there is no general rule of law that in the case of *corpus* belonging to the wife the *onus* of proof of a gift lies on the husband, while in the case of income the *onus* lies on the wife, & she must establish clearly & conclusively that her husband received the income by way of loan. For this purpose the difference between capital & income is only one of degree & not of principle.—MERCIER *v.* MERCIER, [1903] 2 Ch. 98; 72 L. J. Ch. 511; 88 L. T. 516; 51 W. R. 611; 47 Sol. Jo. 492, C. A.

Annotation:—**Refd.** Hunt *v.* Hunt (1908), 25 T. L. R. 132.

(*b*) *Capital.*

i. *In Husband's Name.*

1410. Purchase in husband's name—Wife's money at husband's disposition.]—GLAISTER *v.* HEWER, No. 1302, *ante.*

1411. —— Reversionary leases—Expectant on term bequeathed to wife.]—PARKER *v.* BROOKE, No. 1387, *ante.*

1412. —— With wife's capital—Dividends paid to wife.]—A., the wife of B., was entitled in her own right to certain real estate, & proceedings to recover the same were instituted against C. who was in possession. The claim was compromised by C.'s paying a sum of money, & A.'s executing a release of the estate. The money was received by B. who, in a letter to the attorney in the proceedings, stated his intention to invest it for his wife's use. The sum was afterwards invested in B.'s name, & he regularly paid the dividends to his wife. B. on several occasions spoke of the stock as belonging to his wife, etc. B. died & upon the claim of A.:—*Held:* B. was a trustee of the fund for her separate use, & the exors. were ordered to transfer it to her.—TROTTER *v.* VINING (1852), 19 L. T. O. S. 6.

1413. —— —— Without wife's knowledge.]—The wife's separate estate was invested in shares, in the joint names of herself & her husband. The husband induced his wife to join in selling them, upon his promise to reinvest the produce in their joint names. The husband alone received the produce, &, unknown to his wife, he employed it in part payment for the purchase of a real estate conveyed to him alone. The wife survived her husband:—*Held:* she was entitled to a lien on the real estate for the amount.—SCALES *v.* BAKER (1859), 28 Beav. 91; 3 L. T. 73; 6 Jur. N. S. 1134; 8 W. R. 287; 54 E. R. 300.

Annotation:—**Refd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663.

1414. —— —— Distinction between capital & income not material.]—MERCIER *v.* MERCIER, No. 1409, *ante.*

1415. Completion in husband's name—Of prenuptial contract for sale of land—Wife devisee of purchaser.]—A. contracted to purchase real estate, & died, having made his widow his universal

Sect. 9.—*Gifts between husband and wife: Sub-sect.* 3, *B.* (*b*) *i., ii. & iii., C.; sub-sect.* 4. *Sect.* 10. *Part VII. Sect.* 1: *Sub-sect.* 1.]

devisee & legatee. The widow married B. who, in 1793, took a conveyance of the premises contracted to be purchased by A. to himself & a trustee, reciting the contract by A., his will & death, the marriage of his widow with B.; & that "thereupon B. became entitled to the beneficial interest in the purchase." B. in 1817 sold the premises to C., & C. took a conveyance from B. & his trustee, reciting that, by certain good & sufficient assurances in the law, the premises stood limited to B. & the trustee, but not reciting the deed of 1793. The widow died, leaving her heir-at-law an infant, who came of age in 1825 in the lifetime of B. The bill was brought by the heir in 1836, after the death of B. for a conveyance of the estate:—*Held:* (1) the recital in the deed must be understood as stating that the widow was devisee of the purchased premises, & the title of B. accrued by the marriage; (2) the ct. would not presume, in favour of a purchaser, that B. had any other title than was so represented; (3) C. must be presumed to have been cognisant of, & to have taken the title of B. his vendor; (4) the equitable title of the heir-at-law of widow was not affected by the lapse of time; & the heir at-law was entitled to the decree for a conveyance of the estate.—NEESOM *v.* CLARKSON (1842), 2 Hare, 163; 12 L. J. Ch. 99; 6 Jur. 1055; 67 E. R. 68; *subsequent proceedings* (1845), 4 Hare, 97.

Annotation:—*As to* (1) & (3) **Consd.** Parkinson *v.* Hanbury (1867), L. R. 2 H. L. 1.

1416. —— —— Husband paying part purchase money.]—Where an estate, L., had been contracted to be purchased by a woman, who married, leaving part of the purchase-money unsatisfied which was paid by her husband, who took the conveyance to himself & devised the estate:—*Held:* the estate was the property of the wife, subject to a charge in favour of her husband for the amount of purchase-money contributed by him.—MADDISON *v.* CHAPMAN (1861), 1 John. & H. 470; 70 E. R. 831.

Annotation:—**Mentd.** *Re* Thursby's Settlmt., Grant *v.* Littledale, [1910] 2 Ch. 181.

1417. Proceeds of mortgage on wife's property—Paid into husband's banking account.]—Money raised by the wife by mtge. of her separate estate, & paid into the bank to the credit of her husband, who drew cheques upon it for various purposes as occasion required, is equivalent to a gift to him from the wife, & upon a liquidation of his affairs passes to the trustee.—*Re* GRAINGER, *Ex p.* GRAINGER (1871), 24 L. T. 334.

1418. —— Received by husband—No proceedings by wife to recover.]—*Re* FLAMANK, WOOD *v.* COCK, No. 1393, *ante*.

1419. Wife's stock held by bankers—Direction to hold for husband—Interest paid to wife—Subsequent divorce.]—CARNEGIE *v.* CARNEGIE, No. 1372, *ante*.

1420. Onus of proof.]—*Re* FLAMANK, WOOD *v.* COCK, No. 1393, *ante*.

1421. ——.]—MERCIER *v.* MERCIER, No. 1409, *ante*.

ii. *In Joint Names.*

1422. Savings in joint names—Investment in realty in husband's name.]—DARKIN *v.* DARKIN, No. 721, *ante*.

1423. Proceeds on sale transferred to husband—Gift.]—HALE *v.* SHELDRAKE, No. 1384, *ante*.

1424. Property purchased with joint fund—No exclusive right in husband.]—HUNT *v.* HUNT, No. 708, *ante*.

iii. *Receipt by Husband of Wife's Legacy.*

1425. Bequest of leaseholds—No trustees appointed.]—PARKER *v.* BROOKE, No. 1387, *ante*.

1426. Wife's concurring in receipt—Legacy for separate use.]—A husband, with his wife's concurrence, received a legacy bequeathed upon trust for her separate use. Some time afterwards he made his will, bequeathing to her a much larger sum, & directing his exor., who was also his residuary legatee, to pay all his just debts:—*Held:* the concurrence of the wife in the receipt of the legacy by the husband was not a gift of it to him.—ROWE *v.* ROWE (1848), 2 De G. & Sm. 294; 17 L. J. Ch. 357; 11 L. T. O. S. 392; 12 Jur. 909; 64 E. R. 132.

Annotations:—**Consd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663. **Refd.** Taylor *v.* Taylor (1859), 33 L. T. O. S. 88. **Mentd.** Edmunds *v.* Low (1857), 3 K. & J. 318; Cole *v.* Willard (1858), 25 Beav. 568; Fairer *v.* Park (1876), 3 Ch. D. 309.

1427. ——.]—DARKIN *v.* DARKIN, No. 721, *ante*.

1428. —— —— No trustees appointed—Expenditure for domestic purposes.]—Pltf., during her husband's lifetime, was entitled, under a will, to a legacy for her separate use. The exors. paid the money, & the wife executed to them a release by deed, to which the husband was party. The money came into the husband's hands, but in what manner or under what circumstances there was no evidence to show, save that pltf. did not deny that it came to him & was paid by him to his bankers, & dealt with by him with her knowledge & consent. No communication took place between the husband & wife afterwards on the subject after the payment. The money was employed by the husband partly in his business & partly in the family expenditure. The husband died intestate, & the widow, pltf., claimed the sum out of the husband's assets, on the ground that he was a trustee of the same for her separate use:—*Held:* the employment of the money by the husband in the manner above mentioned, with the assent of the wife, rendered it impossible for the widow to claim the money out of the husband's assets.—GARDNER *v.* GARDNER (1859) 1 Giff. 126; 28 L. J. Ch. 903; 33 L. T. O. S. 313; 5 Jur. N. S. 975; 7 W. R. 692; 65 E. R. 853.

Annotations:—**Refd.** *Re* Curtis, Hawes *v.* Curtis (1885), 52 L. T. 244; *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663; *Re* Flamank, Wood *v.* Cock (1889), 60 L. T. 376.

1429. Draft credited to husband with wife's endorsement—No intention to make gift.]—G., to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in London, for the amount, less the duty, & she indorsed the draft & handed it over to her husband, & his bankers received the amount & placed it by his direction to his

PART VI. SECT. 9, SUB-SECT. 3.—B. (b) i.

1420 i. *Onus of proof.*]—In the case of the receipt of the *corpus* of a wife's separate property by her husband the *onus* of proof of a gift by the wife to her husband lies upon him & must be clearly established.—ALEXANDER *v.* BARNHILL, [1888] 21 L. R. Ir. 511.—IR.

c. *Wife's immoral earnings—Handed to husband.*]—Pltf., an infant, & deft. lived together as wife & husband, though not married. Pltf. handed to deft. various sums of money obtained by prostitution while they were thus living together. Part of this money deft. used in purchasing an interest in hotel property:—*Held:* there was no presumption of a gift in the circumstances, &, as deft. had set up no other defence than a denial of the debt, pltf. was entitled to judgment.—JOHNSTON *v.* DESAULNIERS (1910), 22 W. L. R. 629.—CAN.

deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the cheque to her husband. In an action against his exors. :—*Held:* the widow was entitled to be paid the sum claimed.—GREEN *v.* CARLILL (1877), 4 Ch. D. 882; 46 L. J. Ch. 477.

1430. Bequest of shares—Transfer by executor to husband—Onus of proof on husband.]—Testator, who died in 1860, bequeathed a portion of the residue of his personal estate to his daughter, a married woman, for her separate use. Shares in certain cos. were allotted to her in respect of this bequest, which shares were transferred by the exor. of the will into the name of her husband. In 1862 a deed of release was given to the exor., which was executed both by the husband & the wife. Testator's daughter & her husband lived together on affectionate terms until 1884, when the husband died, having by his will bequeathed to his wife a legacy, & given her a life interest in all his property. During the whole of the time from 1860 to 1884 the husband received the dividends on the shares. He kept very careful books of account, from which it appeared that he did not pay the dividends to his wife, although he did pay to her the dividends of certain other property, which also belonged to her for her separate use. Before 1862 the shares were always referred to in the books as having originally belonged to the wife, but this mode of reference was discontinued after that date. The wife died in 1884, a few days after her husband; & the question was, whether the shares, which still remained *in specie*, formed part of her estate or of that of her husband:—*Held:* the mere transfer of the shares into the name of the husband was not *per se* evidence of a gift thereof to him; the burden lay upon those who represented him to show that the wife had given him the shares, which burden they had not discharged; & the shares must be treated as forming part of the wife's estate.—*Re* CURTIS, HAWES *v.* CURTIS (1885), 52 L. T. 244.

Annotation:—**Refd.** *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663.

C. Fund in Court.

Payment out to husband.]—*See* Part XII., Sect. 1, sub-sect. 1, H., *post.*

SUB-SECT. 4.—PARTIES NOT LEGALLY MARRIED.

1431. Stock purchased in joint names—Purchaser & deceased wife's sister—No gift presumed.]—SOAR *v.* FOSTER, No. 1323, *ante.*

1432. Parties living as married—Woman's money invested in man's name—Man declared trustee.]—Where a man lived with a woman in the character of her husband, & obtained money from her that he might invest it, the ct. refused, without positive proof, to declare he was not a trustee, or to permit him after eleven years to claim the money & the investments as his own, or to say that it was a loan, & to plead Stat. Limitations in bar to the suit.—JAMES *v.* HOLMES (1862), 4 De G. F. & J. 470; 31 L. J. Ch. 567; 6 L. T. 589; 8 Jur. N. S. 732; 10 W. R. 634; 45 E. R. 1266, L. C.

SECT. 10.—**MARRIAGE SETTLEMENTS.**

See SETTLEMENTS.

Where conflict of laws—What law governs.]—*See* CONFLICT OF LAWS, Vol. XI., p. 434, Nos. 965 *et seq.*

—— **Variation of settlements.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 440, Nos. 1009 *et seq.*

Whether bills of sale.]—*See* BILLS OF SALE, Vol. VII., p. 26, Nos. 124 *et seq.*

Part VII.—Liability for Ante-Nuptial Obligations of Wife.

SECT. 1.—**LIABILITY OF HUSBAND.**

SUB-SECT. 1.—IN GENERAL.

See, now, Married Women's Property Act, 1882 (c. 75), ss. 13—15.

1433. Married Women's Property Act, 1870, Amendment Act, 1874 (c. 50), s. 5—Application to debts contracted abroad.]—By the law of Jersey a husband is liable for the ante-nuptial debts of his wife, & the above Act does not apply to Jersey:—*Held:* notwithstanding, an Englishman married in England, after the passing of the Act, to a woman who has contracted debts while a *feme sole* in Jersey, is liable, in an action brought against them in England for those debts, to the extent only of the assets derived from his wife, & specified in sect. 5 of the Act.—DE GREUCHY *v.* WILLS (1879), 4 C. P. D. 362; 48 L. J. Q. B. 726; 41 L. T. 345; 43 J. P. 818; 28 W. R. 169.

1434. Onus on husband to show no assets.]—In an action against a husband & wife married since the above Act, for the recovery of a debt of the wife contracted before the marriage, it is not necessary that the statement of claim should allege that the husband has received assets of the wife; it is sufficient that he should simply allege that the husband is liable for the debt, leaving it to the husband to exercise his option of pleading non-liability under the provisions of the Act. A demurrer by the husband to pltf.'s statement of claim in such an action, on the ground that pltf. had failed to allege that the husband had received assets, was therefore overruled. The effect of Married Women's Property Acts, 1870 (s. 12), & 1874, considered.—MATTHEWS *v.* WHITTLE (1880), 13 Ch. D. 811; 49 L. J. Ch. 359; 43 L. T. 114; 28 W. R. 822.

1435. —— Termination of liability—On death of

PART VI. SECT. 9, SUB-SECT. 4.

d. *Parties living as married—Property purchased in woman's name.*]—Where parties cohabit as husband & wife, as between themselves, their rights of property should, in the absence of evidence, be as near as may be those of married persons. Property resulting from the man's business invested in land, purchased with the man's knowledge in the woman's name, upon which buildings were erected with his knowledge, by money the proceeds of his business, she having the legal estate, will, as between her & beneficiaries under his will, be held to be hers.—MURDOCK *v.* AHERNE (1878), 4 V. L. R. 244.—**AUS.**

PART VII. SECT. 1, SUB-SECT. 1.

e. *Judgment—Joint liability of husband—Execution — Procedure.*]—Pltf. proceeded by writ of revivor to obtain execution against husband & wife on a judgment recovered against the latter before marriage. The declaration set out the writ, in which the judgment was stated, & prayed execution against both defts. upon it; defts. demurred, on the ground that no legal right of action was shown against them, & that the proceeding by writ of revivor was not applicable:—*Held:* under

Sect. 1.—*Liability of husband: Sub-sects.* 1, 2 & 3. *t.* 2: *Sub-sects.* 1 & 2.]

wife.]—A husband is not liable under the above Act, after his wife's death, for her debts contracted before the marriage.—BELL *v.* STOCKER (1882), 10 Q. B. D. 129; 52 L. J. Q. B. 49; 47 L. T. 624; 47 J. P. 8; 31 W. R. 183.

1436. Married Women's Property Act, 1882 (c. 75)—Unsatisfied judgment against wife—Subsequent action against husband.]—(1) A judgment having been recovered by pltf. in an action brought against a married woman under sect. 13 of above Act, for a debt incurred by her before marriage, but such judgment remaining unsatisfied because she had no separate estate, an action for the debt was afterwards brought by pltf. against the husband who had acquired property from his wife to an amount exceeding the debt:—*Held:* the judgment recovered against the wife was no defence to the action against the husband. (2) A husband cannot be made liable under sects. 14 & 15 of above Act for an ante-nuptial debt of the wife which accrued due against the wife more than six years before the commencement of the action.—BECK *v.* PIERCE (1889), 23 Q. B. D. 316; 58 L. J. Q. B. 516; 61 L. T. 448; 54 J. P. 198; 38 W. R. 29; 5 T. L. R. 672, C. A.

Annotation:—*As to* (1) **Refd.** *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510.

1437. Limitation of actions—Time from which statute begins to run.]—BECK *v.* PIERCE, No. 1436, *ante.*

SUB-SECT. 2.—IN RESPECT OF SHARES OWNED BY WIFE.

See COMPANIES, Vol. IX., pp. 331, 332, Nos. 2089–2091, 2096–2098.

SUB-SECT. 3.—PROOF OF MARRIAGE.

Proof of marriage generally, *see* Part II., Sect. 12. *ante.*

1438. Proof of de facto marriage.]—ALLEYNE *v.* GREY (1689), 2 Salk. 437; 91 E. R. 380.

1439. ——.]—In *assumpsit*, one deft. sued as husband to the other pleads that they never were joined in lawful matrimony. This plea is bad; for a marriage *de facto* makes him liable. Such plea is good only in dower & appeal.—NORWOOD *v.* STEVENSON (1738), Andr. 227; 95 E. R. 374.

1440. Primâ facie evidence sufficient.]—In an action against husband & wife on the note of the wife made *dum sola* a witness stated that he knew A., the wife, formerly & had heard that she afterwards married E., the husband. The witness was not cross-examined:—*Held:* sufficient *primâ facie* evidence of marriage.—EVANS *v.* MORGAN (1832), 2 Cr. & J. 453; 2 Tyr. 396; 149 E. R. 192.

Annotation:—**Refd.** Shedden *v.* A.-G. (1860), 30 L. J. P. M. & A. 217.

1441. ——.]—In an action against a man & his wife for a debt due by the wife before her marriage, it is not necessary to give direct evidence of the marriage, presumptive evidence being sufficient.—TACEY *v.* MACARLTON (1839), 1 Will. Woll. & H. 550; *sub nom.* DACEY *v.* M'CARTER, 3 Jur. 124; *sub nom.* TRACY *v.* M'ARLTON, 7 Dowl. 532.

Proof in matrimonial causes.]—*See* Part XIII., Sect. 5, sub-sect. 1, C.; Sect. 11, sub-sect. 2, *post.*

SECT. 2.—**LIABILITY OF WIFE.**

SUB-SECT. 1.—BEFORE MARRIED WOMEN'S PROPERTY ACTS.

1442. Marriage pending action.]—If judgment be obtained against a woman who marries before *ca. sa.* awarded, yet she alone shall be taken in execution by her maiden name.—DOYLEY *v.* WHITE (1613), Cro. Jac. 323; Bull. N. P. 23; 79 E. R. 276.

Annotations:—**Refd.** Cooper *v.* Hunchin (1804), 4 East, 521; Thorpe *v.* Argles (1844), 1 Dow. & L. 831; Beynon *v.* Jones (1846), 15 M. & W. 566; Rayner *v.* Jones (1846), 7 L. T. O. S. 406.

1443. ——.]—After interlocutory judgment against a *feme* upon a contract, she marries: yet pltf. may proceed to judgment & execution against her, without joining the husband by *sc. fa.*; & a *ca. sa.* against her, following the judgment, is at all events regular, though pltf. had notice of the marriage before.—COOPER *v.* HUNCHIN (1804), 4 East, 521; 1 Smith, K. B. 282; 102 E. R. 930.

Annotations:—**Refd.** Chalk *v.* Deacon (1821), 6 Moore, C. P. 128; Thorpe *v.* Argles (1844), 1 Dow. & L. 831.

1444. ——]—An action was commenced against a *feme sole*; between the service of the writ & declaration she married; pltf. proceeded to judgment, & sued out a *ca. sa.* against her, & took her in execution. The affidavit, upon which it was moved to discharge her out of custody, stated that no settlement had been made upon the marriage; but did not state that she had no separate property:—*Held:* on this affidavit she was not entitled to her discharge.—EVANS *v.* CHESTER (1837), 2 M. & W. 847; Murp. & M. 243; 6 L. J. Ex. 194; 1 Jur. 778; 150 E. R. 1001.

Annotation:—**Refd.** Norris *v.* Seed (1849), 3 Exch. 782.

1445. ——.]—If an action be brought against a *feme sole*, & a judge's order be made by consent to stay proceedings on payment of the debt & costs by a certain day, otherwise final judgment; & before that day she intermarries & on the day in question default is made; judgment may still be entered up against her by her maiden name, & she may be taken in execution under a *ca. sa.*, awarded against her alone.—THORPE *v.* ANGLES (1844), 1 Dow. & L. 831; 13 L. J. Q. B. 143; 8 Jur. 602; *sub nom.* THORP *v.* EYERS, 2 L. T. O. S. 354.

Annotation:—**Refd.** Norris *v.* Seed (1849), 3 Exch. 782.

1446. ——.]—Where an action is commenced against a *feme sole* who marries during the pendency of it & pltf. obtains judgment against her in her name when *sole* & she is taken under a *ca. sa.* sued out upon such judgment, the ct. will not discharge her out of custody on the ground that she has no separate property.—BEYNON *v.* JONES (1846), 15 M. & W. 566; 15 L. J. Ex. 303; 153 E. R. 974.

Annotations:—**Consd.** Larkin *v.* Marshall (1850), 4 Exch 804; Edwards *v.* Martyn & Field (1851), 16 Jur. 358.

C. L. P. Act, s. 143, the proceeding was proper, & the right of action need not be shown, but only a right *primâ facie* to have execution on the judgment. C. S. U. C., c. 73, s. 18, applies only to cases where judgment has not been obtained against the woman before marriage.—AYLESWORTH *v.* PATTERSON (1861), 21 U. C. R. 269.—**CAN.**

f. Married Women's Property Act, 1884—Reception by husband of wife's personal property.]—The wife had furniture before marriage, & it was removed to the house occupied by her & her husband after marriage. In an action against the husband for a debt contracted by the wife before marriage:—*Held:* the use in the household of the furniture was not a reception by the husband of personal property of the wife, in connection with, or as a result of, the marriage, within 1884 Act, s. 9.—BENNETT *v.* LAWRENCE (1898), 31 N. S. R. 289.—**CAN.**

g. Married Women's Property Act, 1900—Onus of proving wife's property "acquired" by husband.]—BAULD *v.* REID (1903), 36 N. S. R. 127.—**CAN.**

Refd. Newton *v.* Rowe (1847), 9 Q. B. 948; Poole *v.* ng (1867), 2 C. P. 241; Scott *v.* Morley (1887), R. D. 126

1447. ——.]—A married woman, against whom, prior to coverture, a judgment had been obtained as a *feme sole*, was arrested under a *ca. sa.* It appeared from her affidavit, that she had no property except the interest of a sum of money in the funds, which was in settlement, & settled to her separate use. It did not appear what the amount of the debt was. The ct. refused to grant a rule to discharge her out of custody.—JAY *v.* AMPHLETT, *Ex p.* BUTLER (1862), 1 H. & C. 637; 1 New Rep. 101; 32 L. J. Ex. 176; 7 L. T. 362; 11 W. R. 75; 158 E. R. 1040.

1448. Marriage before action.]—GABRY *v.* GABRY (1669), 1 Sid. 395; 82 E. R. 1178.

1449. ——.]—(1) An attorney sued with his wife for a debt incurred by her *dum sola*, loses his privilege. (2) Nor is his wife entitled to be discharged out of custody on mesne process, if arrested with her husband.—ROBARTS *v.* MASON (1808), 1 Taunt. 254; 127 E. R. 831.

Annotations:—*As to* (1) **Refd.** Rastrick *v.* Beckwith (1844), 7 Man. & G. 905. *As to* (2) **N.F.** Lawson *v.* Shepheard (1829), 8 L. J. O. S. K. B. 104.

1450. ——.]—A married woman, taken in execution together with her husband for a debt due from her before marriage, is not entitled to be discharged, unless it appears that she has no separate property, even although the husband has been discharged under the Insolvent Act.—SPARKES *v.* BELL (1828), 8 B. & C. 1; 2 Man. & Ry. K. B. 124; 6 L. J. O. S. K. B. 206; 108 E. R. 943.

Annotations:—**Consd.** Lockwood *v.* Salter (1833), 5 B. & Ad. 303; Chubb *v.* Stretch (1870), L. R. 9 Eq. 555.

1451. ——.]—Where husband & wife are both arrested for a debt due from the wife before marriage, the ct. will set aside the arrest as to her, however fraudulent may have been her conduct.—LAWSON *v.* SHEPHEARD (1829), 8 L. J. O. S. K. B. 104.

1452. ——.]—To a declaration against husband & wife, for a debt due from the wife before coverture, the husband's discharge under the Insolvent Act is a good plea.—LOCKWOOD *v.* SALTER (1833), 5 B. & Ad. 303; 2 Nev. & M. K. B. 255; 2 L. J. K. B. 198; 110 E. R. 803.

Annotations:—**Folld.** Carr *v.* Duncan (1858), 6 W. R. 466. **Consd.** Chubb *v.* Stretch (1870), L. R. 9 Eq. 555. **Refd.** *Re* Parkin, Hill *v.* Schwarz, [1892] 3 Ch. 510.

1453. ——.]—Where judgment is obtained against a husband & wife for the debt of the wife *dum sola*, & the wife is taken in execution, the ct., in its discretion, will discharge the wife from custody, unless it is shown that she has separate property which may be applied to the satisfaction of the debt. Although the husband has not been & cannot be taken, he having obtained final protection from the Ct. of Insolvent Debtors. It is not sufficient, in order to prevent this exercise of the discretion of the ct., that the wife's property was, before her marriage, assigned to trustees for her creditors, & the trustees had power, if they thought fit, to make her an allowance, & were to make over to her any surplus which might remain after the creditors should be satisfied.—IVENS *v.* BUTLER (1857), 7 E. & B. 159; 26 L. J. Q. B. 145; 28 L. T. O. S. 232; 3 Jur. N. S. 334; 5 W. R. 202; 119 E. R. 1207.

Annotations:—**Refd.** Poole *v.* Canning (1867), 2 C. P. 241; Edwards *v.* Porter, [1925] A. C. 1.

1454. ——.]—To a declaration against husband & wife, for a debt due from the wife before coverture, the husband's bkpcy. is a good plea; there being no allegation that the wife is possessed of separate property.—CARR *v.* DUNCAN (1858), 31 L. T. O. S. 96; 6 W. R. 466.

1455. ——.]—The estate of a married woman settled to her separate use by her marriage settlement, is liable in equity for her ante-nuptial debts. Such separate estate is so liable, notwithstanding that the husband has been sued for the debt & has obtained his discharge in bkpcy.—CHUBB *v.* STRETCH (1870), L. R. 9 Eq. 555; 39 L. J. Ch. 329; 22 L. T. 86; 34 J. P. 548; 18 W. R. 483.

SUB-SECT. 2.—SINCE MARRIED WOMEN'S PROPERTY ACTS.

1456. Effect of Married Women's Property Acts.]—By the Act of 1870 the husband's liability for ante-nuptial debts was limited to the amount of any property he received with the wife at the time of marriage, by sect. 12 of that Act the wife being made liable to be sued for ante-nuptial debts as if she had continued unmarried. Under that sect. it was decided that judgment might be entered against a married woman personally, & the cts. of equity allowed the judgment to stand, & carried it out by ascertaining what separate estate the married woman had, & directing the trustees to pay the judgment debt & costs out of the separate estate. Then came the Act of 1882, which provided that a married woman should be capable of entering into contracts & rendering herself liable in respect of & to the extent of her separate property, & of suing & being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, & that any damages or costs recovered against her in any such action or proceeding should be payable out of her separate property & not otherwise. That provision is contained in sub-sect. 2 of sect. 1 of the Act; & the question is what is the construction of that sub-sect. It is contended, on behalf of defts., that the words "in respect of & to the extent of her separate property" limit the whole of the sub-sect.; but I think that they do not. She can make a contract binding only to the extent of her separate property; but her power of suing & being sued is not so limited. She may sue & be sued "in all respects as if she were a *feme sole*." A *feme sole* can sue to judgment. She may obtain judgment, & may have judgment signed against her. Again, damages or costs may be recovered against a married woman, under the sub-sect. Recovery is the technical word for a common law judgment. Under an order of the Ct. of Ch. nothing is recovered until something further has been done. I think, therefore, that judgment in default, or under R. S. C., Ord. 14, may be signed against a married woman, but I think that execution should only issue against her separate estate (FIELD, J.).—PERKS *v.* MYLREA, [1884] W. N. 64; Bitt. Rep. in Ch. 128.

1457. Married Women's Property Act, 1870, Amendment Act, 1874 (c. 50)—Wife may be sued solely.]—By an ante-nuptial settlement it was provided that any property to which the wife, or the husband in her right, should become entitled "at

PART VII. SECT. 2, SUB-SECT. 2.

h. *Wife personally liable—After judgment summons—Failure to attend—Committal.*]—A married woman was sued for a debt contracted before marriage, & judgment was given against her personally for the amount of the debt:—*Held:* the judgment was properly a personal & not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; & an application, upon *habeas corpus*, to discharge her from custody under an order for her

Sect. 2.—*Liability of wife: Sub-sect.* 2. *Part VIII.* 1: *Sub-sects.* 1 & 2.]

any time during the intended coverture," except jewels & articles of a like nature, which it was declared should be for the separate use of the wife, should vest in the trustees of the settlement. The wife was sued without her husband for a debt contracted before the marriage, & the creditor obtained judgment & issued execution against her separate estate, seizing a large quantity of jewellery, most of which had been given to her as wedding presents before her marriage. On an interpleader issue between the husband & the execution creditor:—*Held:* the creditor was right in suing the wife without making the husband a party.—WILLIAMS *v.* MERCIER (1882), 9 Q. B. D. 337; 51 L. J. Q. B. 594; 47 L. T. 140; *sub nom.* MERCIER *v.* WILLIAMS, 30 W. R. 720, C. A.; *on appeal* WILLIAMS *v.* MERCIER (1884), 10 App. Cas. 1, H. L.

Annotations:—**Refd.** Perks *v.* Mylrea, [1884] W. N. 64. **Mentd.** *Re* Garnett, Robinson *v.* Gandy (1886), 33 Ch. D. 300; Floyd *v.* Lyons (1897), 76 L. T. 251; Masson, Templier *v.* De Fries, [1909] 2 K. B. 831.

1458. No necessity for proof of separate property—At date of judgment.]—In an action against husband & wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of above Act, but before the coming into operation of Married Women's Property Act, 1882 (c. 75), judgment may be entered against the wife under R. S. C., 1883, Ord. 14, r. 1, making the debt & costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott* v. *Morley*, No. 1469, *post*, without proof of the existence of separate estate at the date of the judgment.—DOWNE *v.* FLETCHER (1888), 21 Q. B. D. 11; 59 L. T. 180; 52 J. P. 375; 36 W. R. 694.

Annotation:—**Apld.** Axford *v.* Reid (1889), 22 Q. B. D. 548.

1459. —— —— ——.]—BRERETON *v.* EDWARDS (1888), 4 T. L. R. 549.

1460. Married Women's Property Act, 1882 (c. 75)—What are ante-nuptial obligations—Debts contracted during previous coverture.]—The ante-nuptial debts of a married woman within sects. 13 & 19 of above Act, are not confined to debts contracted by her while a *feme sole*, but include debts contracted by her under sect. 1 (2) of the Act during the existence of a previous marriage. Upon the dissolution of her marriage by decree absolute of the Probate, Divorce, & Admlty. Div., a woman applied for variation of the marriage settlement. She afterwards married, & by an ante-nuptial settlement agreed to assign to the trustees of the settlement whatever sum might be ordered to be paid to her upon her application for variation of the first settlement upon trust for herself for life for her separate use without power of anticipation, etc. A sum of £5,000 was ordered to be paid to her out of funds settled by the first husband, & this sum was paid by the trustees of the first settlement to the trustees of the second settlement:—*Held:* the £5,000 was the married woman's "own property" within sect. 19 of the above Act, & was, therefore, liable to satisfy her ante-nuptial debts, notwithstanding a restriction against anticipation.—JAY *v.* ROBINSON (1890), 25 Q. B. D. 467; 59 L. J. Q. B. 367; 63 L. T. 174; 38 W. R. 550; 6 T. L. R. 340, C. A.

Annotations:—**Consd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422. **Refd.** Rothschild *v.* Fisher, [1920] 2 K. B. 243.

1461. —— **Effect on personal liability at common law.**]—SCOTT *v.* MORLEY, No. 1469, *post*.

1462. —— ——.]—The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by above Act.—ROBINSON, KING & CO. *v.* LYNES, [1891] 2 Q. B. 577; 63 L. J. Q. B. 759; 71 L. T. 249; 43 W. R. 62; 38 Sol. Jo. 666; 10 R. 448.

Annotation:—**Consd.** Birmingham Excelsior Money Soc. *v.* Lane, [1904] 1 K. B. 35.

Judgments against married women.]—*See* Part XII., Sect. 1, sub-sect. 1, F. (*b*), *post*.

Part VIII.—Contracts of Wife during Coverture.

SECT. 1.—AS PRINCIPAL.

SUB-SECT. 1.—IN GENERAL.

See, now, Married Women's Property Act, 1882 (c. 75), s. 19.

1463. No charge created on property of wife.]—The circumstance that the separate estate of a married woman is liable for general engagements does not give her creditors any charge upon the separate property. Therefore, in an action to obtain payment of the debt of a married woman out of her separate property, an application before the hearing for an injunction to restrain the married woman from alienating her separate property was refused.—NATIONAL PROVINCIAL BANK OF ENGLAND *v.* THOMAS (1876), 24 W. R. 1013; 3 Char. Pr. Cas. 396.

1464. —— **Before judgment.**]—In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the ct. will not, before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate.—

committal for failure to attend upon an after-judgment summons, was refused.—*Re* TEASDALL *v.* BRADY (1898), 18 P. R. 104.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 1.

k. *Act not retrospective.*]—*Held* M. W. P. Act, 1884, is not retrospective.—SCOTT *v.* WYE (1885), 11 P. R. 93.—**CAN.**

l. *Agreement to refer to arbitration—Award not binding on her.*]—A *feme covert* cannot enter into an agreement to refer to arbitration, & an award is not binding on her.—BAGLEY *v.* HUMPHRIES (1865), 11 Gr. 118.—**CAN.**

m. ——.]—HARPER *v.* ALEXANDER (1866), 6 All. 485.—**CAN.**

n. *During husband's imprisonment for felony.*]—During her husband's imprisonment for felony a wife can contract, at all events as to what may be regarded as goods & chattels, as a *feme sole*. *Semble:* a married woman may execute a deed without her husband joining during the imprisonment of the husband as a felon.—CROCKER *v.* SOWDEN (1873), 33 U. C. R. 397.—**CAN.**

o. *Liability confined to separate property at time of contract.*]—STEELS *v.* HULLMAN (1873), 33 U. C. R. 471.—**CAN.**

p. ——.]—MCCREADY *v.* HIGGINS (1874), 24 C. P. 233.—**CAN.**

q. ——.]—CLARKE *v.* CREIGHTON (1881), 45 U. C. R. 514.—**CAN.**

r. ——.]—BULLEY *v.* BULLEY (1892), N. B. Dig. 316.—**CAN.**

s. ——.]—A married woman having been informed by a relative that he made his will in her favour, signed a promissory note three days after his death, before she had seen the will, & some weeks before it was proved. The will gave her a vested interest in the property bequeathed. She also owned a promissory note of her husband:—*Held:* she was possessed of

ROBINSON *v.* PICKERING (1881), 16 Ch. D. 660; 50 L. J. Ch. 527; 44 L. T. 165; 29 W. R. 385, C. A.

Annotation:— **Refd.** Cummins *v.* Perkins (1898), 68 L. J. Ch. 57.

1465. —— Receiver.]—A woman at the time of her marriage in Dec. 1882, being then an infant was entitled to a sum of money absolutely, to a sum for her separate use & to certain freeholds. After her marriage & while still an infant, she contracted a debt for which judgment was recovered against her separate estate. After this debt was contracted & before the woman attained her majority a post-nuptial settlement of all the property was made in 1884 under the Infants Settlement Act, 1855 (c. 43), to the wife for life for her sole & separate use with a restraint on anticipation & after her death to her husband & children. This settlement was approved by the Ch. Div. of the High Ct. The judgment creditor applied to have a receiver appointed of the property on the ground that such settlement was void as against creditors under Married Women's Property Act, 1882 (c. 75), s. 19:—*Held:* the settlement though made after the debt was contracted was valid as against creditors by virtue of the first part of Married Women's Property Act, 1882 (c. 75), s. 19, & the judgment creditor was not entitled to have a receiver appointed.—HEMINGWAY *v.* BRAITHWAITE (1889), 61 L. T. 224, D. C.

1466. Continuing contract — Entered into as widow — Subsequent remarriage concealed.]—Resp. after the death of her first husband, continued to reside in the same house as before, & took from, & paid applts. for, a supply of gas, the accounts being made out in her widowed name. She married again, & her second husband then became the tenant & occupier of the house in which she had been living during her widowhood, but the fact of her remarriage was not known to applts., who continued to supply gas to the house. Resp. paid one quarter's account for gas after her remarriage, but, not having paid the account for a later quarter, applts. took proceedings against her to recover the amount:—*Held:* there was a contract by resp. to pay for the gas supplied to the house until she gave applts. notice to discontinue the supply or gave them notice of her marriage, & as she had done neither she was liable for the amount.—LEA BRIDGE DISTRICT GAS CO. *v.* MALVERN, [1917] 1 K. B. 803; 86 L. J. K. B. 553; 116 L. T. 311; 81 J. P. 141; 15 L. G. R. 412, D. C.

SUB-SECT. 2.—UNDER MARRIED WOMEN'S PROPERTY ACT, 1882.

See Married Women's Property Acts, 1882 (c. 75), s. 1, 1893 (c. 68), s. 1.

1467. Act not retrospective.]—Sect. 1 (3) & (4) of the above Act have not a retrospective operation so as to include contracts entered into by a married woman before the date of the commencement of the Act. But an order made after the commencement of the Act by consent in an action by a creditor against a married woman in respect of her contract before the Act, by which order all questions under the contract were referred to an arbitrator, & the parties bound themselves to abide by, obey, perform, & keep the award, is an agreement by the married woman after the commencement of the Act, within sect. 1 (3), & therefore by sect. 1 (4) any separate estate which she had at or after the date of such agreement is liable to pay the amount found by the award to be due from her under the contract.—CONOLAN *v.* LEYLAND (1884), 27 Ch. D. 632; 54 L. J. Ch. 123; 51 L. T. 895.

Annotation:—**Apprvd.** Turnbull *v.* Forman (1885), 15 Q. B. D. 234.

1468. ——.]—Sect. 1 (4) of the above Act is not retrospective; &, therefore, in an action on a contract made by a married woman before the passing of that Act, judgment cannot be ordered in such terms as to be available against separate property to which deft. became entitled after the separate estate, & had contracted with respect to it.—MULCAHY *v.* COLLINS (1894), 24 O. R. 441; 25 O. R. 241.—**CAN.**

t. ———.]—LEA *v.* WALLACE (1896), 33 N. B. R. 492.—**CAN.**

a. ———.]—Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume & pay off a mortgage debt thereon, & a covenant to the same effect with the vendor, his exors. & assigns, & she took possession of the lands & enjoyed the same, & the benefits thereunder, without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, & an assignee of the covenant could enforce it against her separate estate.—SMALL *v.* THOMPSON (1897), 28 S. C. R. 219.—**CAN.**

b. ——.]—A married woman is capable of contracting in respect of her separate estate.—NARAYANAN CHETTY *v.* JENSEN (1865), 2 Mad. 383.—**IND.**

c. *Intention to benefit separate estate.*]—A personal obligation undertaken by a married woman with the view of benefiting her separate estate is binding on her although benefit does not result.—HENDERSON *v.* DAWSON (1895), 22 R. (Ct. of Sess.) 895; 32 Sc. L. R. 674; 3 S. L. T. 82.—**SCOT.**

d. *Contract respecting real estate—Whether concurrence of husband requisite.*]—The real estate of a married woman, married after Mar. 2, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; & her contracts respecting such real estate are binding upon her without the joinder of her husband.—BRYSON *v.* ONTARIO & QUEBEC RY. CO. (1885), 8 O. R. 380.—**CAN.**

e. ——— ———.]—WELLS & FISHER *v.* SOUTHLAND DISTRICT LAND REGISTRAR (1901), 21 N. Z. L. R. 215.—**N.Z.**

f. ——— ———.]—A married woman possessed of separate estate entered into a contract without her husband's consent which involved the making of certain money payments by her. She subsequently brought an action to reduce the contract on the ground that having been entered into by a married woman without her husband's consent it was void:—*Held:* the contract was not reducible on that ground.—LAING *v.* PROVINCIAL HOMES INVESTMENT CO., LTD., [1909] S. C. 812; 46 Sc. L. R. 616; 1 S. L. T. 480.—**SCOT.**

g. *Presumption of intention to contract with reference to separate estate—Separate property inalienable.*]—Personal estate settled upon a married woman for her separate use for life without power of anticipation, & after her death to such uses as she might by deed or will appoint, & in default of appointment then over, no income therefrom having accrued due at the time of contracting is not separate property in reference to which the married woman can be presumed to have contracted.—GORDON *v.* WARREN (1897), 24 A. R. 44.—**CAN.**

h. —— *Woman carrying on separa business.*]—In an action brought to recover from deft., a married woman, the balance of an account for goods sold & delivered to her:—*Held:* debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate.—WISHART *v.* MCMANUS (1884), 1 Man. L. R. 213.—**CAN.**

k. —— ——.]—Debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate.—VELIE *v.* RUTHERFORD (1892), 8 Man. L. R. 168.—**CAN.**

l. —— ——.]—STOVEL CO. *v.* DE TREMAUDAN (1914), 29 W. L. R. 193; 20 D. L. R. 465.—**CAN.**

m. *What is separate property.*]—At the time of a contract being entered into by a married woman, the only property possessed by her consisted of her engagement & wedding rings, a silver watch & chain & her clothing:—*Held:* this was not separate estate with respect to which she could be reasonably deemed to have contracted. Property that may be called separate estate must be of that character which is understood to be commercial property, & not at all such as a wedding ring, or the clothing of a married woman, or like property, not subject to alienation.—ABRAHAM *v.* HACKING (1896), 27 O. R. 131.—**CAN.**

Sect. 1.—As principal: Sub-sect. 2.]

date of the contract.—TURNBULL *v.* FORMAN (1885), 15 Q. B. D. 234; 54 L. J. Q. B. 489; 53 L. T. 128; 49 J. P. 708; 33 W. R. 768; 1 T. L. R. 557, C. A.

1469. No personal liability.]—Under Debtors Act, 1869 (c. 62), s. 5, there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of Married Women's Property Act, 1882 (c. 75). The proper form of judgment against a married woman under Married Women's Property Act, 1882 (c. 75), s. 1 (2), settled by the ct.

Up to the time of the coming into operation of the Married Women's Property Act, 1882 (c. 75), a married woman could be taken in execution upon a judgment recovered after her marriage against her & her husband in respect of a contract made by her before marriage, & also upon a judgment recovered against her & her husband in respect of a wrongful act done by her during the marriage. But neither at law nor in equity was she liable to be taken in respect of a contract made by her during marriage. It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. It does not prevent the bringing of an action against a husband & wife in respect of a contract made by the wife before marriage, & it does not affect the case of a wrongful act committed by a woman during marriage, &, where at common law a married woman was liable to be taken under a *ca. sa.*, in such cases she can now be summoned under Debtors Act, 1869 (c. 62), & be dealt with accordingly (LORD ESHER, M.R.).—SCOTT *v.* MORLEY (1887), 20 Q. B. D. 120; 57 L. J. Q. B. 13; 57 L. T. 919; 52 J. P. 230; 36 W. R. 67; 4 T. L. R. 56; *sub nom. Re* MORLEY, *Ex p.* MORLEY, SCOTT *v.* MORLEY, 4 Morr. 286, C. A.

Annotations:—**Apld.** Downe *v.* Fletcher (1888), 21 Q. B. D. 11; Galmoye *v.* Cowan & Brown (1889), 58 L. J. Ch. 769. **Consd.** Axford *v.* Reid (1889), 22 Q. B. D. 548; Holtby *v.* Hodgson (1889), 24 Q. B. D. 103; Pelton *v.* Harrison, [1891] 2 Q. B. 422. **Distd.** Bird *v.* Barstow (No. 1) (1891), 36 Sol. Jo. 41. **Apld.** Surman *v.* Wharton, [1891] 1 Q. B. 491. **Consd.** *Re* Allen, [1894] 2 Q. B. 924; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Distd.** Robinson, King *v.* Lynes, [1894] 2 Q. B. 577. **Folld.** Moran *v.* Place (1896), 74 L. T. 223. **Consd.** *Re* Handford, *Ex p.* Handford, [1899] 1 Q. B. 566; Softlaw *v.* Welch, [1899] 2 Q. B. 419. **Distd.** *Re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180; Evans *v.* Jenkins (1903), 47 Sol. Jo. 787. **Consd.** Oxley *v.* Link, [1914] 2 K. B. 734; Edwards *v.* Porter, [1925] A. C. 1. **Refd.** *Re* Gardiner, *Ex p.* Coulson (1887), 20 Q. B. D. 249; Foster *v.* Wheeler (1888), 38 Ch. D. 130; Hyde *v.* Hyde (1888), 13 P. D. 166; Hemingway *v.* Braithwaite (1889), 61 L. T. 224; Eddowes *v.* Argentine Loan & Mercantile Agency Co. (1890), 62 L. T. 602; Jay *v.* Robinson (1890), 25 Q. B. D. 467; Braumstein *v.* Lewis (1891), 7 T. L. R. 216; Cox *v.* Bennett 1891), 64 L. T. 380; Harting *v.* White (1892), 37 Sol. Jo. 132; Hill *v.* Ailesbury (1894), 10 T. L. R. 487; Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788; *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328; Loftus *v.* Heriot, [1895] 2 Q. B. 212; Whiteley *v.* Edwards (1896), 65 L. J. Q. B. 457; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717; Barnett *v.* Howard, [1900] 2 Q. B. 784; Brown *v.* Dimbleby, [1904] 1 K. B. 28; Bolitho *v.* Gidley, [1905] A. C. 98; Masson, Templier *v.* De Fries, [1909] 2 K. B. 831; Studley *v.* Studley (1913), 82 L. J. P. 65; *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095; Shaw *v.* Allen (1914), 30 T. L. R. 631; British Union & National Insce. *v.* Rawson, [1916] 2 Ch. 152; Lea Bridge District Gas Co. *v.* Malvern (1917), 116 L. T. 311; Sutherland *v.* Hannevig, [1921] 1 K. B. 336.

1470. —— .]—OXLEY *v.* LINK, No. 2225, *post.*

Judgments against married women.]—*See* Part XII., Sect. 1, sub-sect. 1, F. (*a*), *post.*

1471. Liability confined to separate property at time of contract.]—The contract entered into by a married woman "to bind her separate property," referred to in sect. 1 (4) of the above Act, is a contract entered into at a time when she has existing separate property. If the married woman commits a breach of such a contract, & a judgment is recovered against her for the breach, the judgment can be enforced against any separate property which she then has. But sect. 1 (4), does not enable a married woman who has no existing separate property to bind by a contract any separate property which she may possibly thereafter acquire.—*Re* SHAKESPEAR, DEAKIN *v.* LAKIN (1885), 30 Ch. D. 169; 55 L. J. Ch. 44; 53 L. T. 145; 33 W. R. 744.

Annotations:—**Apprvd.** Palliser *v.* Gurney (1887), 19 Q. B. D. 519. **Consd.** Loibl *v.* Fraser (1893), 37 Sol. Jo. 600; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** *Re* Hodgson, Darley *v.* Hodgson, [1899] 1 Ch. 666.

1472. —— Subsequent death of wife—Devolution to husband jure mariti.]—A husband by deed of gift settled leasehold property on his wife to her "own proper use & benefit," & the deed gave her "full power & authority to sue & give receipts." The husband died, & the wife married deft. After the commencement of the Married Women's Property Act, 1882 (c. 75), the wife borrowed money from pltf. The wife died, & deft., without taking out administration, entered into possession of the property comprised in the deed of gift. Pltf. sued deft. to recover the money lent to the wife:—*Held:* (1) the deed made the property comprised in it the wife's separate estate; (2) by Married Women's Property Act, 1882 (c. 75), s. 1 (3), such property was bound by her contract when she borrowed the money; (3) on her death the property passed to deft. *jure mariti*, & administration was unnecessary; (4) deft. was the legal personal representative of his wife within Married Women's Property Act, 1882 (c. 75), s. 23, & therefore subject to the same liabilities as she would be subject to if living, & was therefore liable, but only to the extent of the property which had been her separate estate.—SURMAN *v.* WHARTON, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233; 64 L. T. 866; 39 W. R. 416; 7 T. L. R. 196, D. C.

Annotations:—*As to* (4) **Refd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

1473. —— Onus on plaintiff to prove separate property.]—Sect. 1 (2), of the above Act, does not make a married woman capable of rendering herself liable in respect of her separate property on any contract unless she has some separate property at the time the contract is made. In an action against a married woman to recover the price of goods sold & delivered to her:—*Held:* the *onus* was on pltf. to show that deft. had separate property at the time she made the contract.—PALLISER *v.* GURNEY (1887), 19 Q. B. D. 519; 56 L. J. Q. B. 546; 51 J. P. 520; 35 W. R. 760; 3 T. L. R. 778, D. C.

Annotations:—**Apld.** Tetley *v.* Griffith (1887), 57 L. T. 673. **Folld.** McGregor *v.* McGregor (1888), 20 Q. B. D. 529; Whitaker *v.* Van Der Smissen (1888), 4 T. L. R. 707. **Apprvd.** Jay *v.* Robinson (1890), 63 L. T. 174. **Folld.** Stogdon *v.* Lee, [1891] 1 Q. B. 661. **Distd.** *Re* Ann, Wilson *v.* Ann, [1894] 1 Ch. 549. **Consd.** Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Apld.** *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1. **Refd.** Hyde *v.* Hyde, Fellgate, etc. (1888), 59 L. T. 523; Leak *v.* Driffield (1889), 24 Q. B. D. 98; Bonner *v.* Lyon (1890), 38 W. R. 541; Eddowes *v.* Argentine Loan & Mercantile Agency Co. (1890), 62 L. T. 602; Braumstein *v.* Lewis (1891), 7 T. L. R. 246; Pelton *v.* Harrison, [1891] 2 Q. B. 422; Pike *v.* Cave (1893), 68 L. T. 650; *Re* Hughes, Brandon *v.* Hughes, [1898] 1 Ch. 529; Softlaw *v.* Welch, [1899] 2 Q. B. 419; Johnson *v.* Clark, [1908] 1 Ch. 303.

1474. —— —— .]—Where a married woman is deft. to an action on a contract, & has made default in the delivery of a defence, pltf.'s statement of claim must contain an allegation that deft. has separate estate; otherwise the ct. will refuse to make an order against deft. on the statement of claim under R. S. C., Ord. 27, r. 11.

In an action for specific performance of an agreement for a lease, pltf. was the intended lessor & deft. the intended lessee. Deft. was a married woman, & after entering an appearance to the action put in no defence, & the action came on in due course upon motion for judgment upon default of defence. The statement of claim contained no allegation that deft. had separate estate. The question arose whether pltf. was entitled to judgment against the separate estate of the married woman without having alleged in his statement of claim that she had separate estate :—*Held :* owing to the omission, no order could be made ; but that liberty would be given to pltf. to amend his statement of claim.—TETLEY *v.* GRIFFITH (1887), 57 L. T. 673 ; 36 W. R. 96.

Annotation :— **Consd.** Softlaw *v.* Welch, [1899] 2 Q. B. 419.

1475. —— ——.]—WHITAKER *v.* VAN DER SMISSEN (1888), 4 T. L. R. 707.

—STOGDON *v.* LEE, No. 2035, *post*.

1477. ——— ——.]—Testatrix, who was twice married, by a settlement dated June, 2, 1890, & made on her first marriage, assigned her reversionary interest in a fund to trustees upon trust, after the fund had been received by them, upon her request to raise thereout a sum not exceeding £7,000, & to pay the same to her for her separate use, but so that she should not have power to alienate or charge that sum during coverture, & subject to such trusts to hold the fund upon trust for her for her life for her separate use without power of anticipation, & after her death upon trusts for her issue, & ultimately upon trust, if she should survive her husband, for her absolutely. By deed dated Jan. 29, 1891, in consideration of £10,000 advanced to testatrix's husband by his mother, he covenanted to repay the same with interest, & testatrix also covenanted that immediately upon the reversionary interest falling into possession she would request the trustees of the settlement to raise thereout £4,000 & pay it to herself, & that she, her exors. or administrators, would pay to her husband's mother the same or so much thereof as might be required to satisfy the amount due upon his covenant. He died in 1894. Testatrix married again in 1898, & thereupon settled her reversionary interest upon herself for life, with a general testamentary power of appointment in herself. The reversionary interest fell into possession in 1901. Testatrix, who never had any issue, by her will made in 1904 exercised the power of appointment, & thereby under sect. 4 of the above Act, made the appointed fund assets for the payment of her debts & other liabilities. She died in 1907, leaving her second husband her surviving. Her first husband's mother claimed under the covenant of Jan. 29, 1891, to be paid out of the settled fund the sum of £4,000, alleging that £8,500 & interest remained owing to her in respect of the £10,000 advanced by her. It was admitted that testatrix's covenant did not operate to charge the £4,000 upon the £7,000 by reason of the restraint on alienation or charging in the settlement of 1890. Evidence was filed on behalf of claimant that testatrix on her first marriage had received valuable presents of jewellery, & the ct. was asked to infer that she still had those presents as her separate property when she entered into the covenant six months later :—*Held :* (1) notwithstanding the exercise of the power of appointment by testatrix the *onus* was upon claimant to prove that at the date of her covenant testatrix had separate property in respect of which she ought to be deemed to have covenanted ; & there was practically no evidence to discharge that *onus ;* (2) even if testatrix had any jewellery at that time, it was not separate property with respect to which she could be supposed to have contracted, & consequently her estate was not liable for damages for breach of the covenant.—*Re* FIELDWICK, JOHNSON *v.* ADAMSON, [1909] 1 Ch. 1 ; 78 L. J. Ch. 153 ; 100 L. T. 106 ; 53 Sol. Jo. 47, C. A.

1478. Presumption of intention to contract with reference to separate estate—Separate banking account.]—Where a married woman had a separate banking account, & drew cheques upon it, & received & paid bills :—*Held :* to be evidence upon which it might be found that she had separate property, & had entered into contracts to pay bills out of it.—CLAREMONT *v.* WILMOT (1885), 1 T. L. R. 567, D. C.

1479. —— **Separate property inalienable.**]—The fact that the separate estate of a married woman is inalienable repels the presumption of law now raised by sect. 1 (3) of the above Act, that a contract made by her is "entered into with respect to, & to bind her separate estate," & shows "the contrary" within that sub-sect.—HARRISON *v.* HARRISON (1888), 13 P. D. 180 ; 58 L. J. P. 28 ; 60 L. T. 39 ; 36 W. R. 718 ; 4 T. L. R. 616, C. A.

Annotations :— **Apld.** Leak *v.* Driffield (1889), 24 Q. B. D. 98. **Refd.** Bonner *v.* Lyon (1890), 38 W. R. 511 ; Braunstein *v.* Lewis (1891), 7 T. L. R. 246 ; Everett *v.* Paxton (1891), 65 L. T. 383 ; Pelton *v.* Harrison, [1891] 2 Q. B. 422 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559 ; *Re* Wingfield & Blew, [1904] 2 Ch. 665 ; *Re* Fieldwick, Johnson *v.* Adamson (1908), 78 L. J. Ch. 153. **Mentd.** *Re* Latham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27 ; Watkins *v.* Watkins, [1896] 222 ; Maclurcan *v.* Maclurcan (1897), 77 L. T. 474.

1480. —— **Wearing apparel bought with income of restrained property.**]—In an action against a married woman to recover the price of goods sold & delivered to her, it appeared that upon her marriage certain property had been settled upon her to her separate use with a restraint upon anticipation, the income of which she spent in the purchase of clothes for herself & her children, & that at the date of her contract with pltfs. she had no separate property free from restraint upon anticipation other than the clothes so purchased ;—*Held :* the test of her liability was the possession by her at the date of the contract of free separate property with respect to which she might reasonably be deemed to have contracted ; she could not reasonably be deemed to have contracted with respect to the clothes of herself & her children, & pltfs. were therefore not entitled to recover.—LEAK *v.* DRIFFIELD (1889), 24 Q. B. D. 98 ; 59 L. J. Q. B. 89 ; 61 L. T. 771 ; 38 W. R. 93 ; 6 T. L. R. 35, D. C.

Annotations :— **Distd.** Bonner *v.* Lyon (1890), 38 W. R. 511. **Consd.** Braunstein *v.* Lewis (1891), 7 T. L. R. 246 ; Everett *v.* Paxton (1891), 65 L. T. 383 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Apld.** *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1. **Refd.** Eddowes *v.* Argentine Loan & Mercantile Agency Co. (1890), 62 L. T. 602.

1481. —— **Woman carrying on separate business.**]—A co. entered into a contract with a firm carrying on business in A. to indemnify them against a particular claimant, the co. being at liberty to use the name of the firm in defending any action brought by claimant. At the time when the contract was entered into an action in this country had been commenced by claimant. It was defended by the co. in the name of the firm & in their pleadings the co. stated that E., who was a married woman, had become the surviving partner of the firm. Judgment was given against the firm but no execution had issued thereunder, & it appeared that E., who resided in A., had no property in this country. E. brought an action to enforce the contract of indemnity. It was objected by the co.

Sect. 1.—*As principal: Sub-sects.* 2, 3, 4, 5, 6 & 7. *Sect.* 2: *Sub-sect.* 1.]

that it had not been shown that E. had any separate estate & that she would therefore not be liable to the claimant:—*Held:* E. being a married woman carrying on a trade it must be assumed unless the contrary were shown that she had separate estate.—EDDOWES *v.* ARGENTINE LOAN & MERCANTILE AGENCY CO., LTD. (1890), 63 L. T. 364, C. A.

1482. —— Jewellery.]—In an action by certain jewellers against a married woman for jewellery supplied, the jury found that she had purchased the goods "on her own credit for her own use as her separate estate." According to the evidence, the only separate estate existing at the time of the contract was certain other jewellery previously supplied by pltfs. & a wardrobe of dresses, furs, & jackets, & there was no evidence of any separate property being subsequently acquired other than these:—*Held:* pltfs. were entitled to judgment, on the ground that such separate property was property in respect of which the married woman might reasonably be deemed to have contracted credit within the above Act, & the words "unless the contrary be shown," in sect. 1 (3) of that Act, only admit of evidence of the fact of there being no such separate property in respect of which a married woman could reasonably be deemed to have contracted, & not of any intention, or absence of intention, of the married woman so to contract, at the time of making the contract or getting credit.—BONNER & CO. *v.* LYON (1890), 38 W. R. 541; 6 T. L. R. 318, D. C.

Annotations:—**Consd.** *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1. **Refd.** Everett *v.* Paxton (1891), 65 L. T. 383.

1483. —— ——.]—*Re* FIELDWICK, JOHNSON *v.* ADAMSON, No. 1477, *ante*.

1484. —— Small sum of money.]—Where a married woman entered into a covenant in a mtge. deed for the payment of £400, & the only free separate estate which she was possessed of at the date of the covenant was a sum of money amounting to between £3 & £4:—*Held:* there was no presumption of law that the contract was entered into with respect to, & to bind such small separate estate, & the contract was not binding.—BRAUNSTEIN *v.* LEWIS (1891), 65 L. T. 449; 55 J. P. 775; 7 T. L. R. 566, C. A.

Annotation:—**Distd.** Harting *v.* White (1892), 37 Sol. Jo. 132.

1485. —— Accumulation of income of restrained property.]—Deft., a married woman, was sued for a sum of £53 being the balance of an account for groceries supplied to her from Mar. 1889 to Mar. 1890, while she was living apart from her husband. This balance consisted of a number of small items, some for a few pence, for goods supplied from time to time. The account commenced in 1885, & payments were made from time to time, the last payment being in July, 1890. Deft. was entitled to an income of upwards of £300 *per annum* payable to her, to her separate use for life, but subject to a restraint on anticipation. Her trustee received this income & paid it over to her as it was received, generally every month. Deft. was usually in debt to tradesmen, & as she received each cheque she cashed it, & paid away the bulk of the money so received to tradesmen on account of their bills, but she retained some portion, though only a few shillings, for her immediate use, & having a running account the amount of the goods was entered up & not paid for at the time. She was also entitled to the separate use of some furniture for her life, & if the furniture had been sold she would have had the income from the proceeds to her separate use, but with a restraint on anticipation. She lived rent free in a house belonging to her brother, & this house was furnished with her own furniture. She let the house on two occasions & received the proceeds, & she also had some trinkets & some wearing apparel of value. The county ct. judge held that deft. had sufficient separate estate from the accumulations of the income & the proceeds of letting the house, to form the ground of a contract within sect. 1 (2) of the above Act, & he gave judgment for pltf. for the whole amount:—*Held:* (SMITH, J.), there was no evidence to support the finding that on each date of the orders given deft. was possessed of separate estate of the requisite character whereon to found a contract; therefore, the judgment for the whole amount en bloc could not be supported, but must be set aside, with liberty to pltf. to go down to a new trial as to the exact position of deft. upon each of the dates upon which she contracted; (GRANTHAM, J.), there was ample evidence to show that deft. had sufficient separate estate, arising from accumulations of income, at the times she entered into these contracts, & this was so whether each item was to be taken as forming an independent contract, or whether the whole account was to be taken generally, & therefore deft. was liable for the whole amount claimed under the contracts.

The ct. being divided, the judgment for pltf. stood.—EVERETT *v.* PAXTON (1891), 65 L. T. 383; 56 J. P. 230; 7 T. L. R. 465, D. C.

1486. —— Separate estate proportionate to liability incurred.]—HARTING & SON *v.* WHITE (1892), 37 Sol. Jo. 132.

1487. — —.]—NECK *v.* TAYLOR (1893), 9 T. L. R. 547.

1488. ——.]—UNION DEBENTURE CO., LTD. *v.* BAKER (1896), 12 T. L. R. 299, D. C.

1489. What is separate property—Reversionary interest.]—In an action against a married woman on a guarantee binding her separate estate the defence was that at the time of entering into the guarantee she had no separate estate *in præsenti* but only a reversionary interest in property settled to her separate use:—*Held:* she was "entitled to" separate property within sect. 1 (4) of the above Act.—LOIBL *v.* FRASER (1893), 9 T. L. R. 531; 37 Sol. Jo. 600.

——.]—*See* Part IV., Sects. 2, 3, *ante*.

SUB-SECT. 3.—UNDER MARRIED WOMEN'S PROPERTY ACT, 1893.

1490. Application of Act—Contract must be made for first time after passing of Act.]—Under sect. 1 of the above Act, in order to bind the separate estate of a married woman there must be a contract by her entered into after the passing of the Act, & then entered into for the first time. An acknowledgment since the Act of the fact that the married woman had had moneys advanced to her prior to the Act, but for which she was under no liability, having had no separate estate at the time of the advance, even if such acknowledgment is in such terms as would make a debt recoverable though barred by Stat. Limitations, is not sufficient to render her liable to repay such advances.—*Re* WHEELER, HANKINSON *v.* HAYTER, [1904] 2 Ch. 66; 73 L. J. Ch. 576; 91 L. T. 227; 52 W. R. 586; 48 Sol. Jo. 493.

Annotations:—**Refd.** *Re* Abrahams, Abrahams *v.* Abrahams, [1908] 2 Ch. 69. **Mentd.** *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135; *Re* Melton, Milk *v.* Towers (1917), 117 L. T. 679.

SUB-SECT. 4.—"OTHERWISE THAN AS AGENT."

See Sect. 2, *post*.

SUB-SECT. 5.—IN RESPECT OF SHARES.

See, now, Married Women's Property Act, 1882 (c. 75), ss. 6, 7.

See COMPANIES, Vol. IX., pp. 205, 262, 331, 332, Nos. 1270, 1623, 2089–2095.

SUB-SECT. 6.—JOINT OR JOINT AND SEVERAL CONTRACTS.

See Married Women's Property Act, 1893 (c. 63), s. 1.

Joint contractors generally, *see* CONTRACT, Vol. XII., pp. 33–39, Nos. 105–190.

1491. Joint & several promissory note—Signature in ignorance of nature of document.]—A joint & several promissory note was made by a husband & wife. In an action brought upon it, the wife set up a defence that she had been induced by her husband to sign it in ignorance of the real nature of the document. The jury having found in her favour:—*Held:* the finding of the jury was conclusive against pltf.—SANGUINETTI *v.* MESSITER (1885), 2 T. L. R. 135, D. C.

1492. Judgment obtained against one—Joint contract—Bar to proceedings against other.]—The rule that judgment recovered against one of two joint contractors is a bar to an action against the other applies equally when one of the joint contractors is a married woman contracting in respect of her separate property.—HOARE *v.* NIBLETT, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565; 64 L. T. 659; 55 J. P. 661; 39 W. R. 491; 7 T. L. R. 468, D. C.

—— **Liability not joint.**] —*See* Sect. 2, sub-sect. 8, *post*.

SUB-SECT. 7.—LIMITATION OF ACTIONS.

See, generally, LIMITATION OF ACTIONS.

1493. Statute of Limitations, 1623 (c. 16)—Whether claim against separate estate barred.]—*Feme covert* having a separate estate, borrows money & gives a bond; the separate estate liable; & though six years pass, the demand not barred by the above Act.—NORTON *v.* TURVILL (1723), 2 P. Wms. 144; 2 Eq. Cas. Abr. 152; cited in 35 Ch. D. at p. 99; 24 E. R. 674.

Annotations:—**Expld.** Sockett *v.* Wray (1794), 4 Bro. C. C. 483. **Consd.** Clayton *v.* Adams (1796), 6 Term Rep. 604; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494; Hodgson *v.* Williamson (1880), 15 Ch. D. 87; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94. **Refd.** Hatchett *v.* Baddeley (1776), 2 Wm. Bl. 1079; Heatley *v.* Thomas (1809), 15 Ves. 596; Murray *v.* Barlee (1831), 4 Sim. 82; London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482. **Mentd.** Francis *v.* Wigzell (1816), 1 Madd. 258.

1494. —— ——.]—In order to prevent the operation of the above Act in a ct. of equity in a matter of simple contract, it is sufficient if the bill be filed within six years after the accruer of the right to sue, although the subpœna be not sued out till after the expiration of that period. *Qu.*: whether the Act can be pleaded in bar of a bill filed to enforce payment out of the separate estate of a married woman of a bill of exchange given by her in her separate capacity.—COPPIN *v.* GRAY (1842), 1 Y. & C. Ch. Cas. 205; 11 L. J. Ch. 105; 6 Jur. 312; 62 E. R. 856.

Annotations:—**Consd.** Hele *v.* Bexley, Whitfield *v.* Bowyer, Whitfield *v.* Knight (1855), 20 Beav. 127. **Refd.** Morris *v.* Ellis (1843), 7 Jur. 413.

1495. —— ——.]—Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; &, being debts payable out of funds held in trust for her separate use, are not barred by the above Act.—HODGSON *v.* WILLIAMSON (1880), 15 Ch. D. 87; 42 L. T. 676; *sub nom. Re* BARBER, HODGSON *v.* WILLIAMSON, 28 W. R. 944.

Annotation:—**Consd.** *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94.

1496. —— ——.]—*Re* HASTINGS (LADY), HALLETT *v.* HASTINGS, No. 1831, *post*.

SECT. 2.—**AS AGENT FOR HUSBAND.**

SUB-SECT. 1.—IN GENERAL.

Agency generally, *see* AGENCY, Vol. I., p. 267 *et seq.*

1497. No inherent authority.]—A wife cannot give a person authority to enter her husband's house.—TAYLER *v.* FISHER (1591), Cro. Eliz. 246; 78 E. R. 501.

1498. ——.] —MANBY *v.* SCOT (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E. R. 1065, Ex. Ch.

Annotations:—**Consd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Jolly *v.* Rees (1861), 15 C. B. N. S. 628; Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559. **Refd.** Dyer *v.* East (1669), 2 Keb. 554; Tod *v.* Stokes (1698), 12 Mod. Rep. 244; Gibbons *v.* Cloyne (Bp.) (1705), Holt, K. B. 599; Bolton *v.* Prentice (1744), 2 Stra. 1214; Hatchett *v.* Baddeley (1776), 2 Wm. Bl. 1079; Montague *v.* Baron (1825), 5 Dow. & Ry. K. B. 532; Johnston *v.* Sumner (1858), 3 H. & N. 261; Beale *v.* Arabin (1877), 36 L. T. 249; Debenham *v.* Mellon (1880), 29 W. R. 141; Wilson *v.* Glossop (1887), 19 Q. B. D. 379; Morel *v.* Westmorland (1902), 87 L. T. 635; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562. **Mentd.** R. *v.* Haughton (1718), 1 Stra. 83; Jennings *v.* Rundall (1799), 8 Term Rep. 335; Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148; Belton *v.* Hodges (1832), 9 Bing. 365; Doe d. Mudd *v.* Suckermore (1837), Will. Woll. & Dav. 405; Leeds & Thirsk Ry. *v.* Fearnley (1849), 4 Exch. 26; Newry & Enniskillen Ry. *v.* Coombe (1849), 3 Exch. 565; Woodward *v.* Dowse (1861), 8 Jur. N. S. 413; Bartlett *v.* Wells (1862), 1 B. & S. 836; Davidson *v.* Wood (1863), 11 W. R. 791; *Re* Rhodes, Rhodes *v.* Rhodes (1890), 44 Ch. D. 94.

1499. Husband's authority must be express or implied.]—The husband is not chargeable without some evidence of his assent (HALE, C.J.).—CALVERLY *v.* PLUMMER (1671), 2 Lev. 16; 83 E. R. 432.

Annotations:—**Expld.** Compton *v.* Collinson (1790), 1 Hy. Bl. 331; Read *v.* Legard (1851), 20 L. J. Ex. 309.

1500. —— **Supply of goods not necessaries.**]—A husband is liable for necessaries provided for his wife, when he neglects to provide them himself; but, if there be no necessity for the articles

PART VIII. SECT. 1, SUB-SECT. 6.

1492 i. *Judgment obtained against one—Joint contract—Bar to proceedings against other.*]—STOVEL CO. *v.* DE TREMAUDAN (1914), 29 W. L. R. 193; 20 D. L. R. 465.—**CAN.**

n. *Wife having no separate estate.*]—A married woman having no separate estate who enters into a joint contract is not liable thereunder, the other contractors are liable without her.—DINGMAN *v.* HARRIS (1894), 26 O. R. 84.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 1.

1499 i. *Husband's authority must be express or implied.*]—The liability of a husband for his wife's debts depends on the principles of agency, & the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.—GIRDHARI LAL *v.* CRAWFORD (1886), I. L. R. 9 All. 147.—**IND.**

o. *Presumption of agency—Contract made with husband's consent.*]—Deft. held land as tenant from year to year

Sect. 2.—*As agent for husband: Sub-sects.* 1, 2, 3, 4 & 5.]

delivered, the tradesman is not entitled to recover their value, unless he can show an express or implied assent of the husband, to the contract made by the wife.—SEATON *v.* BENEDICT (1828), 5 Bing. 28; 2 Moo. & P. 66; 130 E. R. 969; *sub nom.* SEATON *v.* ESPINASSE, 6 L. J. O. S. C. P. 208; *subsequent proceedings, sub nom.* SEATON *v.* BENEDICT, 5 Bing. 187.

Annotations:—**Expld.** Read *v.* Legard (1851), 6 Exch. 636. **Mentd.** Walker *v.* Rawson (1833), 5 C. & P. 486; Drake *v.* Lewin (1834), 4 Tyr. 730; Emmett *v.* Norton (1838), 8 C. & P. 506; Archer *v.* English (1840), 1 Man. & G. 873; M'Lean *v.* Leeming (1850), 16 L. T. O. S. 6.

Right to pledge credit for necessaries, *see* Sect. 3, *post.*

1501. —— Onus on plaintiff to prove authority.]—A person is only liable to pay for goods supplied to his wife upon the ground of an implied contract, & it is not for deft. to prove that he has given notice to pltf. not to supply the goods to his wife, but it lies on pltf. to satisfy the jury that deft.'s wife contracted the debt by the authority of her husband.—SPREADBURY *v.* CHAPMAN (1838), 8 C. & P. 371, N. P.

1502. —— Question of fact.]—DEBENHAM *v.* MELLON, No. 1587, *post.*

1503. Execution of deed without authority.]—If a *feme covert* without any authority from her husband contract with a servant by deed, the servant having performed the service stipulated may maintain *assumpsit* against the husband. A person executing a deed for his principal under a power of attorney should sign in the name of the principal. The deed of a surety does not extinguish the simple contract debt of the principal.—WHITE *v.* CUYLER (1795), 6 Term Rep. 176, 1 Esp. 200; 101 E. R. 497.

Annotations:—**Consd.** Hunter *v.* Parker (1840), 7 M. & W. 322. **Refd.** Clifford *v.* Burton (1823), 8 Moore, C. P. 16. **Mentd.** Weston *v.* Foster (1836), 3 Scott, 161; Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131; Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310.

1504. ——.]—(1) A deed signed in the husband's name by a *feme covert* without the authority of her husband who is therein named a trustee, is not a sufficient execution by the husband under the second condition of sect. 192 of Bkpcy. Act, 1861 (c. 134).

(2) Nor is the execution of a deed by the wife, upon the authority of a letter from her husband, sufficient.—*Re* MILSTED, *Ex p.* JOREY (1868), 18 L. T. 156; 16 W. R. 582.

1505. Authority to receive money.]—To a count for work done & attendance given by A, then & still the wife of pltf., for defts., & at their request, defts. pleaded payments made from time to time to the wife, & acceptance by her in satisfaction of the cause of action & damages:—*Held:* bad, for not averring that the wife was authorised by pltf. to receive payment.—OFFLEY *v.* CLAY (1840), 2 Man. & G. 172; 2 Scott, N. R. 372; 4 Jur. 1203; 133 E. R. 709.

1506. Proof of cohabitation unnecessary.]—HODGE *v.* COOPER, No. 1588, *post.*

1507. Implied authority—Photograph of wife & children.]—*Held:* the true inference from the facts was that the wife acted as the agent of her husband in having herself & children photographed, & the husband was therefore entitled to prevent the photographer from exhibiting the photograph in public.—STEDALL *v.* HOUGHTON (1901), 18 T. L. R. 126.

SUB-SECT. 2.—EXPRESS AUTHORITY.

Agency generally, *see* AGENCY, Vol. I., pp. 267 *et seq.*

1508. Loan to wife at request of husband.]—*Assumpsit* will lie for a loan to the wife at the request of the husband.

It is true that no complete or perfect contract can be made by a *feme covert* by her own authority; yet, by the assent of her husband, she may contract as his substitute as in case of either sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior, & communicated to deft., as in the present case, the contract is made actually, & not merely virtually, with the husband; if subsequent, then the wife's contract is inchoate & imperfect, till affirmed or disaffirmed by the husband; & such affirmation, if given, transfers the contract to him (BLACKSTONE, J.).—STEVENSON *v.* HARDIE (1773), 2 Wm. Bl. 872; 96 E. R. 513; *sub nom.* STEPHENSON *v.* HARDY, 3 Wils. 388.

Annotation:—**Distd.** Stone *v.* Macnair (1817), 1 Moore, C. P. 126.

1509. ——.]—In an action of *assumpsit*, brought against deft. for money lent to his wife, it must be alleged to have been lent at his request or it will be insufficient; & that even after a judgment has been suffered by default. Nor is it cured by a count for money lent to deft. & his wife, at the request of him & his wife; although it is stated in both counts that the husband promised to pay.—STONE *v.* M'NAIR (1817), 4 Price, 48; 7 Taunt. 432; 1 Moore, C. P. 126; 146 E. R. 390, Ex. Ch.

1510. Surrender of lease.]—In an action to recover one quarter's rent for the use & occupation of a dwelling-house, under the terms of a lease held by deft. of pltfs., who were joint tenants of the reversion, it appearing that there had been a concealment at the time of the execution of the lease of the fact that arrears of ground rent & land tax were due upon the premises, & that the supply of water had been cut off, & it also appearing that other disputes had afterwards arisen between the parties:—*Held:* the delivery of the key of the street door by deft.'s wife to one of pltf.'s, & its acceptance by him, was a surrender of the lease by operation of law, there being evidence from which the jury had inferred an authority in the wife to act for her husband, & in pltf. who received the key to act for his co-tenant; & such surrender having been made before the rent sued for had become due, was a good defence to the action.—DODD *v.* ACKLOM (1843), 6 Man. & G. under an agreement with pltf.'s wife & with his consent, by which agreement the rent was to be paid to the wife:—*Held:* the wife, in making the lease, must be presumed to have been acting as her husband's agent.—DOE d. ANDREWS *v.* TAYLOR (1861), 5 All. 144.—**CAN.**

p. *Negotiations for sale of wife's land—Conducted by husband—Correspondence by wife in husband's name—Whether wife agent for husband.*]—Land belonged to & stood in the name of the wife. The husband conducted negotiations for sale. "The letters written in the name of deft.'s husband were written by her after consultation with him & by his authority:—*Held:* if any agreement were made it was with the husband & not the wife who acted as agent for husband.—TRICK *v.* CANNIFF (1906), 4 W. L. R. 515.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 2.

1510 i. *Surrender of lease.*]—A husband being in debt for rent left the country & on his way he wrote to his wife with respect to his landlord's business. "I wish you to do the best you can; but tell him not to be afraid of me." On receipt of this letter the wife sold his chattels to the lessor at a valuation, & executed a surrender to him of the demised premises, of which he then resumed possession:—*Held:* the letter to his wife clothed her with authority to part with the property, & surrender the premises.—WHEELDON *v.* MILLIGAN (1879), 44 U. C. R. 174.—**CAN.**

672; 7 Scott, N. R. 415; 13 L. J. C. P. 11; 2 L. T. O. S. 121; 7 Jur. 1017; 134 E. R. 1063.
Annotations:—**Refd.** Cannan *v.* Hartley (1850), 9 C. B. 634; Furnivall *v.* Grove (1860), 8 C. B. N. S. 496. **Mentd.** Morrison *v.* Chadwick (1849), 18 L. J. C. P. 189; Kelly *v.* Webster (1852), 12 C. B. 283; R. *v.* Tyrone JJ. (1860), 2 L. T. 639; Phene *v.* Popplewell (1862), 12 C. B. N. S. 334.

1511. Surrender of furniture—In payment of husband's debts.]—To an action of trover it is an admissible defence, under the plea of not possessed, that an agent of pltf. had parted with the property to deft. by pltf.'s authority before action brought.

Pltf. was indebted to deft., & the wife of pltf. in his absence gave the furniture in question to deft. in payment of his debt, & deft. took it away. The jury believed that the wife had sufficient authority to do so, & found a verdict for deft. When the wife, with the authority of pltf., as must be taken to have been found by the jury, gave the goods to deft., the property in them passed to him; & so the issue was properly found for deft. (LORD DENMAN, C.J.).—RINGHAM *v.* CLEMENTS (1848), 12 Q. B. 260; 17 L. J. Q. B. 289; 11 L. T. O. S. 353; 12 Jur. 580; 116 E. R. 866.
Annotation:—**Refd.** Bourne *v.* Fosbrooke (1865), 34 L. J. C. P. 164.

SUB-SECT. 3.—BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.

Bills of exchange generally, *see* BILLS OF EXCHANGE, Vol. VI., pp. 9 *et seq.*

1512. Acceptance in husband's name — Money received by wife—Applied in payment of husband's debts.]—In an action against deft. as acceptor of a bill of exchange no evidence being given in whose hand the acceptance was written:—*Held:* the circumstance of the bill having been paid by the drawer, & the amount of it obtained on discount by deft.'s wife having been applied by her in discharge of his debts, was not sufficient to prove that he had sanctioned the acceptance.—GOLDSTONE *v.* TOVEY (1839), 6 Bing. N. C. 98; 8 Scott, 394; 3 Jur. 1175; 133 E. R. 38.

1513. Indorsement in husband's name—Wife with general management of husband's business—Whether within scope of authority.]—Upon an issue as to the indorsement of a promissory note by S., it was proved, that the wife of S. had the general management of his business; that she was in the habit of drawing, accepting, & indorsing bills & notes in his name; & that the name of S. was indorsed upon the note in question by his daughter, by the direction & in the presence of her mother, by whom the note was afterwards handed to pltf.:—*Held:* it was a question of fact for the jury, whether the indorsement so made was within the scope of the wife's authority; & the evidence warranted them in concluding that it was.—LORD *v.* HALL (1849), 8 C. B. 627; 19 L. J. C. P. 47; 14 L. T. O. S. 253; 137 E. R. 653.
Annotation:—**Refd.** Hemming *v.* Hale (1859), 7 C. B. N. S. 487.

SUB-SECT. 4.—HUSBAND UNDISCLOSED PRINCIPAL.

Contracts on behalf of unnamed principal generally, *see* AGENCY, Vol. I., pp. 624–628, Nos.

1514. Wife acting under express authority not disclosed — Liability of husband.]—A married woman living with her husband bought articles of dress from applts. The articles were purchased with the knowledge & consent of her husband, & were suitable for her position. They were debited to her in applts.' books as "Mrs. H.," but applts. made no inquiry as to whether in fact she had a husband living, or was living with him. She had no separate estate, & had paid for other articles by cheques signed in her own name, & drawn upon money supplied to her by her husband for household & personal expenses:—*Held:* there was no evidence that she had contracted "otherwise than as agent" for her husband within Married Women's Property Act, 1893 (c. 63), s. 1, & she was not liable for the price of the goods.—PAQUIN, LTD. *v.* BEAUCLERK; [1906] A. C. 148; 75 L. J. K. B. 395; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395; 50 Sol. Jo. 358, H. L.
Annotations:—**Distd.** Lea Bridge District Gas Co. *v.* Malvern, [1917] 1 K. B. 803. **Mentd.** Skeate *v.* Slaters, [1914] 2 K. B. 429; Cooke *v.* Wilson (1915), 85 L. J. K. B. 888; Winterbotham, Gurney *v.* Sibthorp & Cox, [1918] 1 K. B. 625.

SUB-SECT. 5.—CREDIT GIVEN TO WIFE OR THIRD PARTY.

Agency generally, *see* AGENCY, Vol. I., pp. 267 *et seq.*

1515. Credit given to wife—Husband not liable.]—If wearing apparel is supplied to a married woman in quantities unsuitable to her husband's degree, & without his knowledge, for which the credit is given to her, & her promissory note is taken in payment, the husband is not liable for any part of the goods, & in an action against him for their value, is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter.—METCALFE *v.* SHAW (1811), 3 Camp. 22, N. P.
Annotation:—**Refd.** Holt *v.* Brien (1821), 4 B. & Ald. 252.

1516. ——— ———.]—TAYLOR *v.* BRITTAN (1823), 1 C. & P. 16, n., N. P.

———.]—MONTAGUE *v.* BENEDICT, No. 1642, *post.*

1518. ——— ——.]—CALLOT *v.* NASH, No. 1622, *post.*

1519. To whom credit given—Question of fact.]—BENTLEY *v.* GRIFFIN, No. 1570, *post.*

1520. Evidence that credit given to wife—Existence of separate property.]—The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury, if the wife be living with the husband, ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, & such as the husband never would have authorised, that will alone be sufficient to repel the inference of agency.

If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency, & evidence that pltf. has made out the invoices to the wife, & has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; & the fact that the husband sold some of the goods which were supplied to the wife & received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, & whether the wife was the agent of her husband.

Sect. 2.—As agent for husband: Sub-sects. 5, 6, 7, [illegible]

An allowance from the Ct. of Ch. for the maintenance of children is never granted unless it be shown that the husband has not a sufficient income to maintain his children without such an allowance. Such evidence is enough to show that avadavats & mocking birds are not necessaries for his wife (LORD ABINGER, C.B.).—FREESTONE *v.* BUTCHER (1840), 9 C. & P. 643, N.P.

Annotations:—**Consd.** Lane *v.* Ironmonger (1844), 13 M. & W. 368. **Refd.** Callot *v.* Nash (1923), 39 T. L. R. 292.

1521. —— Goods booked to her alone.]—(1) Where goods for which a wife has ordinarily authority to contract on the part of her husband, such as articles of dress, are ordered by her & delivered at his residence, where she also resides, *primâ facie* the husband is liable, there being a presumption in law in favour of pltf. & any evidence to rebut the presumption, as that the articles are unnecessarily costly in their character, or that the credit was given exclusively to the wife, must be submitted to the jury.

(2) The question whether the party who ordered the goods was the wife of deft. must be raised at the trial; & the point is not raised, but rather waived, by an objection that the credit was given to the wife alone; &, *semble:* if the parties live together & the woman represents herself as the wife of deft. that is *primâ facie* evidence that they were married.

The objection that credit was given to the wife alone, means that it was given to her to the exclusion of her husband's liability, & the circumstance that the goods were booked to her alone, but in her marriage name as deft.'s wife, is not sufficient to show this; on the contrary, the fact that she was known by pltf. to be a married woman, & supposed to be deft.'s wife, is rather *primâ facie* evidence that credit was given to the husband.—JEWSBURY *v.* NEWBOLD (1857), 26 L. J. Ex. 247; 29 L. T. O. S. 128.

Annotations:—*As to* (1) **Refd.** Paquin *v.* Beauclerk, [1906] A. C. 148; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562.

1522. Credit given to third party—Husband not liable.]—HARVEY *v.* NORTON, No. 1778, *post.*

SUB-SECT. 6.—SEPARATE TRADING.

Separate trading, *see* Part IV., Sect. 6, *ante.*

1523. Trade carried on with consent of husband—Liability of husband after death of wife.]—A *feme covert* trades by the consent of her husband, buys & sells goods, & gives bills for money, & her husband permits her so to do, & receives the profit of her trade; if she dies & leaves a stock to her husband, he shall be answerable for debts contracted in the trade.—BOWYER *v.* PEAKE (1697), Freem. Ch. 215; 22 E. R. 1168.

1524. —— ——.]—Where a man married a woman trader, who died, & at her death was indebted to several persons for wares which she had bought of them, & which were by her in *specie* at the time of her death, & came to the hands of her husband; though a bill be brought against him, he may either pay for the goods, or let the persons have them again; yet he may insist, that he is neither exor. nor administrator to his wife, & therefore not liable to her debts, & that all her goods belong to him by law.—BLACKMORE *v.* LEY (1700), 1 Eq. Cas. Abr. 60; 21 E. R. 874.

1525. ——.]—If husband & wife cohabit, he is liable to her contracts though she deals as a separate trader.—LANGFORD *v.* TYLER (1704), 6 Mod. Rep. 162; 1 Salk. 113; 87 E. R. 919.

Annotations:—**Refd.** Montague *v.* Baron (1825), 5 Dow. & Ry. K. B. 532; Petty *v.* Anderson (1825), 3 Bing. 170. **Mentd.** Ryall *v.* Rolle (1749), 1 Atk. 165; Hinde *v.* Whitehouse (1806), 7 East, 558; Bloxam *v.* Sanders (1825), 4 B. & C. 941; Clay *v.* Harrison (1829), 10 B. & C. 99; Laidler *v.* Burlinson (1837), 2 M. & W. 602.

1526. —— Notice by husband that not liable for debts.]—A married woman carried on in her maiden name a millinery business separately from her husband. A debtor's summons was issued against the husband & wife, claiming the payment of a sum due upon some bills of exchange drawn by the summoning creditor upon & accepted by the wife in her maiden name, & dishonoured. The husband applied to the ct. to dismiss the summons. He deposed that he never authorised his wife to pledge his credit, & that five years previously he had given notice to the summoning creditor that he had nothing to do with his wife's business. On this evidence, which was uncontradicted, the registrar made the common order staying the proceedings on security being given by the husband:—*Held:* on the evidence the husband was not liable for the debt, the issuing of the summons was an abuse of the procedure; & the summons must be dismissed with costs.—*Re* SHEPHERD, *Ex p.* SHEPHERD (1879), 10 Ch. D. 573; 48 L. J. Bcy. 35; 39 L. T. 652; 27 W. R. 310, C. A.

SUB-SECT. 7.—LIABILITY AS CONTRIBUTORY.

See, now, Married Women's Property Act, 1882 (c. 75), s. 7.

See COMPANIES, Vol. IX., pp. 262, 332, Nos. 1623, 2095.

SUB-SECT. 8.—EFFECT OF JUDGMENT OBTAINED AGAINST WIFE.

See R. S. C., Ord. 14, r. 5.

1527. Bar to action against husband—Unless joint liability.]—The fact that husband & wife live together & that necessaries for the household are supplied on the orders of the wife is not evidence that husband & wife are jointly liable. The presumption that the wife has in such a case authority to pledge the husband's credit may be rebutted by proof that he made her a sufficient allowance, though this arrangement is not known to those who supply the necessaries.—MOREL BROTHERS & CO., LTD. *v.* WESTMORELAND (EARL), [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38, H. L.

Annotations:—**Apld.** French *v.* Howie, [1906] 2 K. B. 674; Moore *v.* Flanagan, [1920] 1 K. B. 919. **Refd.** Slater *v.* Parker (1908), 24 T. L. R. 621; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562; Debenham *v.* Perkins (1925), 133 L. T. 252. **Mentd.** Cross *v.* Matthews & Wallace (1904), 91 L. T. 500; Francis Walton *v.* Topakyan, Kevorkian & Marler (1905), 53 W. R. 657; Isaacs *v.* Salbstein, [1916] 2 K. B. 139; London General Omnibus

PART VIII. SECT. 2, SUB-SECT. 6.

q. *Liability of husband—In absence of statutory certificate.*]—A husband is liable for debts of his wife contracted in carrying on business in her own name so long as the certificate called for by M. W. Act, 1900, s. 18 (1), has not been filed, but is not liable for contracts made by the wife after the filing of such certificate.—BROCK *v.* PATTERSON & ALLEN (1919), 52 N. S. R. 403; 44 D. L. R. 463.—**CAN.**

r. —— *Separate venture of wife.*]—For a number of years the wife, with the knowledge & sanction of the husband, managed his business, & afterwards contracted debts, & whilst living with her husband, for what appeared a separate venture in another locality on her own account. In an action against the husband for the value of the goods supplied:—*Held:* there was an implied authority on the part of the husband to the wife which rendered him liable.—RANKIN *v.* WALSH (1883), 6 Nfld. L. R. 497.—**NFLD.**

L. 270;

1528. Judgment recovered for part of debt.]—In an action against a husband & wife on the footing of a joint liability pltf., on certain admissions made by the wife, obtained judgment against her for £4, in respect of the amount claimed, with leave to defend as to the residue, the husband being given unconditional leave to defend as to the whole amount, & the action was remitted for trial to the county ct. At the trial the jury found that pltf. gave credit to the husband alone, & negatived the joint liability. The county ct. judge entered judgment against the husband for the claim, less the amount for which judgment had been signed against the wife, & the Div. Ct. affirmed his decision:—*Held:* on the finding of the jury the judgment against the wife for an indivisible part of the claim was a complete bar to the claim against the husband, & the county ct. judge was wrong in entering judgment against the husband.—FRENCH *v.* HOWIE, [1906] 2 K. B. 674; 75 L. J. K. B. 980; 95 L. T. 274, C. A.

Annotation:—**Distd.** Debenham *v.* Perkins (1925), 133 L. T. 252.

1529. ——— ———.]—Pltf., who was a milliner & dressmaker, brought an action by a specially indorsed writ against a husband & wife claiming against them jointly to recover the price of goods supplied to the wife. Upon an application for leave to sign final judgment against both husband & wife for the amount claimed, the master gave leave, & pltf. signed judgment against both. The husband alone appealed. The judge in chambers set aside the judgment against the husband & gave him leave to defend. At the trial the judge found that there was no joint liability in the husband & wife, that the goods being *primâ facie* necessaries for the wife the husband *primâ facie* was the principal & the wife the agent, & he held that pltf. had not, by the judgment against the wife, elected to treat her as principal, & was entitled to recover against the husband:—*Held:* as the remedy was an alternative one, pltf., having signed judgment against the agent, could not afterwards recover judgment against the principal in respect of the same debt, & therefore the husband was not liable.—MOORE *v.* FLANAGAN, [1920] 1 K. B. 919; 89 L. J. K. B. 417; 122 L. T. 739, C. A.

Annotations:—**Mentd.** Parr *v.* Snell, [1923] 1 K. B. 1; Duffner *v.* Bowyer (1924), 40 T. L. R. 700.

1530. Two distinct causes of action—Goods purchased prior to separation.]—Where an action for goods sold is brought against a wife on a bill containing a number of items, & judgment is recovered against her on all items purchased after a certain date, on the ground that since that date she has been acting as principal by reason of her having separated from her husband on that date, proceedings may subsequently be taken against the husband as agent for the items purchased prior to that date, since there are two distinct causes of action, & there has been no election by suing of the wife to judgment on the whole or part of one undivided debt.—DEBENHAM'S, LTD. *v.* PERKINS (1925), 133 L. T. 252.

SUB-SECT. 9.—ACKNOWLEDGMENT OF DEBT OF WIFE.

See EVIDENCE, Vol. XXII., p. 110, Nos. 1148-1150.

1531. Wife carrying on husband's business—Whether admissions admissible.]—Where a husband permits his wife to act for him in any department or business, her admissions or acknowledgments are evidence to charge the husband.—EMERSON *v.* BLONDEN (1794), 1 Esp. 141, N. P.

Annotation:—**Folld.** Clifford *v.* Burton (1823), 8 Moore, C. P. 16.

1532. ——— ———.]—(1) Where the wife of deft. alone transacts the business at home, & purchases all the articles used in their trade, her admission as to the state of the accounts between pltf., who has supplied goods to her to be used in the trade, & her husband is evidence against the latter.

(2) The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of Stat. Limitations in an action against the husband.—ANDERSON *v.* SANDERSON (1817), 2 Stark. 204; Holt. N. P. 591, N. P.

1533. ——— ———.]—In an action for goods sold & delivered, the admissions of deft.'s wife, who served in his shop, & conducted the business of it in his absence, are admissible, in evidence against her husband, although the goods were delivered previously to an application, for payment, when she admitted that a certain sum was due to pltf., & that she would pay it if he would make a deduction, to which she claimed to be entitled.—CLIFFORD *v.* BURTON (1823), 1 Bing. 199; 8 Moore, C. P. 16; 1 L. J. O. S. C. P. 61; 130 E. R. 81.

Annotation:—**Mentd.** G. W. Ry. *v.* Willis (1865), 18 C. B. N. S. 748.

1534. ——— ———.]—Where a wife carried on in her husband's absence the business of a shop, & by his authority attended to all the receipts & payments:—*Held:* a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, & admitting its amount, was not evidence against the husband of the terms of the tenancy.—MEREDITH *v.* FOOTNER (1843), 11 M. & W. 202; 12 L. J. Ex. 183; 152 E. R. 775.

1535. Acknowledgment taking debt outside Statute of Limitations, 1623 (c. 16).]—PALETHORP *v.* FURNISH (1783), 2 Esp. 511, n., N. P.

1536. ——— ———.]—In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years is admissible evidence to take the case out of the above Act.—GREGORY *v.* PARKER (1808), 1 Camp. 394, N. P.

Annotation:—**Mentd.** Scales *v.* Jacob (1826), 3 Bing. 638.

1537. ——— ———.]—ANDERSON *v.* SANDERSON, No. 1532, *ante*.

1538. ——— ———.]—COPNER *v.* COPNER (1852), 19 L. T. O. S. 67.

1539. What amounts to sufficient acknowledgment—Statute of Limitations, 1623 (c. 16).]—An unsigned letter, acknowledging a debt, written by debtor's wife at his dictation, & sent to the creditor in the same envelope with a letter to the creditor, written & signed by the wife, & which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorised agent of debtor, so as to take the case out of the above Act.—INGRAM *v.* LITTLE (1883), Cab. & El. 186.

See, also, LIMITATION OF ACTIONS.

SUB-SECT. 10.—IMPLIED AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR NECESSARIES.

See Sect. 3, *post*.

Sect. 2.—*As agent for husband: Sub-sects.* 11 & 12, *A., B., C. & D.; sub-sect.* 13, *A.*]

SUB-SECT. 11.—IMPLIED AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR COSTS.

See Sect. 4, *post.*

SUB-SECT. 12.—HOLDING OUT.

A. By Previous Dealings.

Holding out generally, *see* AGENCY, Vol. I., p. 384; ESTOPPEL, Vol. XXI., pp. 359 *et seq.*

1540. Goods previously bought—General notice not to trust.]—WATSON'S CASE (1647), Clay. 125.

1541. —— From same tradesmen.]—Deft.'s wife bought goods of pltf., a mercer, which deft. paid for. Deft. is afterwards separated from his wife, who buys more goods of pltf. before he had notice of separation; deft. is liable. *Semble: secus*, if she had afterwards taken up goods of a stranger.—HINTON *v.* HUDSON (1677), Freem. K. B. 248; 89 E. R. 178.

1542. —— ——.]—Where a wife had in one single instance bought goods which were delivered at the lodgings of her mother, without her husband's knowledge, but for which he subsequently paid:—*Held:* in an action for other goods also bought by the wife from the same tradesman, & delivered at the lodgings of the mother, but at a different place; evidence of the facts was proper to be left to the jury, to show an agency in the wife, & a sanction of her dealings by her husband; & the jury having found for pltf., the ct. refused to disturb the verdict.—FILMER *v.* LYNN (1835), 1 Har. & W. 59; 4 Nev. & M. K. B. 559.

1543. ——.]—When a husband has not authorised his wife to pledge his credit, he is not, by the fact of giving a cheque in payment of a debt incurred by her, estopped from disputing his liability for goods afterwards supplied to her.—DURRANT *v.* HOLDSWORTH (1886), 2 T. L. R. 763.

1544. Previous contract adopted—With same party.]—Pltf. engaged with deft. for the services of his, pltf.'s, wife on a voyage from the East Indies to this country; & the wife, being enceinte & unable to perform the duties she had undertaken, afterwards agreed to procure a substitute at St. Helena, & that the wages paid to such substitute should be deducted from the sum to be paid for her services; to which agreement the husband subsequently assented. By a second agreement, the wife released deft. from the residue of the money due to herself:—*Held:* by adopting the first contract made by the wife at St. Helena, pltf. impliedly gave her authority to enter into the second agreement, & was therefore bound by it.—HARRINGTON *v.* M'DOWELL (1828), 7 L. J. O. S. C. P. 47.

B. Wife Managing Household.

1545. Adulterous wife—Left in charge of house & children.]—NORTON *v.* FAZAN, No. 1748, *post.*

1546. Expenditure for family.]—*Held:* proof of deft.'s having paid for articles ordered by his wife for the use of her own house, was relevant evidence to go to a jury, upon a question whether or not she had placed her niece at a school with his authority & at his charge.—M'GEORGE *v.* EGAN (1839), 5 Bing. N. C. 196; 1 Arn. 462; 7 Scott, 112; 3 Jur. 266; 132 E. R. 1080.

1547. —— Allowance for wife.]—The husband was an engine fitter, in the receipt of weekly wages, & sometimes absent from home in his business three weeks or a month or more at a time; he regularly allowed his wife 25*s.* per week for meat, drink, etc. She having contracted a debt of £10 odd for groceries, etc.:—*Held:* he was liable for the amount.—RUDDOCK *v.* MARSH (1857), 1 H. & N. 601; 28 L. T. O. S. 290; 5 W. R. 359; 156 E. R. 1342.

Annotations:—**Dbtd.** Debenham *v.* Mellon (1880), 5 Q. B. D. 394. **Refd.** Atkyns *v.* Pearce (1857), 2 C. B. N. S. 763.

1548. Purchase of goods for cash—Not holding out to obtain goods on credit.]—(1) A husband is not bound to give notice to a tradesman with whom he has dealt for ready money during his cohabitation with his wife of his separation from her, & the consequent revocation of her ordinary authority to bind him by her contract for necessaries.

(2) If he had, during the cohabitation, authorised her to deal with the tradesman on credit, he would have been bound to give notice of the revocation of that authority on the separation.—WALLIS *v.* BIDDICK (1873), 22 W. R. 76.

1549. Goods ordered by wife—With concurrence of husband.]—Where a husband & wife were living together, & furniture was supplied for, & work done at, the house, on the order of the wife, but the husband took part in making selections & giving directions as to the execution of the orders:—*Held:* the husband was liable to pay for the goods & work although he had expressly prohibited her from pledging his credit, & they had agreed together that she should pay for the goods & work.—JETLEY *v.* HILL (1884), Cab. & El. 239.

C. Wife Carrying on Husband's Business.

1550. Authority to bind husband—Business in wife's name—Husband sharing in profits.]—Deft., a baker & confectioner, was discharged under Insolvent Debtors Act, & the business, during his absence, & after his return from imprisonment, was carried on by his wife, who purchased goods in her own name. The wife was acknowledged by the landlord as tenant of the house in which they lived, & was rated in the books of the parish as the occupier. Deft. was aware of, & assented to, the dealings of his wife, &, being with her, partook of the profits of the trade:—*Held:* he was liable in an action for the price of the goods, notwithstanding that the invoices were made out in the name of the wife alone, she being his agent.—PETTY *v.* ANDERSON (1825), 3 Bing. 170; 2 C. & P. 38; 10 Moore C. P. 577; 3 L. J. O. S. C. P. 223; 130 E. R. 479.

1551. —— Wife giving orders as to particular order.]—It is competent to a jury to infer agency in a wife, to accept a notice with respect to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, & on one of these occasions giving directions to the foreman.—PLIMMER *v.* SELLS (1834), 3 Nev. & M. K. B. 422.

1552. —— Occasional visits by husband.]—

PART VIII. SECT. 2, SUB-SECT. 12.—B.

1546 i. *Expenditure for family.*]—The fact of a woman, living with her husband & family, ordering household goods does not raise an implied personal promise to pay or bind her separate estate, or any other presumption than that she is acting as her husband's agent.—GRIFFIN *v.* PATTERSON (1881), 45 U. C. R. 536.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 12.—C.

s. *Authority to bind husband.*]—Where a wife took an active part in her husband's business & had the custody of his money, sums paid to her were treated as paid to the husband.—ROBINSON *v.* COYNE (1868), 14 Gr. 561.—**CAN.**

A., who kept a fruiterer's shop, in the year 1824, became bkpt., but did not surrender to his commission, & from that time to the year 1833 the business was carried on by A.'s wife. Fruit was supplied to her between the years 1828 & 1832, to an amount exceeding £266; & evidence was given that A. was seen in London a few times between 1824 & 1833, & was arrested at the shop in 1833, & that he attended the marriage of two of his daughters at M. church:—*Held:* proof of these facts was not evidence to go to the jury to show that A.'s wife acted as the agent of A., so as to charge him with the price of the fruit, although it might be sufficient to charge him with necessaries supplied to the wife.

Deft. coming to his wife's house could only make him liable for necessaries supplied to her (PARKE, B.).—SMALLPIECE *v.* DAWES (1835), 7 C. & P. 40, N. P.

Annotation:—**Refd.** Lovell *v.* Newton (1878), 43 J. P. 93.

1553. —— Wife left in house to keep lodgers.]—STRONG *v.* HUDSON (1850), 16 L. T. O. S. 149.

D. Revocation of Authority.

Revocation of agency generally, *see* AGENCY, Vol. I., pp. 690 *et seq.*

1554. Necessity for notice to tradesman.] —HINTON *v.* HUDSON, No. 1541, *ante.*

1555. —— Notice in Gazette not sufficient.]—HUNT *v.* DE BLAQUIERE, No. 1764, *post.*

1556. ——.]—WALLIS *v.* BIDDICK, No. 1548, *ante.*

1557. Death of husband.]—BLADES *v.* FREE, No. 1812, *post.*

1558. ——.]—Where a man who had been in the habit of dealing with pltf. for meat supplied to his house, went abroad, leaving his wife & family resident in this country, & died abroad:—*Held:* the wife was not liable for goods supplied to her after his death, but before information of his death had been received; she having had originally fully authority to contract, & done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being by the act of God, & the continuance of the life of the principal being equally within the knowledge of both parties.—SMOUT *v.* ILBERY (1842), 10 M. & W. 1; 12 L. J. Ex. 357; 152 E. R. 357.

Annotations:—**Consd.** Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 13; Yonge *v.* Toynbee, [1910] 1 K. B. 215. **Refd.** Jenkins *v.* Hutchinson (1849), 13 Jur. 763; Read *v.* Teakle (1853), 1 C. L. R. 200; Campanari *v.* Woodburn (1854), 15 C. B. 400; Randell *v.* Trimen (1856), 18 C. B. 786; Collen *v.* Wright (1857), 8 E. & B. 647; Bradbury *v.* Morgan (1862), 7 L. T. 101; *Re* Pearce, Roberts *v.* Stephens (1894), 8 R. 805; Halbot *v.* Lens, [1901] 1 Ch. 344; Oliver *v.* Bank of England, Starkey, Leveson & Cooke, Third Parties, [1901] 1 Ch. 652; Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538. **Mentd.** Weedon *v.* Woodbridge (1849), 13 L. T. O. S. 159; *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D.

1559. —.]—Pltf. was a tradesman, & deft. had given his wife authority to deal with pltf., & had held her out as his agent & as entitled to pledge his credit. Afterwards, deft. became insane, & whilst his malady lasted, his wife ordered goods from pltf., who accordingly supplied them. At the time of supplying the goods pltf. was unaware that deft. had become insane. Deft. afterwards recovered his reason, & then refused to pay for the goods supplied to his wife by pltf.:—*Held:* deft. was liable for the price of the goods.

It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent, thus the bkpcy. & death of the principal . . . all put an end to the authority of the agent (BRETT, L.J.).—DREW *v.* NUNN (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 43 J. P. 541; 27 W. R. 810, C. A.

Annotations:—**Refd.** Chili Republic *v.* London & River Plate Bank (1894), 10 T. L. R. 658; Burke *v.* Amalgamated Soc. of Dyers, [1906] 2 K. B. 583; Willis, Faber *v.* Joyce (1911), 104 L. T. 576; Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538.

See, also, AGENCY, Vol. I., pp. 690, 691, Nos. 2989–3005.

1560. Bankruptcy of husband.]—DREW *v.* NUNN, No. 1559, *ante.*

See, also, AGENCY, Vol. I., pp. 691, 692, Nos. 3006–3013.

1561. Lunacy of husband.]—DREW *v.* NUNN, No. 1559, *ante.*

——.]—*See* Sect. 3, sub-sect. 1, E., *post.*

See, also, AGENCY, Vol. I., p. 692, Nos. 3015, 3017.

SUB-SECT. 13.—RATIFICATION.

A. In General.

Ratification generally, *see* AGENCY, Vol. I., pp. 396 *et seq.*

1562. Acceptance by husband of contract—Before or subsequent.]—STEVENSON *v.* HARDIE, No. 1508, *ante.*

1563. —— Cannot be subsequently withdrawn—Though made in ignorance of law.]—A husband who allows his wife a separate maintenance, promises to pay the amount of a debt which she contracts in a state of separation; he cannot afterwards recede from his promise on the ground that pltf. knew that he allowed his wife a separate maintenance, & that he made the promise under a misapprehension of law.—HORNBUCKLE *v.* HORNBURY (1817), 2 Stark. 177, N. P.

Annotation:—**Refd.** Burge *v.* Jones (1828), 7 L. J. O. S. K. B 59.

1564. —— ——.]—An express promise by a husband to pay a debt incurred by his wife, for which he is not otherwise liable, is binding.—HARRISON *v.* HALL (1832), 1 Mood. & R. 185, N. P.

1565. —— May be conditional.]—HOLT *v.* BRIEN, No. 1610, *post.*

1566. ——.]—A bill of exchange, addressed to deft. by the name of W. B., was accepted by his wife, by writing across it her own name, M. B. There was no evidence of any express authority in the wife so to accept the bill; but, on its being presented to the husband, after it had become due, he said he knew all about it, that the bill was a millinery bill (for which the husband appeared to be liable), & that he would pay it very shortly:—*Held:* he was liable as acceptor.—LINDUS *v.* BRADWELL (1848), 5 C. B. 583; 17 L. J. C. P. 121; 10 L. T. O. S. 393; 12 Jur. 230; 136 E. R. 1007.

1567. ——.]—Where a sum of money was advanced to a wife who was living with her husband, &, after her decease, the husband promised to repay the sum "when convenient to him" but stated he had not been privy to the loan:—*Held:* there was evidence to go to the jury that the wife had borrowed the money with the sanction

PART VIII. SECT. 2, SUB-SECT. 13.—A.

t. *Acceptance by husband of contract—May be implied—Question for jury.*]—To bind the husband & make him liable for the contracts of his wife express assent is not necessary—his assent may be implied. The question of ratification by the husband is one purely for the jury.—BACON *v.* YOUNG (1858), 4 Nfld. L. R. 241.—**NFLD.**

a. *Effect of ratification of part.*]—HALPENNY *v.* PENNOCK (1873), ; U. C. R. 229.—**CAN.**

Sect. 2.—*As agent for husband: Sub-sect.* 13, *A. & B. Sect.* 3: *Sub-sect.* 1, *A.* (*a*).]

of the husband, or that she professed so to do, & that he had ratified her act.—WEST *v.* WHEELER (1849), 2 Car. & Kir. 714, N. P.

1568. — — Binding upon other party.]—A contract entered into & paid for by a wife without the knowledge, but for the benefit of her husband, is valid & binding when ratified by the husband.

A wife, unknown to her husband, requested her father to sell a field, to be paid for out of her savings. The father at first refused but he received the money, & shortly afterwards put the husband into possession. For ten years the money was retained by the father without payment of interest & the field by the husband without payment of rent. The father then attempted to eject the husband, who being made acquainted with the circumstances, insisted on retaining the field:—*Held:* the father was bound to convey it to the husband.—MILLARD *v.* HARVEY (1864), 34 Beav. 237; 11 L. T. 360; 10 Jur. N. S. 1167; 13 W. R. 125; 55 E. R. 626.

B. What amounts to Ratification.

1569. Husband with control over goods—Failure to return to tradesman.]—(1) Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman, for which he would not otherwise be liable, he assents to the contract, if having any control over the goods, he does not cause them to be returned to the vendor.

(2) A husband is liable for necessaries furnished to his wife suitable to the appearance in life he permits her to assume, though greatly beyond his degree or his circumstances.

(3) If a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious inquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which those inquiries would have shown him to be responsible.—WAITHMAN *v.* WAKEFIELD (1807), 1 Camp. 120, N. P.

Annotation:—*Generally*, **Refd.** Freestone *v.* Butcher (1840), 9 C. & P. 613.

1570. Husband seeing wife in possession of goods—Credit given to wife.]—It is a question of fact whether a tradesman who furnishes goods to a wife gives credit to her or to her husband; if the credit is given to her, the husband is not liable, though the wife lives with him, & he sees her in possession of some of the goods.—BENTLEY *v.* GRIFFIN (1814), 5 Taunt. 356; 128 E. R. 727.

Annotations:—**Refd.** Holt *v.* Brien (1821), 4 B. & Ald. 252; Petty *v.* Anderson (1825), 3 Bing. 170; Paquin *v.* Beauclerk, [1906] A. C. 148.

1571. —— Contract entered into contrary to husband's wishes.]—ATKINS *v.* CURWOOD, No. 1629, *post.*

1572. Contract in respect of wife's separate estate.]—Where *baron & feme* declared with A. jointly upon an agreement to demise lands to B., upon certain considerations thereunto moving & averring the promises to the three, & it appeared in evidence that the agreement was entered into by an agent, for & on behalf of the wife & A. only:—*Held:* a fatal variance, though the husband had received rent from the tenant, subsequent to the date of the agreement.—SAUNDERSON *v.* GRIFFITHS (1826), 5 B. & C. 909; 8 Dow. & Ry. K. B. 643; 4 L. J. O. S. K. B. 318; 108 E. R. 338.

Annotations:—**Apprvd.** Keighley, Maxsted *v.* Durant, [1901] A. C. 240. **Refd.** Bobbett *v.* Pinkett (1876), 1 Ex. D. 368.

1573. Hire of house—Husband joining in receipt for rent from lodger.]—In *assumpsit* on an agreement to hire a house, which had been made between pltf. & deft.'s wife, & for the use & occupation of the premises by deft.'s wife, it appeared that deft. & his wife were separated, he living in Yorkshire, she in London; but that on one occasion he was in her house about a fortnight, & joined in giving a receipt for rent due from her lodgers:—*Held:* upon the count for use & occupation, the judge ought to have left it to the jury to determine whether deft. had adopted the contract of his wife.—BARNES *v.* JARRETT (1838), 2 Jur. 988.

1574. Wife living apart—Husband supplying servant.]—Where a husband had taken his wife to a particular place & left her there, with an intention on his part of not returning to her, of which she was not aware, & she, not having been furnished with funds, had gone into debt with pltf. for lodging & board; & deft., after being applied to by pltf., wrote to him in such a way as to imply acquiescence in her continuing there, these circumstances were left to the jury as evidence of liability.—JENNER *v.* HILL (1858), 1 F. & F. 269, N. P.

1575. Engagement of servant by wife—With allowance & forbidden to pledge credit—Temporary residence of husband.]—SABINE *v.* LEGGE (1921), 152 L. T. Jo.

SECT. 3.—NECESSARIES.

SUB-SECT. 1.—WHILE LIVING TOGETHER.

A. Presumption of Husband's Liability.

(*a*) *Presumption from Cohabitation.*

1576. Assent of husband presumed—Unless contrary proved.]—DYER *v.* EAST (1669), 2 Keb. 554; 1 Mod. Rep. 9; 1 Sid. 425; 1 Vent. 42; 84 E. R. 347.

1577. —— ——.]—Warning a servant usually employed by a tradesman in his trade that his master trust a man's wife no more, is a sufficient warning to the master.

Where a husband turns away his wife, he gives her credit wherever she goes & must pay for necessaries for her; but if she runs away from her husband he shall not be bound by any contract she makes. & while they cohabit together the husband shall answer all contracts of hers for

PART VIII. SECT. 2, SUB-SECT. 13.—B.

b. *Hire of horses—Payment by husband of similar claims—On previous occasions.*]—C., a livery stable keeper, sued A. for the hiring of horses by B., his wife. A. pleaded that B. hired them for the purposes of her own business, & was therefore chargeable for them out of her separate property, & that she was not authorised by him to hire them. It was proved that on previous occasions A. had paid for the hiring of horses by B.:—*Held:* on this evidence, A. was liable.—PARSLOW *v.* COCHRANE (1899), 4 Terr. L. R. 312.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 1. A. (a).

1576 i. *Assent of husband presumed—Unless contrary proved.*]—When goods are ordered by a married woman living with her husband, for use in the household, the presumption of law is that the wife is acting as the agent of her husband, & such presumption is not displaced by the fact that the merchant kept the account in the name of the wife & rendered statements of it from time to time to her instead of to her husband.—VOPNI *v.* BELL (1908), 8 W. L. R. 205; 17 Man. L. R. 417.—**CAN.**

1576 ii. —— ——.]—When a wife is living with her husband, if he gives her nothing but the shelter of his house, she is entitled to provide food & apparel for herself at his expense & he is bound to pay for them.—PRICE *v.* PRICE (1910), 16 O. W. R. 260; 21 O. L. R. 454; 1 O. W. N. 977.—**CAN.**

1576 iii. —— ——.]—The presumption of law is that a wife in purchasing necessaries acts as agent for her husband, & the *onus* is on him to rebut that presumption.—GARTZ *v.* JARVIS, [1918] 3 W. W. R. 888.—**CAN.**

necessaries, for his assent shall be presumed upon the account of cohabiting unless the contrary appear, in which case, as by warning, etc. there is no room for such a presumption (HOLT, C.J.).—ETHERINGTON *v.* PARROT (1703), Holt, K. B. 102; 2 Ld. Raym. 1006; 1 Salk. 118; 90 E. R. 955.

Annotations :—**Refd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Montague *v.* Benedict (1825), 3 B. & C. 631; Jolly *v.* Rees (1864), 15 C. B. N. S. 628.

1578. —— ——.]—FREESTONE *v.* BUTCHER, No. 1520, *ante*.

1579. ——.]—MORTON *v.* WITHENS (1692), Skin. 348; 90 E. R. 155.

Annotation :—**Consd.** Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148.

1580. ——.]—A husband is liable for necessaries furnished to his wife during her cohabitation with him; or if he turns her out of doors; or if he receive her back after separation; but if she leave him, & live separate, & the person has notice of the separation, he is not liable.—ROBISON (OR ROBINSON) *v.* GOSNOLD (1704), 6 Mod. Rep. 171; Holt, K. B. 103; 1 Salk. 119; 87 E. R. 927, N. P.

Annotations :—**Refd.** Wilson *v.* Glossop (1887), 19 Q. B. D. 379; Wickins *v.* Wickins (No. 2), [1918] P. 282.

1581. ——.]—(1) If an action is brought against a husband, for the price of goods supplied to his wife, who is living with him, it lies on the husband to show, that the goods were furnished in such circumstances that he is not liable to pay for them. But if the goods be supplied to his wife, when she is living separate & apart from the husband, it is incumbent on the tradesman to prove that the separation occurred in such circumstances as will make the husband liable.

If goods are furnished to a married woman who is living with her husband, it must be taken *primâ facie*, that those goods are supplied to her by his authority (LORD TENTERDEN, C.J.).

(2) A husband is not liable for goods furnished to his wife living apart from him if she has a sufficient separate maintenance although no part of it is supplied by the husband.—CLIFFORD *v.* LATON (1827), 3 C. & P. 15; Mood. & M. 101, N. P.

Annotations :—**Refd.** Johnston *v.* Sumner (1858), 3 H. & N. 261; *Re* Wood, Davidson *v.* Wood (1863), 8 L. T. 476.

1582. ——.]—SEATON *v.* BENEDICT, No. 1500, *ante*.

1583. ——.]—(1) Where a wife is living with her husband, & in the ordinary arrangement of their household she gives orders which are proper & not extravagant, it is presumed that she has the authority of her husband for so doing.

(2) When the husband & wife do not live together, & the husband has turned the wife out of doors, the law makes her his agent to order such things as are reasonable & necessary for herself; but if she is living in open adultery, her husband is not bound by any contract she may make even for necessaries. If the husband has not turned the wife out of doors, & they have separated in consequence of differences, the question will be, whether the husband has given the wife sufficient for necessaries suitable to his degree, for if he has, he is not liable to her debts even for necessaries.—EMMETT *v.* NORTON (1838), 8 C. & P. 506, N. P.

Annotation :—*Generally*, **Refd.** Johnston *v.* Sumner (1858), 3 H. & N. 261.

1584. —— **Question for jury.**]—In an action for goods supplied to a married woman, the proper question to leave to the jury is, not simply whether the goods were necessaries suitable to the station in life of the party, but whether, upon the facts proved, the wife had authority, express or implied, to bind her husband by her contracts.—REID *v.* TEAKLE (1853), 13 C. B. 627; 22 L. J. C. P. 161; 17 Jur. 841; 138 E. R. 1346; *sub nom.* READ *v.* TEAKLE, 1 C. L. R. 200.

Annotations :—**Refd.** Jewsbury *v.* Newbold (1857), 26 L. J. Ex. 247; Jolly *v.* Rees (1864), 15 C. B. N. S. 628; Chappell *v.* Nunn (1879), 41 L. T. 287; Debenham *v.* Mellor (1880), 42 L. T. 577; Morel *v.* Westmorland (1902), 87 L. T. 635; Remmington *v.* Broadwood (1902), 18 T. L. R. 270.

1585. —— ——.]—JEWSBURY *v.* NEWBOLD, No. 1521, *ante*.

1586. —— ——.]—(1) While a husband & wife are living together, it is a presumption of fact that the wife is agent for, & has the authority of her husband to pledge his credit for goods supplied to their establishment which are suited to her station & degree; & it is for the husband, not the jury, to fix what shall be the standard of living for his family. It is a question for the jury whether the presumption arising from cohabitation is rebutted.

(2) If a husband turns his wife out of his house without the means of obtaining necessaries suitable to her estate & degree, it is a presumption of law, which cannot be rebutted by evidence, that she was turned out with her husband's authority to pledge his credit for such necessaries.

It is perfectly clear that medical attendance is one of the most primary necessaries (ERLE, C.J.).—HARRISON *v.* GRADY (1865), 13 L. T. 369; 12 Jur. N. S. 140; 14 W. R. 139.

Annotation :—*As to* (2) **Folld.** Forristall *v.* Lawson, Connelly *v.* Lawson (1876), 34 L. T. 903.

1587. —— ——.]—Where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband & wife. Otherwise where such management did not exist. A. was the manager of a limited co.'s hotel at Bradford, where his wife acted as manageress, they cohabited, he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name & were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication :—*Held :* the husband was not liable; in the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust his wife.

The question is whether the mere fact of marriage implies a mandate by law making the wife the agent in law of her husband to bind him & pledge his credit. . . . There is no such mandate in law from the fact of marriage only except in the particular case of necessity, a necessity which may arise when the husband has deserted the wife or by his conduct compelled her to live apart from him (LORD SELBORNE, C.).—DEBENHAM *v.* MELLON (1880), 6 App. Cas. 24; 50 L. J. Q. B. 155; 43 L. T. 673; 45 J. P. 252; 29 W. R. 141, H. L.; *affg.* 5 Q. B. D. 394, C. A.

Annotations :—**Distd.** Jetley *v.* Hill (1884), Cab. & El. 239. **Apld.** Morel *v.* Westmorland, [1904] A. C. 11. **Refd.** Barnes *v.* Toye (1884), 53 L. J. Q. B. 567; Durrant *v.* Holdsworth (1886), 2 T. L. R. 763; Watkins *v.* Watkins (1896), 65 L. J. P. 75; Remmington *v.* Broadwood (1902), 18 T. L. R. 270; Paquin *v.* Beauclerk, [1906] A. C. 148; Slater *v.* Parker (1908), 24 T. L. R. 621; Swan & Edgar *v.* Mathieson (1910), 103 L. T. 832; Balfour *v.* Balfour, [1919] 2 K. B. 571; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562.

1588. —— **Cohabitation in fact ceased.**]—In an

Sect. 3.—*Necessaries: Sub-sect.* 1, *A.* (*c*) *iii., iv., v., vi. & vii., B.* (*a*) *&* (*b*).]

while they were living together, but without his actual assent or knowledge, the question whether they are necessaries, & suitable to her estate & degree as his wife, depends, on the one hand, not only on his actual, but upon his apparent income, as represented to the world by the rate at which he lives, & allows her to live; &, on the other hand, it depends partly upon the supply of similar articles, which, in fact, she may have had at the time of her ordering the goods in question. Apart from the authority implied in law, to pledge his credit for necessaries, there may be an authority, implied, in fact, from his approving of her having such things, & knowing that she had no means of paying for them; & thus, if a husband approves of his wife's hunting, & going to balls, etc. & knows she has no separate income, or none sufficient to pay for the requisite dresses, there may be an authority, implied, in fact, to pledge his credit for them, as otherwise she would not be able to obtain them. So far as the question depends upon her having a separate income or allowance, the question is not only whether it is adequate to the expenses, which he tacitly encourages & allows, but whether it is paid. & when the question is as to express prohibition to the wife to order goods on credit, it must appear that there was a direct, present, positive, absolute prohibition, & not a mere complaint of extravagance, or a declaration as to the future, that, if such extravagance is continued, he will not be answerable for her debts.

The law implies an authority from the husband to the wife to pledge his credit for necessaries suitable to her estate & condition as his wife, but that presumption may be rebutted; & if it appears that the wife has a sufficiency of the articles ordered, or that she has an allowance from her husband so that she could supply herself with such articles without pledging his credit, the presumption of an implied authority is then rebutted (COCKBURN, J.).

"You must not order any more goods on my credit," is a prohibition; but "If you go on in this way I shall stop your credit," is rather a threat of future prohibition than an actual & express present prohibition (COCKBURN, J.).—MORGAN *v.* CHETWYND (1865), 4 F. & F. 451, N. P.

1616. ——.]—A husband, who was living with his wife, paid an agreed allowance to her to enable her to provide herself with clothes, & for personal expenses:—*Held:* she had no authority to pledge her husband's credit for articles of clothing.—REMMINGTON *v.* BROADWOOD (1902), 18 T. L. R. 270, C. A.

Annotations:—**Consd.** Slater *v.* Parker (1908), 24 T. L. R. 621; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562. **Refd.** Morel *v.* Westmorland & Wife (1902), 87 L. T. 635.

1617. —.]—Deft. who was a cabdriver, allowed his wife, with whom he was living, £1 a week for household necessaries, being a sufficient sum for the maintenance of the household. The wife ordered meat from a butcher for the use of the household for which, however, she did not pay. There was no express prohibition by deft. to his wife forbidding her to pledge his credit. The meat supplied was a household "necessary." In an action by the butcher against deft. to recover the price thereof:—*Held:* the making of the allowance to the wife for household expenses was sufficient to rebut the presumption that the wife had authority to pledge her husband's credit for household necessaries, & pltf. was not entitled to recover.—SLATER *v.* PARKER (1908), 24 T. L. R. 621; 52 Sol. Jo. 498.

Annotation:—**Refd.** Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562.

1618. ——.]—SABINE *v.* LEGGE (1921), 152 L. T. Jo. 364.

1619. ——.]—MISS GRAY, LTD. *v.* CATHCART (EARL), No. 1592, *ante*.

iv. *Separate Income of Wife.*

1620. Evidence to rebut agency.]—FREESTONE *v.* BUTCHER, No. 1520, *ante*.

1621. —— **Not conclusive.**]—The mere fact that a wife has an income of her own does not negative her power to pledge her husband's credit for necessaries.—SEYMOUR *v.* KINGSCOTE (1922), 38 T. L. R. 586.

Annotation:—**Refd.** Callot *v.* Nash (1923), 39 T. L. R. 292.

1622. —— ——.]—The mere fact that a wife has a separate income, however large, does not of itself exonerate a husband from the obligation of paying her dress bills, but where a husband prohibits his rich wife from pledging his credit & refuses to pay her dress bills the right of the wife to pledge her husband's credit for dress would justify no extravagance whatever on her part, & it is for the husband alone to decide on the scale of domestic life. Further, the contract of the wife does not bind the husband if the tradesman gives credit, not to the husband at all, but to the wife exclusively, knowing that she is a married woman.—CALLOT *v.* NASH (1923), 39 T. L. R. 292.

v. *Extravagance of Wife.*

1623. Husband not liable.]—FREESTONE *v.* BUTCHER, No. 1520, *ante*.

1624. ——.]—LANE *v.* IRONMONGER, No. 1639, *post*.

1625. ——.]—A labourer's wife purchased without her husband's knowledge certain goods of the value of £1 2*s.* 6*d.* In an action brought to recover the price of such goods the county ct. judge held the wife had an implied authority to purchase goods of that description on her husband's credit, but only of the value of 17*s.* 6*d.*, & those sold to the wife were neither suitable nor necessary for a person of deft.'s means. The case came before the Div. Ct. on the question as to whether or not the county ct. judge had been bound in law to find for pltf. for the full amount claimed:—*Held:* he was not so bound, & in such cases judgment should be given for deft. & not for pltf. for a reduced amount.—WALTER *v.* ALDRIDGE (1884), 1 T. L. R. 138, D. C.

1626. ——.]—MISS GRAY, LTD. *v.* CATHCART (EARL), No. 1592, *ante*.

vi. *Sufficient Supply of Articles Ordered.*

1627. Husband not liable.]—MONTAGUE *v.* BENEDICT, No. 1642, *post*.

1628. ——.]—SEATON *v.* BENEDICT, No. 1500, *ante*.

1629. ——.]—A husband is not bound by the contracts of his wife, unless they are made by his authority, or with his concurrence; with one exception, which is, that if the husband makes no provision at all for his wife, he is liable for necessaries for her suitable to his state & circumstances.

If a married lady, who has sufficient clothes, go, contrary to her husband's wish, to a watering place, & go to balls, & for that purpose order dresses, some of them expensive, & unsuitable to her husband's circumstances, the husband is not

bound to pay for any of them ; & in an action for the price of the dresses, it is immaterial whether pltf. knew these facts or not, & whether the clothes the lady had before were paid for or not ; & the fact that the husband afterwards saw some of the dresses, does not vary the case, if it be shown that he disapproved of the conduct of his wife in ordering them.—ATKINS *v.* CURWOOD (1837), 7 C. & P. 756, N. P.

1630. ——.]—MISS GRAY, LTD. *v.* CATHCART), No. 1592, *ante*.

vii. *Adultery of Wife.*

1631. Husband not liable.]—ATKYNS *v.* PEARCE, No. 1745,

See, also, Sub-sect. 2, *post*.

B. What are Necessaries.

(a) In General.

While living apart.]—*See* Sub-sect. 2, B., *post*.

1632. Station in life—Husband's apparent income—Though beyond actual income.]—WAITHMAN *v.* WAKEFIELD, No. 1569, *ante*.

1633. —— ——.]—JOLLY *v.* REES, No. 1614, *ante*.

1634. ——.]—MORGAN *v.* CHETWYND, No. 1615, *ante*.

1635. Standard of living—Right of husband to decide.]—HARRISON *v.* GRADY, No. 1586, *ante*.

1636. ——.]—SHOOLBRED *v.* BAKER, No. 1608, *ante*.

1637. ——.]—A wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, & are necessary & suitable to the style in which her husband chooses to live ; or for goods, if she carries on a separate trade with the concurrence of her husband, suitable for such trade. It is not enough, where the burden of proof lies on pltf., for him to prove facts which are equally consistent with the negative as with the affirmative of the proposition which he has to establish.

The law infers that the wife has authority to contract for things that are really necessary & suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife, & it is incumbent on the tradesman who relies upon the goods coming within that description to prove affirmatively that they do so. The burden of proof lies on him (WILLES, J.). —PHILLIPSON *v.* HAYTER (1870), L. R. 6 C. P. 38 ; 40 L. J. C. P. 14 ; 23 L. T. 556 ; 19 W. R. 130.

Annotations :—**Refd.** Beale *v.* Arabin (1877), 36 L. T. 249 ; Goodyear *v.* Part (1897), 13 T. L. R. 395. **Mentd.** Everett *v.* Griffiths, [1921] 1 A. C. 631.

1638. ——.]—CALLOT *v.* NASH, No. 1622, *ante*.

1639. Question of fact for jury.]—The liability of a husband for goods supplied to his wife depends upon whether she is his agent for the purpose of binding him by contracts for goods supplied to her, which is a question for the jury to determine upon the facts of the case ; & in determining that question, the extravagant nature of her orders is a matter to be taken into consideration, as showing she had no such authority.—LANE *v.* IRONMONGER (1844), 13 M. & W. 368 ; 1 New Pract. Cas. 105 ; 14 L. J. Ex. 35 ; 4 L. T. O. S. 117 ; 153 E. R. 152.

Annotation :—**Refd.** Johnston *v.* Sumner (1858), 3 H. & N. 261.

1640. Onus of proof on plaintiff.]—PHILLIPSON *v.* HAYTER, No. 1637, *ante*.

(b) Particular Instances.

1641. Necessaries for children by former husband.]—Though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, & they become part of his family, he shall be deemed to stand *in loco parentis*, & be liable in a contract made by his wife for their education.—STONE *v.* CARR (1799), 3 Esp. 1, N. P.

Necessaries for children while living apart.]—*See* Sub-sect. 2, H., *post*.

1642. Jewellery.]—In *assumpsit* for goods sold, it appeared that pltf. a jeweller, in the course of two months, delivered articles of jewellery to the wife of deft. amounting in value to £83. It appeared that deft. was a certificated special pleader, & lived in a ready-furnished house, of which the annual rent was £200 ; that he kept no man servant ; that his wife's fortune upon her marriage was less than £4,000 ; that she had, at the time of her marriage, jewellery suitable to her condition, & that she had never worn, in her husband's presence, any articles furnished her by pltf. ; it appeared also that pltf., when he went to deft.'s house to ask for payment always inquired for the wife & not for deft. :—*Held :* the goods so furnished were not necessaries, & as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained.—MONTAGUE *v.* BENEDICT (1825), 3 B. & C. 631 ; 107 E. R. 867 ; *sub nom.* MONTAGUE *v.* ESPINASSE, 1 C. & P. 502 ; *sub nom.* MONTAGUE *v.* BARON, 5 Dow. & Ry. K. B. 532 ; *sub nom.* MONTAGUE *v.* ——, 3 L. J. O. S. K. B. 94.

Annotations :—**Distd.** Read *v.* Legard (1851), 6 Exch. 636. **Refd.** Ruddock *v.* Marsh (1857), 1 H. & N. 601 ; Wilson *v.* Glossop (1888), 20 Q. B. D. 354 ;] Morel *v.* Westmorland (1902), 87 L. T. 635.

1643. Medical attendance.]—HARRISON *v.* GRADY No. 1586, *ante*.

1644. ——.]—FORRISTALL *v.* LAWSON, CONNELLY *v.* LAWSON, No. 1703, *post*.

1645. Shampooing.]—For a thing to be a "necessary" it must be in its nature necessary, it must be necessary in itself, & it must be necessary that the wife should have it. It must be necessary under the circumstances in which the wife is placed. In this case it is said that the rubbing [shampooing] was necessary. It might have been some luxury,' not in the legal sense a "necessary." If there was any real necessity for it the supposed necessity might have been made known to the husband, & he might have provided it (DAY, J.).—CANHAM *v.* HOWARD (1887), 3 T. L. R. 458, D. C.

1646. Millinery.] — JENKINSON *v.* BULLOCK (1891), 8 T. L. R. 61.

1647. Cut flowers.]—GOODYEAR *v.* PART (1897), 13 T. L. R. 395.

Costs of legal proceedings.]—*See* Sect. 4, *post*.

PART VIII. SECT. 3, SUB-SECT. 1.

c. *Artificial teeth.*]—*Semble :* Artificial teeth are necessaries.—JOHNSTON *v.* POWELL (1909), 26 S. C. 35.—**S. AF.**

d. *Dental treatment.*]—A dentist's attendance on a married woman when her teeth really require attention in order to arrest or prevent decay is a necessary for which her husband is obliged to pay.—BRUDO *v.* CHAMBERLAIN (1912), T. P. D. 131.—**S. AF.**

e. *Spectacles.*]—A wife whose eyes were weak but not so bad as to prevent her carrying on her household duties without the aid of spectacles was persuaded to purchase spectacles without her husband's knowledge :—*Held :* the spectacles were not household necessaries.

Semble : under certain circumstances spectacles may be household necessaries.—O'BRIEN *v.* KEAL (1910), T. P. D. 707.—**S. AF.**

Sect. 3. *-Necessaries: Sub-sect.* 2, *A., B. & C.* (*a*) *i. & ii.*]

SUB-SECT. 2.—WHILE LIVING APART.

A. In General.

1648. Circumstances justifying pledging of husband's credit—Onus of proof.]—If a tradesman bring an action against a husband for goods furnished to his wife, while she was living apart from her husband, it is for him, the tradesman, to show that her so living proceeded from some cause which would justify it.—MAINWARING *v.* LESLIE (1826), 2 C. & P. 507; Mood. & M. 18, N. P.

Annotation :—**Distd.** Travers *v.* Sen (1917), 33 T. L. R. 202.

1649. ——.]—To make a husband liable for his wife's board & lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shown, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, & did not make any offer to take her back, except upon conditions which he had no right to make.—REED *v.* MOORE (1832), 5 C. & P. 200, N. P.

1650. ——.]—In an action against a husband for goods supplied to his wife living apart from him, pltf. must give some evidence of the circumstances of the separation, to show that the wife had authority to bind her husband for necessaries.—EDWARDS *v.* TOWELS (1843), 5 Man. & G. 624; 6 Scott, N. R. 641; 12 L. J. C. P. 239; 134 E. R. 709.

1651. ——.]—*Re* KEENE (1865), 13 W. R. 475.

B. What Amounts to living Apart.

1652. Occasional visits of husband.]—Where a married woman having separate property was living with her daughters away from her husband without his consent, but occasionally seeing him, it was left to the jury to determine whether a rupture had taken place between the husband & wife of such a kind as to deprive her of her authority to pledge his credit for necessaries supplied to herself & her daughters.—CROCKER *v.* NAPPER (1867), 16 L. T. 295.

1653. Separation due to husband's calling.]—Pltf., who was a doctor, attended deft., a married woman, on her confinement in England, at a time when her husband, who was an Indian Civil servant, was resident in Rangoon, the separation being due, not to a quarrel, but to the husband's vocation. The husband wrote letters in which he did not repudiate liability, but merely complained of the amount of pltf.'s charges, & in a county ct. action by pltf. against deft.:—*Held:* the action should have been brought against the husband, & judgment entered for deft.—TRAVERS *v.* SEN (1917), 33 T. L. R. 202, D. C.

C. Separation by Mutual Consent.

(*a*) *Where Agreed Allowance.*

i. *Allowance Paid.*

1654. Husband not liable—Knowledge of tradesman.]—(1) If a husband & wife part by agreement, & the former binds himself to allow the latter a separate maintenance, he is not responsible for any debt she may contract after the separation is generally known, though with a person who did not know of the separation. But until such separation is generally known he is. A general reputation in the place where the husband lives is sufficient, though there is no such reputation in the place where the debt was contracted.

(2) A husband is not responsible for necessaries furnished his wife by a tradesman whom he has warned not to trust her.—TODD *v.* STOKES (1699), 1 Ld. Raym. 444; 12 Mod. Rep. 244; Holt, K. B. 100; 1 Salk. 116; 91 E. R. 1195.

Annotations :—*As to* (1) **Consd.** Nurse *v.* Craig (1806), 2 Bos & P. N. R. 148. **Refd.** Hunt *v.* Blaquiere (1829), 3 Moo. & P. 108.

1655. —— ——.]—TURNER *v.* WINTER (*circa* 1770), 1 Selwyn's N. P., 13th ed. at p. 229.

Annotation : **Refd.** Hunt *v.* De Blaquiere (1829), 5 Bing.

1656. —.]—OZARD *v.* DARNFORD (1779), 1 Selwyn's N. P. 13th ed. 229.

Annotations :—**Consd.** Hunt *v.* De Blaquiere (1829), 5 550; Johnston *v.* Sumner (1858), 3 H. & N. 261. **Refd.** Gore *v.* Gardiner (1850), 15 L. T. O. S. 51.

1657. —— —— **Onus of proof.**]—(1) The husband is not liable for necessaries furnished to his wife, after a tradesman had notice from the husband that she had a separate maintenance; but it is incumbent on the husband to show that the tradesman had such notice.

(2) If a husband, living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished to the children.—RAWLYNS *v.* VANDYKE (1800), 3 Esp. 250, N. P.

Annotations :—*As to* (1) **Consd.** Mizen *v.* Pick (1838), 3 M. & W. 481. **Distd.** Deare *v.* Soutten (1869), L. R. 9 Eq. 151. *As to* (2) **Distd.** Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559.

1658. Deed executed under restraint. A deed of separation between husband & wife, even although executed by the wife under restraint, & securing an allowance duly paid, held an answer to an action against the husband for necessaries supplied to the wife. But after a decree for restitution of conjugal rights, the wife not having been really restored to cohabitation, but placed under improper restraint:—*Held:* on her escape from such restraint she was authorised to bind her husband for necessaries.—MALLALIEU *v.* LYON (1859), 1 F. & F. 431, N. P.

1659. — **Adequacy of allowance.**]—JOHNSTON *v.* SUMNER, No. 1680, *post.*

1660. ——.]—Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, though the allowance is inadequate. The wife of deft. having been confined in a lunatic asylum, in consequence of mental disease induced by intoxication, before her discharge therefrom, & after her recovery, he told her that unless she consented to live away from him on an allowance of twelve shillings a week, she should be sent to another asylum; & she consented to the proposed arrangement:—*Held:* no duress; & so long as she remained away & the allowance was paid she had no authority to bind him for necessaries supplied to her.—BIFFIN *v.* BIGNELL (1862), 7 H. & N. 877; 31 L. J. Ex. 189; 6 L. T. 248; 8 Jur. N. S. 647; 10 W. R. 322; 158 E. R. 725.

Annotations :—**Refd.** Jolly *v.* Rees (1864), 15 C. B. N. S. 628; Eastland *v.* Burchell (1878), 3 Q. B. D. 432. **Mentd.** Latter *v.* Braddell (1880), 50 L. J. Q. B. 166.

1661. —— ——.]—Where husband & wife separate by mutual consent, the wife making her own terms as to her income, & that income proves insufficient for her support, the wife has no authority to pledge her husband's credit. Defts., husband & wife, executed a deed of separation,

PART VIII. SECT. 3, SUB-SECT. 2.—B.

1653 i. *Separation due to husband's*].—Where a husband in pursuit of his calling lives at a distance from his wife, it is not to be presumed that she is living separate from him in the legal sense.—R. *v.* SMITH, *Ex p.* CONCH (1878), 4 V. L. R. 134.—**AUS.**

by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her £20 a year towards the maintenance of three of the children of the marriage, & the wife covenanted to maintain these children until they were twenty-one, & not to apply for further assistance to her husband. The husband had kept up the annual payments of £20 in accordance with the terms of the deed. Pltf. sued defts. in the county ct. to recover the price of meat supplied to the wife after the separation, & the judge found that the wife's income was insufficient for her support, & ruled that she had authority to pledge her husband's credit for the price of the meat:—*Held:* this ruling was wrong. & the wife, after her separation, had no implied authority to pledge her husband's credit.

If she leaves him without cause & without consent she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully compels her to leave his home he is bound to maintain her elsewhere & if he makes no adequate provision for this purpose she becomes an agent of necessity to supply her wants upon his credit (LUSH, J.).—EASTLAND *v.* BURCHELL (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500; 38 L. T. 563; 42 J. P. 502; 27 W. R. 290.

Annotations:—**Apld.** Wilson *v.* Glossop (1888), 20 Q. B. D. 354. **Refd.** Balfour *v.* Balfour, [1919] 2 K. B. 571; Miss Gray, Ltd. *v.* Catheart (1922), 38 T. L. R. 562. **Mentd.** Chapman *v.* Knight (1880), 5 C. P. D. 308; Skeate *v.* Slaters, [1914] 2 K. B. 429; Llewellyn *v.* Turner (1922), 126 L. T. 532.

1662. Proof of payment—Receipts for payment.]—HODGKINSON *v.* FLETCHER, No. 1672, *post.*

1663. —— Onus on husband.]—Where, on the separation of husband & wife, the husband by deed, absolutely transfers to trustees for the wife certain personal property, no longer to be liable to his interference; in an action against the husband for a debt subsequently contracted by the wife, deft. must show that the trustees gave effect to the deed by taking possession.—BURRETT *v.* BOOTY (1818), 8 Taunt. 313; 129 E. R. 415.

Annotation:—**Refd.** Hunt *v.* De Blaquiere (1829), 5 Bing.

1664. Effect of resumption of cohabitation—& subsequent separation.] By a deed of separation in 1862, a husband & wife covenanted that the wife should not be compelled to cohabit with the husband, that she might dispose of her own property, that she might live where she pleased, & that the husband should pay to her £100 a year while she should live chastely. From 1862 until 1872 the husband & wife lived apart; but in 1872 they resumed cohabitation. In 1879 they again separated, & in 1881 the wife obtained a decree of judicial separation, with alimony at the rate of £180 *per annum.* In an action by a lodging-house keeper against the husband for food & lodging supplied to the wife between July & Oct. 1880, the husband pleaded the deed of 1862, & that the £100 a year therein covenanted to be paid by him to his wife had been so paid:—*Held:* the deed was not rescinded by cohabitation having been resumed in 1872, the decree for alimony did not affect the deed, & the payment by the husband of the agreed sum was an answer to the action.

[Counsel] has shown us that where there is a deed between husband & wife by which an annuity is to be paid in consideration of separation, the cohabitation of husband & wife being thereupon suspended & payment of the annuity being made during such suspension, recohabitation, I should have thought *ex vi termini*, but at all events by law, puts an end to the deed. That is on the ground that if they are reconciled & resume cohabitation, the whole object of the deed is gone. I quite see the good sense of such reasoning. But that is confined to cases of separation deeds *simpliciter*, where the money covenanted to be paid is to be paid in consideration of cessation of cohabitation, & of course, therefore, only during cessation of cohabitation. But there is another class of cases where the deed contains other & separate provisions, a provision for an annuity during the life of the wife in some cases, a particular house given up to her in others; & where there are absolute provisions of that sort, the deed if a perfectly valid deed, & may be enforced by either party, notwithstanding recohabitation (LORD COLERIDGE, C.J.).—NEGUS *v.* FORSTER (1882), 46 L. T. 675; 30 W. R. 671, C. A.

Annotation:—**Consd.** Nicol *v.* Nicol (1886), 31 Ch. D. 524.

ii. *Allowance Not Paid.*

1665. Husband liable.]—OZARD *v.* DARNFORD (1779), 1 Selwyn's N. P. 13th ed. 229.

Annotations:—**Consd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550. **Expld.** Johnston *v.* Sumner (1858), 3 H. & N. 261. **Refd.** Gore *v.* Gardiner (1850), 15 L. T. O. S. 51.

1666. ——.]—If husband & wife separate by deed, & the former covenant with A. her sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance during their separation, & the wife afterwards live with A. & is by her supplied with necessaries, & the husband fails to pay the stipulated allowance to his wife, A. may maintain an *indebitatus assumpsit* against the husband for such necessaries.—NURSE *v.* CRAIG (1806), 2 Bos. & P. N. R. 148; 127 E. R. 581.

Annotations:—**Consd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Messenger *v.* Clarke (1850), 5 Exch. 388; Johnston *v.* Sumner (1858), 3 H. & N. 261. **Refd.** Hindley *v.* Westmeath (1827), 6 B. & C. 200; Mizen *v.* Pick (1838), 1 Horn & H. 163; Jones *v.* Waite (1839), 5 Bing N. C. 341.

1667. —— Breach of covenant by wife not to molest.]—It is no defence to an action on the implied obligation to support a wife, that a deed of separation had been entered into, by which the husband had covenanted to pay her an annual sum, & that that deed had become void by reason of the wife's breach of covenant not to molest her husband, if the wife is living apart from her husband without her fault & without means of maintenance.—TUCKER *v.* TARRANT (1859), 1 L. T. 6.

1668. —— Necessaries supplied in excess of agreed sum.]—Where a wife separate from a husband under an agreement with his father for a specific weekly sum, not paid, & tradesmen having recovered above that amount for board & lodging:—*Held:* in an action by another tradesman for clothes supplied to her, the husband was liable, if the clothes were suited to her position in society as his wife.—COLLIER *v.* BROWN (1862), 3 F. & F. 67.

1669. ——.]—A husband & wife were living apart. The husband allowed the wife £12 10*s.* per month, which, however, he did not pay regularly, & directed her not to run up bills. She incurred expenses for medical attendance in part

PART VIII. SECT. 3, SUB-SECT. 2.—C. (a) ii.

1665 i. *Husband liable.*]—Where husband & wife have agreed to a separation on terms of the husband allowing the wife a certain sum periodically for maintenance, if such allowance be not paid, the wife may pledge his credit for the supply of necessa . MORGAN *v.* CLEMENTS (1880), 6 V. L. R. 53.—**AUS.**

Sect. 3.—*Necessaries: Sub-sect.* 2, *C.* (*a*) *ii.*, (*b*) *i.* & *ii.*, (*c*), & *D.* (*a*).]

rendered necessary by his cruelty:—*Held:* the husband was liable for these expenses.—BEALE *v.* ARABIN (1877), 36 L. T. 249.

1670. Proof of payment—Onus on husband.]—BURRETT *v.* BOOTY, No. 1663, *ante*.

(*b*) *Where no Agreed Allowance.*

i. *Allowance in fact Made.*

1671. Husband not liable—If allowance adequate.]—A *feme covert* living separate from her husband, & having a competent separate maintenance duly paid to her, may be sued alone on a contract made by her for necessaries.—BARWELL *v.* BROOKS (1784), 3 Doug. K. B. 371; 99 E. R. 702.

Annotations:—**Refd.** Corbett *v.* Poelnitz (1785), 1 Term Rep. 5; Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Beard *v.* Webb (1800), 2 Bos. & P. 93; Marshall *v.* Rutton (1800), 8 Term Rep. 545; Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148.

1672. —— ——.]—If husband & wife live separate, & he pays her an adequate allowance for her support, he is not liable to be sued for her debts, although the separation be not by deed & there be no written agreement between them with respect to the allowance. The adequacy of the allowance is a question of fact for the jury.

In an action against a husband for necessaries supplied to his wife, where the defence is a separate maintenance, the wife's receipts are no evidence to prove that the allowance has been paid.—HODGKINSON *v.* FLETCHER (1814), 4 Camp. 70, N. P.

Annotations:—**Distd.** Willson *v.* Smyth (1831), 1 B. & Ad. 801. **Refd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Mizen *v.* Pick (1838), 1 Horn. & H. 163; Johnston *v.* Sumner (1858), 3 H. & N. 261.

1673. —— ——.]—EMMETT *v.* NORTON, No. 1583, *ante*.

1674. —— ——.]—If a husband & wife separated by mutual consent, the husband is liable for reasonable maintenance for his wife, unless she has a competent provision either from the husband or from some fund of her own; & if she has such provision, it lies on the husband to show that.

A mere notice by the husband that he will not pay for goods supplied to his wife, will not avail him, if, in the circumstances of the separation, he is liable; but if the husband & wife both deal with the same tradesman, & the latter agree with the husband not to charge him for goods to be supplied to the wife, the tradesman cannot after that charge the husband for such goods.—DIXON *v.* HURRELL (1838), 8 C. & P. 717, N. P.

1675. —— —— **Knowledge of tradesman.**]—Where a husband, living apart from his wife, allows her sufficient for her maintenance, he is not liable for necessaries supplied to her, & notice to the tradesmen of that allowance is immaterial, & need not be given.—MIZEN *v.* PICK (1838), 3 M. & W. 481; 1 Horn & H. 163; 7 L. J. Ex. 153; 150 E. R. 1235.

Annotation:—**Refd.** Phillipson *v.* Hayter (1870), 40 L. J. C. P. 14.

1676. —.]—If husband & wife be living separate & apart, & the husband make the wife a regular allowance of a sufficient sum for her maintenance, which is regularly paid, this is sufficient to repel the inference of agency, & he is not liable for any debt she may contract; & it is not necessary that there should be any deed of separation; but the allowance must be such as the jury shall think sufficient, reference being had to the station of the parties & the income of the husband.—HOLDER *v.* COPE (1846), 2 Car. & Kir. 437.

Annotation:—**Refd.** Johnston *v.* Sumner (1858), 3 H. & N. 261.

1677. —— ——.]—If husband & wife be living apart, & the husband makes the wife a sufficient allowance for her support, he is not liable in an action by a tradesman for goods supplied to her, & it is immaterial whether the tradesman knew of such allowance or not.

If a wife living apart from her husband orders goods to be addressed & sent to a third person, & they be sent to the house of such person, that not being the place of abode of the wife, the husband is not liable to pay for those goods.—REEVE *v.* CONYNGHAM (MARQUIS) (1847), 2 Car. & Kir. 444.

1678. —— **Adequacy of allowance—Question for jury.**]—HODGKINSON *v.* FLETCHER, No. 1672, *ante*.

1679. —— —— ——.]—HOLDER *v.* COPE, No. 1676, *ante*.

1680. —— —— **Onus of proof.**]—(1) During cohabitation a wife has an implied authority as agent of her husband to pledge his credit for necessaries suitable to her station, notwithstanding any private agreement between them.

If a husband turns his wife away & she is unable to maintain herself, she has an authority of necessity to pledge his credit for necessaries supplied to her.

Qu.: whether, if a labouring man turns his wife away, she being capable of earning, & earning as much as he did; or if a man turned his wife away she having a settlement double his income in amount, the wife in such cases could bind the husband.

(2) If a wife leaves her husband without his consent, she has no authority whatever to bind him.

(3) Where husband & wife part by mutual consent, & nothing is said, & she cannot maintain herself, a jury may infer that the husband meant that his credit should be pledged; *semble:* even if at parting he said otherwise.

(4) Where husband & wife part by mutual consent, & the wife is capable of supporting herself, or has a sufficient allowance, the burden of proof is on the person who has trusted the wife to show an authority either express or implied to pledge her husband's credit.

(5) A husband & wife separated by mutual consent when it was verbally agreed that the wife should continue to receive £200 a year, which had been settled on her on the marriage:—*Held:* the

PART VIII. SECT. 3, SUB-SECT. 2.—C. (b) i.

1671 i. *Husband not liable—If allowance adequate.*]—The husband had been in embarrassed circumstances, & his wife went to live with her father at B., & continued to reside with him for two years, with the exception of an occasional visit to her husband, who lived in C. Thereafter she complained of wanting clothes; the husband appearing to have always furnished her with money & clothes whenever she asked for them, & also to have paid for their son's board & clothes. The husband then gave her what articles she required & what money he possessed, at the same time expressly telling her not to incur any debts in B. She incurred a debt for the price of silks, valuable laces, & shawls, amounting to the husband's salary for a quarter, the tradesman at the time being aware that she was not living with her husband, but with her father: *Held:* the husband was not liable.—ZEALAND *v.* DEWHURST (1873), 23 C. P. 117.—**CAN.**

1671 ii. —— ——.]—After marriage A. & his wife lived for some months together, when he left & went to another man's house, where he remained several months, leaving his wife at home. He took nothing away from his house, which he left well supplied, & he told his wife to remain there. She remained three or four months; then went to live with M., but her husband's house was always open to her. M. sued for the wife's board & lodging:—*Held:* the husband was not liable.—ANDERSON *v.* MCLEOD (1876), 2 P. E. I. 142.

husband was not liable for necessaries supplied to his wife, pltf. having failed to show that her allowance was insufficient, or that she had any authority to pledge her husband's credit.—JOHNSTON *v.* SUMNER (1858), 3 H. & N. 261; 27 L. J. Ex. 341; 31 L. T. O. S. 166; 4 Jur. N. S. 462; 6 W. R. 574; 157 E. R. 469.

Annotations :—As to (1) **Consd.** Jolly *v.* Rees (1864), 15 C. B. N. S. 628. **Refd.** Davidson *v.* Wood (1863), 11 W. R. 791; Eastland *v* Burchell (1878), 3 Q. B. D. 432; Debenham *v.* Mellon (1880), 6 App. Cas. 24. *As to* (3) **Refd.** Davidson *v.* Wood (1863), 11 W. R. 791. *As to* (4) **Refd.** Biffin *v.* Bignell (1862), 7 H. & N. 877.

ii. *No Allowance Made.*

1681. Husband not liable—Wife with separate maintenance.]—In an action against the husband for lodging & necessaries supplied to his wife, who lives separately from him without any fault of her own, & who is possessed of funds of her own, the question is whether she has such means as are adequate to her support, according to her husband's situation in life.—LIDDLOW *v.* WILMOT (1817), 2 Stark. 86, N. P.

Annotations :—**Consd.** Johnston *v.* Sumner (1858), 3 H. & N. 261. **Refd.** Hunt *v.* Blaquiere (1829), 3 Moo. & P. 108.

1682. ——.]—CLIFFORD *v.* LATON, No. 1581, *ante.*

1683. —— ——.]—The *onus* of proving expressly that a married woman, living apart from her husband, has the means of supporting herself, is not always cast upon the husband, in resisting a demand for necessaries supplied to her whilst so separated.

Where, therefore, it appeared that a married woman for some years subsequent to a separation from her husband maintained herself, & then went to live with her son-in-law, who brought an action against the husband for necessaries, the ct. refused to disturb a verdict for deft. on the ground that it was against evidence.—BIRD *v.* JONES (1828), 3 Man. & Ry. K. B. 121; *sub nom.* BURGE *v.* JONES, 7 L. J. O. S. K. B. 59.

1684. ——.]—DIXON *v.* HURRELL, No. 1674, *ante.*

1685. —— ——.]—DE GRUCHY *v.* BRUYERES (1851), 16 L. T. O. S. 344; *previous proceedings* (1850), 17 L. T. O. S. 7, N. P.

1686. —— —— **Marriage settlement.**]—JOHNSTON *v.* SUMNER, No. 1680, *ante.*

1687. —— **Wife able to maintain herself.**]—Money earned by the wife living separate, shall go towards her maintenance.—WAR *v.* HUNTLY (1703), 1 Salk. 118; 91 E. R. 111; *sub nom.* WARR *v.* HUNTLY, Holt, K. B. 102, N. P.

1688. —— ——.]—JOHNSTON *v.* SUMNER, No. 1680, *ante.*

1689. Proof of separate means—Onus on husband.]—DIXON *v.* HURRELL, No. 1674, *ante.*

—— **Credit given to third party.**]—*See* No. 1778, *post.*

PART VIII. SECT. 3, SUB-SECT. 2.—C. (b) ii.

f. *Husband liable.*]—Where there has been a voluntary separation without provision for the wife's support, she is entitled to pledge her husband's credit for necessaries.—TAIT *v.* LINDSAY (1862), 12 C. P. 414.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 2.—D. (a).

1691 i. *Liability of husband.*]—Deft. turned away his wife without cause, & afterwards offered to take her back & provide for her, but she refused to return :—*Held :* the liability of the husband for necessaries depended upon the implied authority of the wife, as his agent, to bind him; & when the necessity for the authority ceased, her right to bind him ceased also.—BENNETT *v.* JONES (1859), 4 All. 397.—**CAN.**

1691 ii. ——.]—Deft.'s wife, who had been supported by pltf. with deft.'s consent, returned to her husband's home, but was turned out of the house by him, whereupon pltf. again took charge of & supported her :—*Held :* deft., by turning his wife out of his house sent her forth as his delegated agent to pledge his credit for the necessaries of life suitable to her position, & pltf. was entitled to assert a claim against deft. for his expenses in so supporting deft.'s wife.—HUGHES *v.* REES (1884), 10 P. R. 301.—**CAN.**

g. —— *Right of wife to sell husband's property — To procure necessaries.*]—The right of a wife to pledge her husband's credit as a means of procuring necessaries for her support, when the husband abandons her without making proper provision for her support, does not authorise the wife to sell property of the husband.—KIELEY *v.* MORRISON (1892), 24 N. S. R. 327.—**CAN.**

h. —— *Right of wife to credit.*]—Pltf. & deft. were married in 1887. In 1897 deft. left his wife & 2 children in T. He left her with $10 & she collected a further sum of $19 on his account. She received no further sums from him. From about 1898 she had supported herself & children out of her own earnings. She made continual efforts to get deft. to contribute to the support of the children,

(c) Where Agreement for Separation Void.

1690. Husband liable.]—A separate maintenance secured by a deed executed by the husband & wife, but not by her trustee, is void; & such a separate maintenance is no answer to an action brought for necessaries furnished to her, after having left her own house, though she solicited to be received again by her husband.—EWERS *v.* HUTTON (1800), 3 Esp. 255, N. P.

D. Separation without Mutual Consent.

(a) Wife Deserted or Turned Away.

1691. Liability of husband.]—LUNGWORTHY *v.* HOCKMORE (1698), cited in 1 Ld. Raym. at p. 444; 91 E. R. 1196.

Annotation :—**Refd.** Tod *v.* Stokes (1698), 12 Mod. Rep. 214.

1692. ——.]—ETHERINGTON *v.* PARROT, No. 1577, *ante.*

1693. ——.]—ROBISON (OR ROBINSON) *v.* GOSNOLD, No. 1580, *ante.*

1694. ——.]—Money or goods given a woman that is forlorn by her husband shall be recovered from the husband, *secus* where she elopes.

Where a woman goes away from her husband, & a tradesman gives her credit for any goods, etc., after that he knows she left her baron, then he trusts her at his peril; but if a man runs away from his wife, or turns her away, & leaves her not wherewithal to maintain herself, then he gives his wife credit for money or necessaries; but if the baron turns away his wife, or leaves her, & before she takes up anything, the husband does propose to maintain her at home, though yet he will not lie in bed with her as a man should do with his wife, yet if any money was, after such offer or proposal made & refused, disbursed for the wife, that was to be at the peril of any person so disbursing the money, unless the jury be of opinion that such offer was deceitful & fraudulent; for a wife is to be maintained by her husband where & how he thinks fit, according to his ability (HOLT, C.J.).—JAMES *v.* WARREN (1706), Holt, K. B. 104; 90 E. R. 956.

1695. —— **Express notice not to trust wife.**]—A husband who turns away his wife without cause & refuses to provide for her, cannot make a particular prohibition.—BOLTON *v.* PRENTICE (1744), 2 Stra. 1214; 93 E. R. 1136.

1696. —— ——.]—If a husband has turned his wife out of doors, by a general advertisement in the newspapers, or by particular notice to individuals not to trust her, he cannot exempt himself from a demand for necessaries furnished to her while so living apart from him. Though a wife has been guilty of adultery. but the husband takes her again into his house, if he afterwards turns her out, he is liable for necessaries furnished to her.—HARRIS *v.* MORRIS (1801), 4 Esp. 41, N. P.

Annotations :—**Consd.** Wilson *v.* Glossop (1888), 20 Q. B. D.

Sect. 3.—*Necessaries: Sub-sect.* 2, *D.* & (*c*).]

354; Dean *v.* Dean, [1923] P 172. **Refd.** Wickins *v.* Wickins (No. 2), [1918] P. 282.

1697. ——.]—Voluntary pension from the Crown during pleasure, will not exempt the husband from the debts of the wife, when he has set her adrift by shutting his doors against her.—THOMPSON *v.* HERVEY (1768), 4 Burr. 2177; 98 E. R. 136.

1698. ——.]—If a man dismiss his wife without reason, & any one supply her with necessaries, the husband must pay for them; & so he must if they are supplied by his consent; but if the wife goes away of her own accord, the husband is not liable (ABBOTT, C.J.).—BARNES *v.* WINKLER (1826), 2 C. & P. 345, N. P.

1699. ——.]—EMMETT *v.* NORTON, No. 1583, *ante*.

1700. ——.]—JOHNSTON *v.* SUMNER, No. 1680, *ante*.

1701. ——.]—EASTLAND *v.* BURCHELL, No. 1661, *ante*.

1702. Presumption of law.]—HARRISON *v.* GRADY, No. 1586, *ante*.

1703. ——.]—If a husband by selling up all the furniture turns his wife out of doors without providing her with the means of obtaining necessaries suitable to her estate & degree, it is a presumption of law, which cannot be rebutted by evidence, that she was turned out with her husband's authority, to pledge his credit for such necessaries; medical attendance such a necessary.—FORRISTALL *v.* LAWSON, CONNELLY *v.* LAWSON (1876), 34 L. T. 903.

1704. —— ——.]—DEBENHAM *v.* MELLON, No. 1587, *ante*.

Money lent to purchase necessaries.] — *See* Sub-sect. 2, G., *post*.

(*b*) *Wife Living Apart with good Cause.*

1705. What is sufficient cause—Ill-treatment by husband.]—Where a wife is, by the ill-treatment of the husband, forced to leave his house, she shall carry with her credit for necessaries, & the husband be liable.—HODGES *v.* HODGES (1796), 1 Esp. 441; Peake, Add. Cas. 79, N. P.

Annotations:—**Consd.** Woolston *v.* Smith (1825), 3 L. J. O. S. C. P. 200. **Refd.** Collins *v.* Cory (1901), 17 T. L. R. 242.

1706. —— —— **Request to return.**]—Where circumstances justify a wife in leaving her husband, a request on his part that she should return to his protection, will not determine his liability for necessaries supplied to her during the separation.

I take it to be a clear principle of law, that if a husband conducts himself towards his wife with such a degree of misconduct & cruelty, as to render it no longer safe for her to remain in the house, she is not to be turned into the street to starve, or to seek relief in the parish workhouse, but is justified in leaving her home, & goes forth into the world with a credit for the necessaries of life suitable to her condition (GARROW, B.).—EMERY *v.* EMERY (1827), 1 Y. & J. 501; 148 E. R. 769.

1707. —— ——.]—If the wife leaves the house in consequence of ill-treatment on the part of the husband, he is bound for necessaries (TINDAL, C.J.).—DARBY *v.* EVANS (1844), 3 L. T. O. S. 37.

1708. —— ——.]—Where a husband so ill-treated his wife that it was impossible she could live with him, although he did not actually turn her out of doors:—*Held:* he was liable upon her contract for board & lodging, & the necessaries of life obtained by her elsewhere; & this, although she took refuge with her parents & was maintained by them, her father being entitled to recover his expenses of her maintenance from her husband.—COPE *v.* STEERS (1849), 14 L. T. O. S. 67, N. P.

1709. —— ——.]—*Semble:* if the husband is liable to maintain his wife, who is living apart from him, he is liable for money supplied to her to provide her with necessaries. If a wife quits her husband's house without cause, & upon her return he refuses to admit her, he is liable for her maintenance. So *semble:* if she is living apart from him with his assent.

But if she has with her an infant child, there is no implied contract to fix the husband with the maintenance of such child, though within the age of nurture.—GORE *v.* GARDINER (1850), 15 L. T. O. S. 51, N. P.

1710. —— — **Inadequate allowance made.**]—Where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she in fact receives from him an allowance which is found by the jury to be insufficient, regard being had to his means & position in life.—BAKER *v.* SAMPSON (1863), 14 C. B. N. S. 383; 143 E. R. 494.

1711. —— **Introduction of mistress to house.**]—Where a husband by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes & lives apart from him, the husband is bound to provide the wife with necessaries; *e.g.* medicine in sickness, during the separation.—ALDIS *v.* CHAPMAN (1810), 1 Selwyn's N. P. 3rd ed. 249; cited in 2 C. & P. at p. 29, N. P.

Annotation:—**Refd.** Woolston *v.* Smith (1825), 3 L. J. O. S. C. P. 200.

1712. —— —— .] HOULISTON *v.* SMYTH. No. 1716, *post*.

1713. —— **Apprehension of violence.**]—No ill-treatment by the husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain *assumpsit* against her husband for necessaries furnished to her subsequently to her leaving his house.—HORWOOD *v.* HEFFER (1811), 3 Taunt. 421; 128 E. R. 167.

Annotation:—**Dbtd.** Houliston *v.* Smyth (1825), 3 Bing. 127.

1714. —— ——.]—HOULISTON *v.* SMYTH, No. 1716, *post*.

1715. —— ——.]—A reasonable apprehension on the part of a wife that her husband intends to place her under improper restraint, will warrant her removal to a separate residence, & thereby render him liable for necessaries. But an order

& at last brought this action:—*Held:* the board, clothing, maintenance, & medical attendance were necessaries for which the wife, separated by husband's fault, could pledge his credit, & as she had paid for them out of his separate estate she was entitled to recover them.—PARK *v.* PARK (1906), 3 W. L. R. 281.—**CAN.**

k. —— ——.]—If a husband turns his wife out of doors or abandons her so that she is not able to support herself, she is entitled to pledge his credit for necessary supplies.—PARKIN *v.* PARKIN (1907), 7 W. L. R. 66; 1 Sask. L. R. 206.—**CAN.**

l. — — — —.]—A wife deserted by her husband becomes his agent for the purpose of pledging the husband's credit for the support of his infant child.—GEORGE *v.* PEART (1919), 52 N. S. R. 436; 44 D. L. R. 569.—**CAN.**

m. *Whether articles furnished are* .]—In an action by a tradesman against a husband for the value of goods supplied to his wife, whom he has without cause turned out of his house, the question is, whether the articles furnished were really necessaries, & to disprove this deft. may show that she had been already supplied by others with similar goods.—ARCHIBALD *v.* FLYNN (1872), 32 U. C. R. 523.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 2.—D. (b).

n. *Liability of husband.*]—Where a husband's conduct towards his wife is such that she is unable safely or

or protection obtained by her under Matrimonial Causes Act, 1857 (c. 85), will bar an action for such necessaries.

There are many things which would justify a wife in leaving her home, such as being exposed to indignity by her husband, bringing into the house a kept mistress, or cruelty. If in these circumstances she has left her home, she was clothed with her husband's credit, & he will be liable for all necessaries which were supplied her. She would also be justified in remaining away if, after the lapse of time, her husband requested her to return, provided she had a well-grounded belief that the indignities or cruelties would be renewed upon her return. But when a wife is living with her husband, & she leaves him without just cause, then she has no right to pledge her husband's credit. Any person who supplies a married woman living apart from her husband with goods must do so at his own peril, & must make out the authority of the wife to pledge her husband's credit to enable him to recover (CHANNELL, B.).—TEMPANY *v.* HAKEWILL (1859), 1 F. & F. 438, N. P.

1716. —— **Improper restraint in madhouse.**]—If a wife quits her husband's house, under a fair apprehension of personal violence, that is equivalent to her husband's turning her out of doors; & improper restraint of her person in a madhouse is, for this purpose, personal violence; & therefore a party supplying her with necessaries may recover for them against the husband. If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going; & if the husband is sued for necessaries supplied to her, it is no answer to the action that she had committed adultery previous to the credit being given, if the husband did not know it till after the credit, nor that after the credit she obtained a decree for alimony, which alimony was to relate back to a period before the credit.—HOULISTON *v.* SMYTH (1825), 3 Bing. 127; 2 C. & P. 22; 10 Moore, C. P. 482; 130 E. R. 462; *sub nom.* WOOLSTON *v.* SMITH, 3 L. J. O. S. C. P. 200.

Annotations: **Refd.** Brown *v.* Ackroyd (1856), 2 Jur. N. S. 283; Biffin *v.* Bignell (1862), 31 L. J. Ex. 189.

(*c*) *Wife Living Apart without good Cause.*

1717. Husband not liable—Notice to tradesman.]—MANBY *v.* SCOT (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E. R. 1065, Ex. Ch.

Annotations:—**Consd.** Tod *v.* Stokes (1698), 12 Mod. Rep. 244; Compton *v.* Collinson (1790), 1 Hy. Bl. 331; Hunt *v.* De Blaquiere (1829), 5 Bing. 559; Johnston *v.* Sumner (1858), 3 H. & N. 261; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562. **Refd.** Dyer *v.* East (1669), 2 Keb. 554; Bolton *v.* Prentice (1744), 2 Stra. 1214; Hatchett *v.* Baddeley (1776), 2 Wm. Bl. 1079; Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148; Montague *v.* Baron (1825), 5 Dow. & Ry. K. B. 532; Woodward *v.* Dowse (1861), 8 Jur. N. S. 413; Jolly *v.* Rees (1864), 15 C. B. N. S. 628; Beale *v.* Arabin (1877), 36 L. T. 249; Debenham *v.* Mellon (1880), 29 W. R. 141; Morel *v.* Westmorland (1902), 87 L. T. 635. **Mentd.** R. *v.* Griepe (1697), 12 Mod. Rep. 139; Gibbons *v.* Cloyne (1705), Holt, K. B. 599; R. *v.* Haughton (1718), 1 Stra. 83; Jennings *v.* Rundall (1799), 8 Term Rep. 335; Belton *v.* Hodges (1832), 9 Bing. 365; Doe d. Mudd *v.* Suckermore (1837), Will. Woll. & Dav. 405; Leeds & Thirsk Ry. *v.* Fearnley (1849), 4 Exch. 26; Newry & Enniskillen Ry. *v.* Coombe (1849), 3 Exch. 565; Bartlett *v.* Wells (1862), 1 B. & S. 836; Davidson *v.* Wood (1863), 11 W. R. 791; Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559; Wilson *v.* Glossop (1887), 19 Q. B. D. 379; *Re* Rhodes, Rhodes *v.* Rhodes (1890), 44 Ch. D. [illegible]

1718. —.]—DYER *v.* EAST (1669), 2 Keb. 554; 1 Mod. Rep. 9; 1 Sid. 425; 1 Vent. 42; 84 E. R. 347.

1719. —— ——.]—The husband is not chargeable; for here it being apparent that she did not cohabit with the husband, she shall not have a credit to charge him without his consent. If a wife cohabit with her husband, & by it gain credit, though she depart without the leave of her husband, & come to London, & there become in debt. the husband shall be charged till notice is given of her elopement, for it shall be intended to be with the consent of the husband; but after notice, the husband shall not be charged without his consent (HOLT, C.J.).—PIERCE *v.* WELDEN (1692), Holt, K. B. 97; 90 E. R. 952; *sub nom.* PEIRCE *v.* WELDEN, Skin. 323.

1720. —— ——.]—LUNGWORTHY *v.* HOCKMORE (1698), cited in 1 Ld. Raym. at p. 444; 91 E. R. 1196.

Annotation: **Refd.** Tod *v.* Stokes (1698), 12 Mod. Rep. 244.

1721. —— **Knowledge of tradesman.**]—ROBISON (OR ROBINSON) *v.* GOSNOLD, No. 1580, *ante*.

1722. —— ——.]—JAMES *v.* WARREN, No. 1694, *ante*.

1723. ——.]—Cohabitation sufficient to charge a man as a husband.

Debt against husband for the lodging of his wife, & proof only made that he formerly cohabited with her & owned her as his wife:—*Held:* sufficient to charge him but that he might discharge himself by giving elopement in evidence, for they that will trust a wife that has eloped do it at their own peril.—CAR *v.* KING (1700), 12 Mod. Rep. 372; 88 E. R. [illegible]

1724. ——.]—ETHERINGTON *v.* PARROT, No. 1577, *ante*.

1725. ——.]—A husband is not obliged to pay debts contracted by his wife after elopement.—HALL *v.* GATES (1709), 11 Mod. Rep. 241; 88 E. R. 1015.

1726. ——.]—If a woman elopes from her husband, though she does not go away with an adulterer or in an adulterous manner, the tradesman trusts her at his peril & the husband is not bound; indeed if he refuse to receive her again, it may be an answer to the elopement (RAYMOND, C.J.).—CHILD *v.* HARDYMAN (1730), 2 Stra. 875; 93 E. R. 909.

1727. ——.]—BARNES *v.* WINKLER, No. 1698, *ante*.

1728. ——.]—HINDLEY *v.* WESTMEATH (MARQUIS), No. 1924, *post*.

1729. ——.]—A wife living apart from her husband cannot bind her husband for necessaries, unless the separation was forced by him, or with his consent (PATTESON, J.).—BAILEY *v.* CALCOTT (1840), 4 Jur. 699.

1730. ——.]—JOHNSTON *v.* SUMNER, No. 1680, *ante*.

1731. ——.]—EASTLAND *v.* BURCHELL, No. 1661, *ante*.

1732. Husband refusing to receive wife back. MANBY *v.* SCOT (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E. R. 1065, Ex. Ch.

Annotations:—**Refd.** Compton *v.* Collinson (1790), 1 Hy. Bl. 334; Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148; Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Johnston *v.* Sumner (1858), 3 H. & N. 261; Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562. **Mentd.** Dyer *v.* East (1669), 2 Keb. 554; R. *v.* Griepe (1697), 12 Mod. Rep. 139; Tod *v.* Stokes (1698), 12 Mod. Rep. 244: Gibbons *v.*

comfortably to remain in his house, she has a right to pledge his credit for the suitable maintenance of herself & children.—GRIFFITH *v.* PATTERSON (1873), 20 Gr. 615.—**CAN.**

o. *For furniture—Not for money lent.*]—A husband is liable for furniture sold to his wife while living apart from him for sufficient cause, but not for money lent.—GRAY *v.* VESEY (1877), 1 P. & B. 276.—**CAN.**

Sect. 3.—Necessaries: Sub-sect. 2, D. (c) & (d) i. ii., E. & F.]

Cloyne (1705), Holt, K. B. 599; R. *v.* Haughton (1718), 1 Stra. 83; Bolton *v.* Prentice (1744), 2 Stra. 1214; Hatchett *v.* Baddeley (1776), 2 Wm. Bl. 1079; Jennings *v.* Rundall (1799), 8 Term Rep. 335; Montague *v.* Baron (1825), 5 Dow. & Ry. K. B. 532; Belton *v.* Hodges (1832), 9 Bing. 365; Doe d. Mudd *v.* Suckermore (1837), Will. Woll. & Dav. 405; Leeds & Thirsk Ry. *v.* Fearnley (1849), 4 Exch. 26; Newry & Enniskillen Ry. *v.* Coombe (1849), 3 Exch. 565; Woodward *v.* Dowse (1861), 8 Jur. N. S. 413; Bartlett *v.* Wells (1862), 1 B. & S. 836; Davidson *v.* Wood (1863), 11 W. R. 791; Jolly *v.* Rees (1864), 15 C. B. N. S. 628; Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559; Beale *v.* Arabin (1877), 36 L. T. 249; Debenham *v.* Mellon (1880), 29 W. R. 141; Wilson *v.* Glossop (1887), 19 Q. B. D. 379; *Re* Rhodes, Rhodes *v.* Rhodes (1890), 44 Ch. D. 94; Morel *v.* Westmorland (1902), 87 L. T. 635.

1733. ——.]—CHILD *v.* HARDYMAN, No. 1726, *ante*.

1734. Husband taking wife back.]—ROBISON (OR ROBINSON) *v.* GOSNOLD, No. 1580, *ante*.

1735. Wife ceasing wilfully to absent herself—Wife becoming insane—Revival of husband's liability.]—Where a wife leaves her husband without justification his obligation to support her is, except where she has been guilty of adultery, not put an end to, but only suspended so long as she continues wilfully to absent herself, & if during her absence she becomes a lunatic then, as she is no longer capable of volition, her continued absence is not wilful, & her husband's liability to maintain her will revive.—JONES *v.* NEWTOWN & LLANIDLOES GUARDIANS, [1920] 3 K. B. 381; 89 L. J. K. B. 1161; 124 L. T. 23; 84 J. P. 237; 36 T. L. R. 758; 18 L. G. R. 481, D. C.

Annotations:—**Apld.** Biggs *v.* Burridge (1924), 22 L. G. R. 555. **Mentd.** Llewellyn *v.* Turner (1922), 126 L. T. 53

(d) Adultery of Wife.

i. *In General.*

1736. Husband not liable.]—If a *feme covert*, after parting by consent, & receiving a separate maintenance, commit adultery, her husband shall not be liable to her debts.—CRAGG *v.* BOWMAN (1704), 6 Mod. Rep. 147; 87 E. R. 905, N. P.

Annotation:—**Refd.** Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148.

1737. ——.]—Where a wife goes away with an adulterer, the husband cannot be charged for necessaries.—MORRIS *v.* MARTIN (1725), 1 Stra. 647; 93 E. R. 757.

1738. ——.]—Husband not chargeable for goods sold to adulterous wife.—MANWAIRING *v.* SANDS (1726), 2 Stra. 706; 93 E. R. 797.

1739. ——.]—OZARD *v.* DARNFORD (1779), 1 Selwyn's N. P. 13th ed. at p. 229, N. P.

Annotations:—**Refd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Gore *v.* Gardiner (1850), 15 L. T. O. S. 51; Johnston *v.* Sumner (1858), 3 H. & N. 261.

1740. ——.]—COX *v.* KITCHIN (1798), 1 Bos. & P. 338; 126 E. R. 938.

Annotation:—**Mentd.** Petty *v.* Anderson (1825), 3 Bing. 170.

1741. —— **Though himself guilty of adultery.**]—*Held:* a husband was not bound to receive or support his wife after she had committed adultery, though he had before committed adultery himself, & turned her out of doors, without any imputation on her conduct.—GOVIER *v.* HANCOCK (1796), 6 Term Rep. 603; 101 E. R. 726.

Annotations:—**Distd.** Houliston *v.* Smyth (1825), 2 C. & P. 22; Wilson *v.* Glossop (1887), 19 Q. B. D. 379. **Refd.** Cox *v.* Kitchin (1798), 1 Bos. & P. 338; Hunt *v.* De Blaquiere (1829), 5 Bing. 550; Gore *v.* Gardiner (1850), 15 L. T. O. S. 51; Wickins *v.* Wickins (No. 2), [1918] P. 282. **Mentd.** Durnford *v.* Baker, [1924] 2 K. B. 587. **Mentd.** Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80.

1742. ——.]—Where a husband turn his wife out of doors on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her after the expulsion.—HAM *v.* TOOVEY (1807), 1 Selwyn's N. P. 13th ed. at p. 228, N. P.

1743. ——.]—EMMETT *v.* NORTON, No. 1583, *ante*.

1744. ——.]—HARDIE *v.* GRANT, No. 1754, *post*.

1745. ——.]—A. went abroad in 1852, leaving his wife & three children here, with, what the jury found to be, a sufficient provision for their proper maintenance in his absence: on his return, in 1856, he found that his wife had formed an adulterous connection with another man, who lived with her, & passed by her husband's name, & he immediately removed his children:—*Held:* in these circumstances, A. was not liable for medicine & attendance furnished for his children at the wife's request, although pltf. was not aware of the state in which she was living at the time.—ATKYNS *v.* PEARCE (1857), 2 C. B. N. S. 763; 26 L. J. C. P. 252; 29 L. T. O. S. 212; 3 Jur. N. S. 1180; 140 E. R. 616.

Annotations:—**Consd.** Durnford *v.* Baker, [1924] 2 K. B. 587. **Refd.** Cooper *v.* Lloyd (1859), 6 C. B. N. S. 519; Wickins *v.* Wickins (No. 2), [1918] P. 282.

1746. ——.]—COOPER *v.* LLOYD, No. 1753, *post*.

1747. ——.]—A wife who was living with her husband received authority from the latter to order goods from pltfs. The goods so ordered were booked to the "account address," that being the house at which the wife was living with her husband, & the bills therefor were settled by the husband. Deft.'s wife left him & went to live with another man. Between the date when she left her husband & the time when he discovered her whereabouts, the wife ordered goods from pltfs. which she directed to be booked to the account address & forwarded to the place where she was living. On learning where his wife was, deft. inserted an advertisement in the newspaper stating that he would not be responsible for her debts. In an action by pltfs. against deft. to recover the amount due for the goods supplied to his wife after she had left him:—*Held:* the ostensible authority given by deft. to his wife to pledge his credit only continued whilst she was living with him as a virtuous wife, & did not continue after she had left him to live with another man, & the authority was subject to the limitation that it only applied to such goods as were to be sent to the house where she was living with her husband.—SWAN & EDGAR, LTD. *v.* MATHESON (1910), 103 L. T. 832; 27 T. L. R. 153, D. C.

Annotation:—**Refd.** Wickins *v.* Wickins (No. 2), [1918] P. 282.

1748. Wife left in charge of household.]—Deft.'s wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery:—*Held:* the husband should be liable for necessaries furnished to her unless it appeared that pltf. knew or ought to have known the circumstances under which she was living.—NORTON *v.* FAZAN (1798), 1 Bos. & P. 226; 126 E. R. 873.

Annotations:—**Consd.** Cooper *v.* Lloyd (1859), 6 C. B. N. S. 519. **Refd.** Jolly *v.* Rees (1864), 15 C. B. N. S. 628; Wickins *v.* Wickins (No. 2), [1918] P. 282.

Holding out, *see* Sect. 2, sub-sect. 12, *ante*.

1749. Subsequent condonation by husband.]—HARRIS *v.* MORRIS, No. 1696, *ante*.

1750. Connivance of husband.]—In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, & the husband subsequently turned her out of doors;

that she had no means of support; & that pltf. supplied her with the necessaries in question while she was living separate from her husband:—*Held:* the husband was liable.—WILSON *v.* GLOSSOP (1888), 20 Q. B. D. 354; 57 L. J. Q. B. 161; 58 L. T. 707; 52 J. P. 246; 36 W. R. 296; 4 T. L. R. 239, C. A.

Annotations:—**Refd.** Stimpson *v.* Wood (1888), 52 J. P. 822; Mitchell *v.* Torrington Union (1897), 76 L. T. 724; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80; Wickins *v.* Wickins (No. 2), [1918] P. 282; Dean *v.* Dean, [1923] P. 172.

1751. Adultery committed previous to credit—Knowledge of husband after credit given.]—HOULISTON *v.* SMYTH, No. 1716, *ante*.

While living together.]—*See* Sub-sect. 1, *ante*.

Costs of divorce proceeding.]—*See* Sect. 4, *post*.

ii. *What Evidence Admissible.*

1752. Admissions of wife—Admissible.]—In *assumpsit*, for board & lodging supplied to deft.'s wife, if the defence is, the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband, & so are letters from different men, found by him at that time in her writing-desk.—WALTON *v.* GREEN (1825), 1 C. & P. 621, N. P.

1753. ——— ———.]—The adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries. &, in such a case, the wife herself is an admissible witness to prove the adultery.—COOPER *v.* LLOYD (1859), 6 C. B. N. S. 519; 33 L. T. O. S. 149; 6 Jur. N. S. 125; 141 E. R. 559.

Annotations:—**Consd.** Durnford *v.* Baker, [1924] 2 K. B. 587. **Refd.** Wickins *v.* Wickins (No. 2), [1918] P. 282.

Admissions generally.]—*See* EVIDENCE, Vol. XXII., pp. 133 *et seq.*

1754. Verdict of jury—In action for crim. con.—Inadmissible.]—If a husband has put away his wife for adultery he is not liable even for necessaries supplied to her, if it be proved on the trial of an action for the price of such necessaries, that she has been guilty of adultery; but a verdict in an action of crim. con. is not receivable in evidence in such action, as it is *res inter alias partes*. If a husband put away his wife on a charge of adultery, & inform a tradesman with whom his wife has been in the habit of dealing that he has so done, the tradesman cannot recover for articles supplied to her unless they be necessaries, & the tradesman prove that the wife was actually in want of them, even though no evidence is given of the adultery.—HARDIE *v.* GRANT (1838), 8 C. & P. 512, N. P.

1755. ——— **In suit for divorce—Not followed by decree—Inadmissible.**]—In an action for necessaries supplied to the wife of deft. whilst living apart from him, deft. relied for defence upon the adultery of the wife, to establish which he put in the proceedings in a suit against her in the Divorce Ct. in which it was found by the jury that she had been guilty of adultery with co-resp. but in which there was no decree, the jury having also found petitioner had committed adultery:—*Held:* there being no judgment in the Divorce Ct. altering the status of the parties, the proceedings therein afforded no defence to the action. *Semble:* such a judgment or decree would be admissible under "never indebted."—NEEDHAM *v.* BREMNER (1866), L. R. 1 C. P. 583; Har. & Ruth. 731; 35 L. J. C. P. 313; 14 L. T. 437; 12 Jur. N. S. 434; 14 W. R. 694.

Annotation:—**Refd.** R. *v.* Kenny (1877), 46 L. J. M. C. 156.

———.]—*See* EVIDENCE, Vol. XXII., pp. 309–311, Nos. 3008–3037.

E. Lunacy of Husband.

1756. Husband liable—During lunacy.]—A husband is liable for necessaries supplied to his wife during the period of his lunacy.—READ *v.* LEGARD (1851), 6 Exch. 636; 20 L. J. Ex. 309; 17 L. T. O. S. 145; 15 Jur. 494; 155 E. R. 698.

Annotations:—**Refd.** Brown *v.* Kidger (1858), 28 L. J. Ex. 66; Johnston *v.* Sumner (1858), 4 Jur. N. S. 462; Davidson *v.* Wood (1863), 11 W. R. 791; Healing *v.* Healing (1902), 19 T. L. R. 90.

1757. ——— ———.]—The wife in this case was entitled to separate estate derived from her first husband. Her second husband became lunatic, & she incurred a debt in order to pay for necessaries for him & herself during his lunacy. Upon his death the lender carried in a claim against his estate:—*Held:* the wife was entitled to pledge her husband's credit for necessaries, & the claim was allowed.—*Re* WOOD'S ESTATE, DAVIDSON *v.* WOOD (1863), 1 De G. J. & Sm. 465; 32 L. J. Ch. 400; 8 L. T. 476; 27 J. P. 628; 9 Jur. N. S. 589; 11 W. R. 791; 46 E. R. 185, L. JJ.

Annotations:—**Refd.** Drew *v.* Nunn (1879), 4 Q. B. D. 661; Seymour *v.* Kingscote (1922), 38 T. L. R. 586; Callot *v.* Nash (1923), 39 T. L. R. 292.

1758. Unless wife with sufficient allowance.]—Pltf. sued deft. for repairs done to the inside of deft.'s house which he held on a long lease. The orders were given by deft.'s wife, who was residing with her children in the house, deft. at the time being a lunatic & in an asylum. After some of the repairs had been done, pltf. became aware that deft. was a lunatic; but he continued to do the repairs under the wife's direction. The repairs were necessary for the house: but after paying for deft.'s maintenance in the asylum, the wife received the whole of the deft.'s income, & had also an allowance from friends of deft., & what she received was sufficient for all purposes, including the repairs to the house:—*Held:* deft. was not liable: for that the authority of a wife to pledge her husband's credit was no greater in the case of a lunatic than in the ordinary case of husband & wife.—RICHARDSON *v.* DU BOIS (1869), L. R. 5 Q. B. 51; 10 B. & S. 830; 39 L. J. Q. B. 69; 21 L. T. 635; 18 W. R. 62.

Annotation:—**Refd.** Chappell *v.* Nunn (1879), 41 L. T. 287.

See, also, Sect. 2, sub-sect. 12, D., *ante*; Sect. 4, sub-sect. 4, *post*.

F. Separation by Act of Law.

See, now, Matrimonial Causes Act, 1857 (c. 85), s. 26; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 194.

1759. Imprisonment of wife.]—Deft.'s wife having been convicted of a conspiracy to charge her husband with subornation of perjury was committed in execution for a year. Pltf. kept a sponging house within the rules & received deft.'s wife into his house & found her necessaries for which this action was brought. The chief justice ruled that it would not lie, for her being there was illegal she being such a prisoner as was not entitled to the benefit of the rules, & in such case the law will not raise an implied promise to charge the husband.—FOWLES *v.* DINELY (1739), 2 Stra. 1122; 93 E. R. 1072.

PART VIII. SECT. 3, SUB-SECT. 2.—E. p. *Husband liable.*]—The wife of a lunatic has authority to pledge her husband's credit for necessaries for her support.—*Re* NEVINS (1888), 5 Man. L. R. 137.—**CAN.**

Sect. 3.—Necessaries: Sub-sect. 2, F., G. &

1760. Decree of divorce—Effect of.]—After a sentence of divorce *ab initio*, the liability of a husband for the debts of his wife, does not continue.

If the wife becomes a single woman by operation of law, it is the same as if she had always remained single. Her liabilities are in no respect different (PARK, J.).—ANSTEY *v.* MANNERS (1818), Gow, 10, N. P.

Annotation :—**Refd.** Collins *v.* Cory (1901), 17 T. L. R. 242.

1761. Judicial separation—Effect of.]—(1) Matrimonial Causes Act, 1857 (c. 85), s. 26 absolutely puts an end to the right of a wife who has obtained a decree for judicial separation to pledge her husband's credit or to contract on his behalf during the continuance of the judicial separation except where alimony has been decreed & has not been duly paid. Consequently, so long as the husband duly pays the alimony which he has been ordered to pay, the wife has no power to pledge his credit for necessaries which the alimony could not have been reasonably supposed to cover, as where the wife has been put to expense by the misconduct of the husband.

The provision in the second part of Matrimonial Causes Act, 1857 (c. 85), s. 26, with regard to the wife's contracts, that "the husband shall not be liable in respect of any engagement or contract she may have entered into," is governed by the preceding part of the sect. which provides that the wife, "whilst so separated," shall be considered a *feme sole* for the purposes of contract, & is limited to engagements & contracts entered into by the wife during the period of separation. Consequently the husband is not relieved by a decree of judicial separation from his liability under a contract which has been properly entered into by the wife on his account under her implied agency by reason of the coverture, & which remains *in fieri* at the date of the decree. A wife acting under the implied authority of the husband retained a solr. to defend her in a divorce suit instituted by her husband, & also to commence an action of detinue against her husband in respect of her clothes. The divorce suit was dismissed against the husband with costs, & a decree of judicial separation was made in favour of the wife. After the decree of judicial separation the wife obtained, first, an order increasing the *interim* alimony which had been previously allowed her, &, afterwards, an order for permanent alimony, & the action for detinue was tried & decided in the wife's favour. In the meantime the husband had instituted a second divorce suit, which was also resisted by the wife & dismissed with costs. On the taxation of the wife's costs of these proceedings under an order of course obtained by her solr. against the husband, the husband, who had duly paid the alimony as required by Matrimonial Causes Act, 1857 (c. 85), s. 26, disputed his liability to pay any costs, beyond the party & party costs, which he had been ordered to pay, after the decree of judicial separation :—*Held :* (2) as to the costs of the second divorce suit, the husband was not liable ; (3) as to the costs of the action of detinue the husband was liable inasmuch as the retainer continued until the conclusion of the action unless expressly withdrawn by the husband ; (4) as to the costs of the alimony proceedings, the husband was liable inasmuch as they were part of the proceedings in the first divorce suit.—*Re* WINGFIELD & BLEW, [1904] 2 Ch. 665 ; 73 L. J. Ch. 797 ; 91 L. T. 783 ; 48 Sol. Jo. 700, C. A.

Annotations :—*As to* (1) **Consd.** Sheppard *v.* Sheppard, [1905] P. 185. **Refd.** Gilroy *v.* Gilroy (1914), 58 Sol. Jo. 378. *As to* (2) **Refd.** Sheppard *v.* Sheppard, [1905] P. 185.

1762. —— Necessaries supplied before decree for alimony—Decree relating back.]—HOULISTON *v.* SMYTH, No. 1716, *ante*.

1763. .]—A husband is liable for necessaries provided for his wife pending a suit in the Ecclesiastical Ct. & before alimony decreed, although a decree afterwards made direct the alimony to be paid from a date before the time when the necessaries were provided for the wife.—KEEGAN *v.* SMITH (1826), 5 B. & C. 375 ; 8 Dow. & Ry. K. B. 118 ; 4 L. J. O. S. K. B. 189 ; 108 E. R. 140.

Annotation :—**Distd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550.

1764. —— Alimony not paid.]—(1) A husband separated from his wife by a divorce *a mensâ et thoro*, for adultery on his part, with a decree of alimony, is liable for necessaries supplied to the wife, if he omit to pay the alimony. (2) Furniture of a house held to be necessaries for a female, to whom the ct. had decreed £380 a year alimony.

(3) A general warning or notice in the Gazette or other newspaper not to trust her is not a sufficient prohibition (PARK, J.).—HUNT *v.* DE BLAQUIERE (1829), 5 Bing. 550 ; 3 Moo. & P. 108 ; 7 L. J. O. S. C. P. 198 ; 130 E. R. 1174.

Annotation :—*As to* (1) **Refd.** Wilson *v.* Glossop (1887), 19 Q. B. D. 379.

1765. —— ——.]—*Re* WINGFIELD & BLEW, No. 1761, *ante*.

1766. —— Adequacy of alimony immaterial.]—A wife having sued her husband in the Consistory Ct. obtained a decree against him for alimony. He removed the cause into the Arches Ct. The decree then became, in law, inoperative, but the husband continued making the payments under it ; & it was proved that if he had omitted doing so, a new decree could, by a short process, have been obtained from the Arches Ct. but that such application was not usually made unless payment of the alimony were discontinued :—*Held :* the husband was not liable in an action for necessaries supplied to the wife while the above payments were going on ; such payments could not be considered a voluntary allowance, &, therefore, this ct. could not inquire whether or not they were sufficient in proportion to the husband's means.—WILSON *v.* SMYTH (1831), 1 B. & Ad. 801 ; 109 E. R. 984 ; *sub nom.* WILSON *v.* SMYTH, 9 L. J. O. S. K. B. 155.

Annotation :—**Refd.** Johnston *v.* Sumner (1858), 3 H. & N.

1767. —— Contracts in fieri at time of decree.
Re WINGFIELD & BLEW, No. 1761, *ante*.

G. Money lent to Wife.

While living together.]—*See* Sub-sect. 1, A. (*b*), *ante*.

1768. Whether husband liable—Offer to take wife back refused.]—JAMES *v.* WARREN, No. 1691, *ante*.

1769. —— Wife living apart for good cause—Right in equity.]—HARRIS *v.* LEE, No. 1593, *ante*.

1770. —— —— ——.]—A. having gone abroad & left his wife unprovided for, pltf. lent her money to purchase necessaries, & she applied it accordingly :—*Held :* pltf. could not sue A. for the money in a ct. of equity.—MAY *v.* SKEY (1849), 16 Sim. 588 ; 18 L. J. Ch. 306 ; 13 Jur. 591 ; 60 E. R. 1002.

Annotations :—**Overd.** Jenner *v.* Morris (1861), 3 De G. F. & J. 45. **Consd.** Deare *v.* Soutten (1869), L. R. 9 Eq. 151. **Mentd.** Hirst *v.* Tolson (1849), 16 Sim. 620.

1771. ——.]—GORE *v.* GARDINER, No. 1709, *ante*.

1772. ——.] A person who advances to a deserted wife money to enable her to supply herself with necessaries has no demand, enforceable at law, against the husband for the advances but has a remedy in equity against him for so much of the money as is actually applied by the wife in paying for necessaries :—*Held :* accordingly, where pltf. who had deserted his wife filed his bill, to enforce a judgment against real estate of deft., deft. was entitled to set off the amount of sums which before & after the judgment had been advanced by deft. to the wife for the purpose of providing her with necessaries & had been applied by her for that purpose.

Although the cts. of common law do not recognise the right of a person to recover from the husband money advanced to the wife to enable her to provide herself with necessaries ; the cts. of equity do not require that the person making such advances should have himself supplied the wife with necessaries, but hold that he is entitled to stand in the place of the person who actually supplied such necessaries, & to recover from the husband such sums of money so advanced to the wife as have been duly applied in providing her with necessaries, having regard to the husband's circumstances & position in life.—JENNER *v.* MORRIS (1861), 3 De G. F. & J. 45 ; 30 L. J. Ch. 361 ; 3 L. T. 871 ; 25 J. P. 419 ; 7 Jur. N. S. 375 ; 9 W. R. 391 ; 45 E. R. 795, L. C. & L. J.

Annotations : **Refd.** *Re* Wood, Davidson *v.* Wood (1863), 8 L. T. 476 ; Deare *v.* Soutten (1869), L. R. 9 Eq. 151. **Mentd.** Lewis *v.* Alleyne (1888), 4 T. L. R. 251.

1773. ——.]—A person who has advanced money to a married woman deserted by her husband, for the purpose of, & which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband.—DEARE *v.* SOUTTEN (1869), L. R. 9 Eq. 151 ; 21 L. T. 523 ; 34 J. P. 244 ; 18 W. R. 203.

1774. ——.]—Cohabitation by a man, for many years, with a woman, & introducing her as his wife, admitted as some evidence of a marriage, in an action by a third party against him as her husband, for necessaries or money supplied to her. There is no authority in law, in a married woman, living apart from her husband, to borrow money on his credit. PAULE *v.* GODING (1861), 2 F. & F. 585, N. P.

1775. Husband a lunatic.]—*Re* WOOD'S ESTATE, DAVIDSON *v.* WOOD, No. 1757, *ante*.

See, also, Sub-sect. 2, E., *ante*.

1776. Liability of wife.]—HODGSON *v.* WILLIAMSON, No. 1195, *ante*.

H. What are Necessaries.

While living together.]—*See* Sub-sect. 1, *ante*.

1777. General rule.]—BAZELEY *v.* FORDER, No. 1784, *post*.

1778. Style of living of husband—Before separation.]—(1) In an action against the husband for goods supplied to his wife living separate from him, on the issue, whether the goods were necessaries or not, evidence should be given not only of the style of his living before the separation, but of the amount of his income ; & the jury may be directed to consider the style of living of the wife at the time the goods were supplied.

(2) Though the wife, in the case of separation by consent without an allowance, *primâ facie* deals for her husband, he will be discharged if the dealing took place on the credit of another.—HARVEY *v.* NORTON (1840), 4 Jur. 42.

1779. Necessaries for children by former husband.]—A husband is not bound to maintain his wife's child by a former husband.—TUBB *v.* HARRISON (1790), 4 Term Rep. 118 ; 100 E. R. 926.

Annotations :—**Distd.** Stone *v.* Carr (1799), 3 Esp. 1. **Consd.** Cooper *v.* Martin (1803), 4 East, 76.

1780. ——.]—One who marries a widow, having children by her former husband, is not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means.—COOPER *v.* MARTIN (1803), 4 East, 76 ; 102 E. R. 759.

Annotations :—**Expld.** Maund *v.* Mason (1874), L. R. 9 Q. B. 251. **Refd.** Eastwood *v.* Kenyon (1840), 11 Ad. & El. 438. **Mentd.** Urmston *v.* Newcomen (1836), 4 Ad. & El. 899.

1781. Necessaries for children living with mother.]—RAWLYNS *v.* VANDYKE, No. 1657, *ante*.

1782. ——.]—GORE *v.* GARDINER, No. 1709, *ante*.

1783. ——.]—ATKYNS *v.* PEARCE, No. 1745, *ante*.

1784. —— Against wish of father—Order under Custody of Infants Act, 1839 (c. 54).]—Pltf on the order of deft.'s wife supplied clothes for deft.'s child ; the wife was living separate from him for reasons which justified her doing so & the child, which was under seven years of age, was living with her against deft.'s will, an order having been made under above Act giving the wife the custody. The wife had no means adequate to support her according to her husband's degree :—*Held :* as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife for which she had authority to pledge her husband's credit.

A husband whilst his wife resides with him choses his own style of life at least in theory. . . . But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife, in such a case, authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. The increase in the husband's liability only comes into play when he is in fault, & so is not unjust (BLACKBURN, J.).—BAZELEY *v.* FORDER (1868), L. R. 3 Q. B. 559 ; 9 B. & S. 599 ; *sub nom.* BASELEY *v.* FORDER, 37 L. J. Q. B. 237 ; 18 L. T. 756 ; 32 J. P. 550.

Annotation : **Mentd.** Coldingham Parish Council *v.* Smith, [1918] 2 K. B. 90.

1785. ——.]—A wife who by her husband's conduct is forced to live separate from him has implied authority to pledge his credit for the education of the children, who are in her custody, as a "necessary."—COLLINS *v.* CORY (1901), 17 T. L. R. 242.

See, generally, INFANTS.

1786. Furniture for house.]—HUNT *v.* DE BLAQUIERE, No. 1764, *ante*.

Costs of legal proceedings.]—*See* Sect. 4, *post*.

PART VIII. SECT. 3, SUB-SECT. 2.—G.

1774 i. *Whether husband liable—Wife living apart for good cause.*]—A husband is liable for money lent to his wife while living apart from him for sufficient cause.—GRAY *v.* VESEY (1877), P. & B. 276.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 2.—H.

1781 i. *Necessaries for children living with mother.*]—*Held :* board, clothing, maintenance & medical attendance for children were necessaries for which the wife, separated by husband's fault, could pledge his credit.—PARK *v.* PARK (1906), 3 W. L. R. 281.—**CAN.**

SECT. 4.—AUTHORITY TO PLEDGE HUSBAND'S CREDIT FOR COSTS.

SUB-SECT. 1.—IN MATRIMONIAL CAUSES.

A. In General.

Necessaries generally, *see* Sect. 3, *ante*.

1787. Costs as necessaries—For which husband liable.]—(1) A. commenced a suit against his wife in the ecclesiastical ct., for the purpose of obtaining a divorce on the ground of adultery. The wife retained a proctor, to whom a large sum became due in respect of costs. While the suit was in progress A. became bkpt. A.'s proctor, after the bkpcy. by A.'s authority declined to proceed with the suit. The wife's proctor, after the bkpcy., having procured a taxation of his costs up to the bkpcy., & tendered a proof in respect thereof against A.'s estate:—*Held:* he was entitled to make such proof.

(2) A commission to examine witnesses was opened a day or two before the bkpcy., but was not returned until a day or two after:—*Held:* the whole of the costs of the commission were for the purpose of the proof, "costs incurred before the bkpcy."

Why, then, is it not to be considered that the husband was at the time of the bkpcy. legally indebted to the petitioner in the amount of his bill at that time? The bill appears to be as much for necessaries properly furnished to the wife, as a bill for ordinary provisions, clothing, & medical attendance would have been. They were not less justly chargeable upon the husband than the costs of an attorney employed by her to defend herself against an indictment for a crime, if she had been falsely accused, & her husband had refused to interfere. A man, without cause, turning his wife out of doors, sends her into the world with the power of obtaining credit against him for necessaries. All her tradesmen became the creditors of the husband. In like manner it appears to me that by causelessly sending the wife into the Ecclesiastical Ct. to meet a charge of imputed adultery, the husband enables her to obtain credit in the same way, & the proctor employed by the wife becomes the creditor of the husband (KNIGHT BRUCE, V.-C.).—*Ex p.* MOORE (1845), De G. 173; *sub nom. Re* WESTRUPP, *Ex p.* MOORE, 14 L. J. Bcy. 19; 4 Notes of Cases Supp. 1; 5 L. T. O. S. 313; 9 Jur. 604, Ct. of R.

Annotation:—**Consd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1788. —— ——.]—(1) In a matrimonial suit, the husband retained one counsel only, & the wife's proctor, conceiving she could not claim the privilege of two, also retained one only, but for the hearing was induced to retain a second. The costs thereof being allowed upon taxation, the proctor for the husband objected to the registrar's report:—*Held:* the ordinary practice of the ct. was to have two counsel on each side; a wife was *primâ facie* therefore entitled thereto; & the special circumstances of the present case did not afford sufficient ground for exception.

The wife is not to be barred of her right to two counsel by reason of what has passed between the two proctors out of ct.

(2) Wife is entitled to necessaries & if law proceedings are necessary for her protection the husband is liable for the proper & necessary costs thereof.—MONEY *v.* MONEY (1853), 1 Ecc. & Ad. 117; 18 Jur. 179.

1789. —— ——.]—If a wife, from reasonable apprehension of personal violence, leave her husband's house, & it becomes necessary, for her protection, that she should obtain a divorce *a mensâ et toro*, the law gives her authority to pledge her husband's credit for the expenses of the proceeding; & the question as to the husband's liability is, whether, at the commencement of the proceeding, there was such reasonable ground in fact for anticipating ill treatment that the divorce was necessary for the protection of the wife. Such reasonable ground is not furnished by a momentary ebullition of temper on the part of the husband, nor by a threat of violence from which no serious intention to commit violence can be inferred.—BROWN *v.* ACKROYD (1856), 5 E. & B. 819; 25 L. J. Q. B. 193; 26 L. T. O. S. 215; 2 Jur. N. S. 283; 4 W. R. 229; 119 E. R. 686.

Annotations:—**Folld.** Rice *v.* Shepherd (1862), 12 C. B. N. S. 332. **Consd.** Wilson *v.* Ford (1868), L. R. 3 Exch. 63; Ottaway *v.* Hamilton (1878), 38 L. T. 925; Abrahams *v.* Buckley, [1921] 1 K. B. 903. **Refd.** *Re* Hooper, Baylis *v.* Watkins (1864), 33 L. J. Ch. 300; Beale *v.* Arabin (1877), 36 L. T. 249; Durnford *v.* Baker, [1924] 2 K. B. 587.

1790. —— ——.]—The costs of a suit justifiably instituted by a married woman against her husband for a divorce or a judicial separation, are necessaries for which she may pledge her husband's credit. A., a married woman, living apart from her husband, consulted pltfs. respecting the ill usage she had received from her husband, consisting of his adultery & cruelty. They therefore made inquiries, & having satisfied themselves that there were good grounds for legal proceedings, they commenced a suit in the Divorce Ct. on A.'s behalf. Before such suit was brought to a hearing, A. & her husband came to an arrangement whereby he executed a deed securing to her an annual allowance. The attorneys having sued the husband for their bill of costs, the jury in reply to questions left to them by the judge, found that there was legal cruelty; that pltfs. made full inquiries to satisfy themselves & to justify them in acting as A.'s solrs.; but that it was not necessary in order to obtain the deed of separation to carry on the proceedings by filing the petition in the Divorce Ct. Upon a verdict upon this finding being entered for pltfs.:—*Held:* the action was maintainable, & the costs incurred by pltfs. in the proceedings at the suit of A. were, subject to taxation, properly chargeable against her husband.—STOCKEN *v.* PATTRICK (1873), 29 L. T. 507.

Annotations: **Consd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393; Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1791. —— ——.]—PEAD *v.* PRICE, No. 1809, *post*.

1792. —— ——.]—Pltfs.' claim is based on the allegation that the costs incurred by them on behalf of the wife are necessaries. There is no doubt that, on the evidence, the sums claimed by pltfs. are for expenditure necessary for maintaining the wife's rights against her husband, but deft.'s answer is that the divorce has been obtained by collusion & that pltfs. were parties to that collusion. I am satisfied that pltfs. neither knew of nor were in any way parties to any collusion; there will be judgment for them for the amount found to be due on taxation, not confined to party & party costs, but to include all sums reasonably necessary which were incurred on behalf of the wife, together with the costs of this action (SWIFT, J.).—

PART VIII. SECT. 4, SUB-SECT. 1.—A.

1787 i. *Costs as necessaries—For which husband liable.*]—A wife's costs in matrimonial causes have been held to be "necessaries" & to be recoverable as such, & where the solr. for the wife has acted reasonably & instituted before action he can bring action & recover upon his bill of costs no matter what settlement has been made between the parties.—HOWES *v.* HOWES, [1923] 3 W. W. R. 33.—**CAN.**

1787 ii. —— —— ——.]—If a husband falsely charges his wife, who is living apart from him, with adultery & other misdemeanours, he thereby implicitly gives her power to pledge his credit for the necessary costs incurred in answering such charges & vindicating her character.—MECREDY *v.* TAYLOR (1871), 20 W. R. 252.—**IR.**

ABRAHAMS (M.) SONS & CO. *v.* HOFFE-MILES (1923), 40 T. L. R. 2.

1793. —— What costs included—Preliminary & incidental costs.]—The legal expenses incurred by a deserted wife, preliminary & incidental to a suit for restitution of conjugal rights, in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, in obtaining professional advice as to the proper mode of dealing with tradespeople, who were pressing her to pay them for various necessary articles supplied to her since she had been deserted, & also of preventing a distress threatened on furniture belonging to her husband in the house she occupied, are necessaries for which she has implied authority to pledge his credit during his lifetime, & for which, after his death, his exors. are therefore liable.—WILSON *v.* FORD (1868), L. R. 3 Exch. 63; 37 L. J. Ex. 60; 17 L. T. 605; 16 W. R. 482.

Annotations :—**Consd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Phillips *v.* Barnett (1876), 24 W. R. 345; Ottaway *v.* Hamilton (1878), 3 C. P. D. 393; Hunt *v.* Hunt (1908), 25 T. L. R. 132.

1794. —— —— Counsel's opinion—On agreement for settlements.]—WILSON *v.* FORD, No. 1793, Jur. N. S. 114; 12 W. R. 324; 46 E. R. 309, L. JJ.

Annotations :—*As to* (1) **Consd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393. *As to* (2) **N.F.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Taylor *v.* Hailstone (1882), 52 L. J. Q. B. 101.

1795. —— —— Professional advice.]—WILSON *v.* FORD, No. 1793, *ante*.

1796. —— —— Extra costs—Beyond taxed costs.]—A solr. employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty & adultery, may sue the husband for "extra costs," *i.e.* costs reasonably incurred by him beyond the costs taxed & allowed as between party & party. His common law right to sue the husband as for "necessaries" supplied to the wife is not to be limited to the statutable rights & remedies for costs given to the wife under Matrimonial Causes Acts, 1857 (c. 85), 1858 (c. 108).—OTTAWAY *v.* HAMILTON (1878), 3 C. P. D. 393; 47 L. J. Q. B. 725; 38 L. T. 925; 42 J. P. 660; 26 W. R. 783, C. A.

Annotations :—**Consd.** *Re* Wingfield & Blew, [1904] 2 Ch. 665; Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Pead *v.* Price (1903), 19 T. L. R. 563; Cobbett *v.* Wood, [1908] 1 K. B. 590; Gilroy *v.* Gilroy, [1914] P. 122.

1797. Effect of judicial separation—Costs of proceedings prior & subsequent to separation.]—*Re* WINGFIELD & BLEW, No. 1761, *ante*.

B. Conduct of Wife's Solicitor.

1798. Duty to investigate wife's case—Reasonable grounds for instituting suit—Effect of failure of suit.]—(1) The costs of a solr. employed by a married woman to institute proceedings on her behalf against her husband to obtain a decree of judicial separation, are not necessaries for which the husband is liable, unless there was at least great probability of ultimate success; & to entitle a solr. so employed to recover the costs from the husband, or to prove for them against the husband's estate, he must, in the absence of actual success, be at least able to show that he made proper investigation & inquiry into all the circumstances of the case before he commenced the proceedings.

(2) *Qu.*: whether previous inquiry & the existence of reasonable grounds for instituting such a suit would entitle the solr. to recover from the husband if, in the result, the wife failed.—*Re* HOOPER, BAYLIS *v.* WATKINS (1864), 2 De G. J. & Sm. 91; 33 L. J. Ch. 300; 9 L. T. 741; 10 Jur. N. S. 114; 12 W. R. 324; 46 E. R. 309, L. JJ.

Annotations :—*As to* (1) **Consd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393. *As to* (2) **N.F.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Taylor *v.* Hailstone (1882), 52 L. J. Q. B. 101.

1799. —— —— ——.]—Where a solr. conducts matrimonial proceedings on behalf of a wife against her husband, it is not a condition precedent to the solr.'s right to recover his costs thereof from the husband that he show that the proceedings were necessary or that they had a successful issue. It is sufficient that he acted on reasonable grounds, made adequate inquiries, & showed proper diligence & care.—ABRAHAMS (M.) SONS & CO. *v.* BUCKLEY, [1924] 1 K. B. 903; 93 L. J. K. B. 603; 131 L. T. 412; 68 Sol. Jo. 596.

Annotation :— **Distd.** Durnford *v.* Baker, [1924] 2 K. B. 587.

1800. —— —— Previous adultery of wife concealed.]—A wife, who had been guilty of adultery which was unknown to her husband, instructed a solr. to commence proceedings against her husband for divorce on the grounds of his adultery & cruelty. The solr., who was not told of his client's adultery, made inquiries & had reasonable grounds for thinking that the charges of adultery & cruelty against the husband would be made out, & accordingly presented a divorce petition. Subsequently the husband discovered his wife's adultery, & on the wife's solr. being informed of the fact the divorce petition was abandoned. The wife's solr. then claimed in an action based on the wife's agency of necessity at common law to recover the costs of the petition from the husband :—*Held :* the solr. was not entitled to recover, because, although he had reasonable grounds for believing that the charges of adultery & cruelty would be established against the husband, he had to take the risk of his own client, the wife, misinforming him as to her own conduct, & as she had committed adultery she was not entitled to pledge her husband's credit for the costs of her divorce petition.—DURNFORD *v.* BAKER, [1924] 2 K. B. 587; 93 L. J. K. B. 866; 132 L. T. 35; 40 T. L. R. 757; 68 Sol. Jo. 790, C. A.

Annotation :—**Refd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1801. —— ——.]—In a suit by a husband for divorce on the ground of his wife's adultery, the wife in her answer denied the adultery, & made countercharges that petitioner had been guilty of great unkindness towards her, & had kept her without food, & had deserted her; & further, that he had committed adultery with a woman unknown. Particulars of this last plea were asked for & given. Petitioner, in his reply, denied the countercharges. At the hearing, the wife did not go into the witness box, & the ct. found for petitioner upon all the issues & pronounced a decree *nisi*. Upon application by counsel for resp. that she should be allowed the usual order for her costs, the learned judge expressed the opinion, that, as the case was undefended, no such costs ought to be allowed without an explanation from the solr. as to how he came to put an answer upon the record, & to contest the case at all. Counsel for resp. thereupon called the country solr. who had acted as solr. for resp., & he stated, in effect, that resp. brought him the petition & citation with which she had been served, & asked him to act for her; that she instructed him that the charge made against her in the petition was untrue, but that she had been

1796 i. —— *What costs included—Extra costs—Beyond taxed costs.*]—M. W. P. Act, 1908, has not destroyed the authority of a wife to pledge her husband's credit for costs in reference to a matrimonial suit in which she has been successful, & certainly not where the wife has no separate estate. The husband is liable in such case for his wife's costs as between solr. & client, & his liability is not limited to costs of suit taxed & allowed as between party & party.—GRAY & JACKSON *v.* MEWHINNEY (1912), 31 N. Z. L. R. 968.—**N.Z.**

Sect. 4.—*Authority to pledge husband's credit for costs: Sub-sect.* 1, *B. & C.; sub-sect.* 2, *A. & B.; sub-sects.* 3 & 4. *Sect.* 5: *Sub-sect.* 1.]

requested to leave the house where she had been staying. The solr. saw resp.'s sister, in reference to the countercharges of unkindness & desertion, & both she & resp. asserted that no misconduct had taken place prior to the alleged desertion. He did not make inquiries of the people at the house, where resp. had resided apart from her husband, as he gathered that the latter had received his information from those people, & that as they were hostile to resp., & one or more of them would probably be called at the hearing in support of petitioner's case, anything that they might be able to say in regard to resp. had better be left to be dealt with in cross-examination. The solr. further stated that this was the first divorce case in which he had been retained, & that he had acted throughout with *bona fides*:—*Held:* (1) to warrant a petitioner, husband, in opposing & the ct. in refusing, the usual order for a wife's costs, it is not necessary to show "misconduct" on the part of the wife's solr.; (2) a solr. acting for the wife in a matrimonial case is not entitled to rely upon his client's instructions, but, in order to entitle him to look to the husband for payment of the wife's costs, he must fairly investigate for himself the various points put forward by the wife as a defence, & must satisfy himself in regard to their reasonableness.—WALKER *v.* WALKER & LAWSON (1897), 76 L. T. 234.

Annotation:—*As to* (2) **Dbtd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

1802. Proof that proceedings by wife necessary.]—Unless the necessity for proceedings by a wife against her husband for a judicial separation be made out in point of fact, the husband cannot be made liable for costs incurred by the wife, although the solr. for the wife may have had reasonable grounds for supposing upon the statements of the wife that proceedings ought to be taken.—TAYLOR *v.* HAILSTONE (1882), 52 L. J. Q. B. 101; 47 L. T. 440.

Annotation:—**N.F.** Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1803. ——.]—ABRAHAMS (M.) SONS & CO. *v.* BUCKLEY, No. 1799, *ante*.

C. Proceedings to Recover.

1804. Action by solicitor against husband—Petition not proceeded with—Practice for obtaining wife's costs not pursued.]—The husband is liable to an action at the suit of his wife's solr., for costs necessarily incurred by her in filing a petition in the Divorce Ct. for a judicial separation on the ground of cruelty & adultery, although the petition is not proceeded with, & the course prescribed by the practice of the Divorce Ct. for obtaining the wife's costs has not been pursued.—RICE *v.* SHEPHERD (1862), 12 C. B. N. S. 332: 6 L. T. 432; 142 E. R. 1171.

Annotations:—**Consd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Beale *v.* Arabin (1877), 36 L. T. 249; Ottaway *v.* Hamilton (1878), 3 C. P. D. 393.

1805. —— Common law remedy—Not limited by provisions in Matrimonial Causes Acts.]—OTTAWAY *v.* HAMILTON, No. 1796, *ante*.

1806. —— Costs of summary proceedings—Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—By sects. 4 & 5 of above Act any married woman, whose husband shall have been guilty of certain specified kinds of misconduct towards her, may apply to a ct. of summary jurisdiction for an order under the Act, & the ct. may make an order containing various specified provisions for her protection, including "a provision for payment by the appt. or the husband, or both of them, of the costs of the ct., & such reasonable costs of either of the parties as the ct. may think fit." The solr. acting for a married woman in an application, which was unsuccessful, to a ct. of summary jurisdiction for an order under the Act, brought an action for his costs against the husband. The ct. of summary jurisdiction had not made, or been asked to make, any provision for the costs:—*Held:* the action could not be maintained, because the Act intended to exclude any remedy in respect of costs other than that specified in sect. 5 (*d*).—CALE *v.* JAMES, [1897] 1 Q. B. 418; 66 L. J. Q. B. 249; 76 L. T. 119; 61 J. P. 230; 45 W. R. 317; 13 T. L. R. 169, D. C.

Annotations:—**Folld.** Cobbett *v.* Wood, [1908] 1 K. B. 590. **Refd.** Cobbett *v.* Wood, [1908] 2 K. B. 420; Abrahams *v.* Buckley, [1921] 1 K. B. 903; Durnford *v.* Baker, [1921] 2 K. B. 587.

1807. —— —— ——.]—Pltfs. had acted as solrs. for deft.'s wife in a petition for judicial separation in the High Ct., & subsequently in proceedings before justices under Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39). The petition in the High Ct. was dismissed, but deft. was ordered to pay the costs as between party & party, which he did. The proceedings before justices were successful, & deft. was ordered to pay a certain fixed sum for costs, which he paid accordingly. Pltf. then delivered to deft. the bill of costs on which the present action was brought, which was headed "In the High Court of Justice, Probate, Divorce & Admiralty Division (Divorce)," & which contained not only the items of extra costs as between solr. & client in the proceedings in that Ct., but also items of costs in advising the wife as to her differences with deft. & items of costs in respect of the proceedings before justices. The items allowed on taxation in the party & party bill of costs in the High Ct. were not included in the bill:—*Held:* the costs in respect of the proceedings before justices could not be recovered.—COBBETT *v.* WOOD, [1908] 1 K. B. 590; 77 L. J. K. B. 406; 98 L. T. 45; 24 T. L. R. 233; *on appeal*, [1908] 2 K. B. 420, C. A.

Annotations: **Refd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Mentd.** *Re* Osborn & Osborn, [1913] 3 K. B. 862.

1808. Action by solicitor against wife—Death of husband.]—CLARK *v.* FIELD, [1885] W. N. 108, H. L.

1809. —— Alleged agreement limiting wife's liability.]—Pltf. is entitled to his costs unless deft. proves that she made a special bargain. The wife suing in a matrimonial matter is able to hold out an inducement to a solr. that, even if she fails, the husband will be held liable to pay her costs, unless her case is obviously bad. The law says that her costs are in the nature of necessaries. . . . Although the solr. has that right against the husband, the wife is still liable. The question is, did deft. make a bargain with pltf. that she was to pay no more than £20? (PHILLIMORE, J.).—PEAD *v.* PRICE (1903), 19 T. L. R. 563.

PART VIII. SECT. 4, SUB-SECT. 1.—C.

q. *Action by solicitor against husband—Barred by judgment recovered by solicitor against wife.*]—A matrimonial suit brought by a wife having separate property, against a husband was settled by agreement between husband & wife behind the backs of the solrs. Petitioner's solrs. sued the wife for the costs incurred by them in the suit, & recovered judgment against her:—*Held:* as the wife contracted as the agent of her husband a judgment recovered against her as agent was a bar to any proceeding against her husband as principal.—SULLIVAN *v.* SULLIVAN (1911), 45 I. L. T. 198.—**IR.**

1810. Proof in husband's bankruptcy.]—*Ex p.* MOORE, No. 1787, *ante*.

1811. ——.]—*Re* HOOPER, BAYLIS *v.* WATKINS, No. 1798, *ante*.

SUB-SECT. 2.—PROCEEDINGS BY WIFE AGAINST HUSBAND.

A. Criminal.

Costs in criminal cases, *see* CRIMINAL LAW, Vol. XV., pp. 614 *et seq.*

1812. Articles of peace against husband—Solicitor's costs—Husband liable.]—(1) If a husband turns his wife out of doors, & it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose.

(2) Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence:—*Held:* he was liable to an attorney, whom she employed to defend her, & by whom he knew that she was defended.—*v.* MACKOUL (1813), 3 Camp. 326, N. P.

Annotations:—*As to* (1) **Consd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Grindell *v.* Godmond (1836), 5 Ad. & El. 755; Brown *v.* Ackroyd (1856), 5 E. & B. 819.

1813. —— —— ——.]—Where a wife, ill treated by her husband, indicts him for assaulting & imprisoning her, a party who advances money for her to the attorney, without which he would not have undertaken the prosecution, cannot recover the amount from her husband as money supplied to procure her necessaries. *Semble:* otherwise if she exhibit articles of the peace against her husband.—GRINDELL *v.* GODMOND (1836), 5 Ad. & El. 755; 2 Har. & W. 339; 1 Nev. & P. K. B. 168; 6 L. J. K. B. 31; 111 E. R. 1351.

Annotations:—**Refd.** Gore *v.* Gardener (1850), 15 L. T. O. S. 51; Brown *v.* Ackroyd (1856), 5 E. & B. 819; Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1814. —— —— —— Though wife with separate maintenance.]—If a husband, living separate from his wife, & allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense. & if such attorney sues the husband for his costs, the ct. will not inquire whether or not the wife could have paid them out of the maintenance, without resorting to the husband.—TURNER *v.* ROOKES (1839), 10 Ad. & El. 47; 2 Per. & Dav. 294; 8 L. J. Q. B. 211; 113 E. R. 18.

Annotations:—**Consd.** *Re* Wingfield & Blew, [1904] 2 Ch. 665. **Refd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393; Sheppard *v.* Sheppard (1905), 53 W. R. 608; Abrahams *v.* Buckley, [1924] 1 K. B. 903.

1815. Indictment for assault—Solicitor's costs—Husband not liable.]—GRINDELL *v.* GODMOND, No. 1813, *ante*.

B. Civil.

1816. Liability of husband for solicitor's costs—Wife separated from husband—Promise to pay.]—Case lies against a husband for the reasonable costs of proceedings at law & in equity, instituted by an attorney, against him on behalf of his wife, who had been forced to leave his house by extreme ill-treatment, the husband having previously tendered to pltf. the rent of a cottage occupied by the wife, after her departure, & undertaken to pay the bill of costs, if reasonable.—WILLIAMS *v.* FOWLER (1825), M'Cle. & Yo. 269; 148 E. R. 413.

Annotation:—**Refd.** Grindell *v.* Godmond (1836), 5 Ad. & El. 755.

1817. Separation deed—Costs of counterpart.]—A husband, who had separated from his wife, agreed that a deed of separation should be prepared & executed:—*Held:* the husband was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared, & executed, in the absence of any promise by him to pay that expense.—LADD *v.* LYNN (1837), 2 M. & W. 265; Murp. & H. 27; 6 L. J. Ex. 73; 1 Jur. 42; 150 E. R. 755.

Annotations:—**Dbtd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Wilson *v.* Ford (1868), 37 L. J. Ex. 60.

SUB-SECT. 3.—PROCEEDINGS AGAINST BY THIRD PARTIES.

1818. Wife indicted for keeping disorderly house—Costs of defence.]—SHEPHERD *v.* MACKOUL, No. 1812, *ante*.

Disorderly houses generally, *see* CRIMINAL LAW, Vol. XV., pp. 754–757.

SUB-SECT. 4.—LUNATIC HUSBAND.

See, generally, LUNATICS.

1819. Proceedings by wife in lunacy.]—The wife of a gentleman alleged to be a lunatic, & who has separated from her, presented a petition praying an inquiry into the state of his mind. The petition being ordered to stand over, the husband in the meantime recovered:—*Held:* unless there were grave reasons against such a course, the costs of the action must be paid by the alleged lunatic.—*Re* F—— (1863), 2 De G. J. & Sm. 89; 33 L. J. Ch. 333; 9 L. T. 698; 46 E. R. 308, L. JJ.

Annotation:—**Apld.** *Re* —— (1889), 5 T. L. R. 227.

Lunacy as revocation of authority.]—*See* Sect. 2, sub-sect. 12, D., *ante*.

Right of wife to pledge lunatic husband's credit for necessaries.]—*See* Sect. 3, sub-sect. 2, E., *ante*.

SECT. 5. **CONTRACTS WITH HUSBAND.**

SUB-SECT. 1.—IN GENERAL.

1820. Married Women's Property Act, 1882 (c. 75), s. 3—Act not retrospective.]—H. was married to his wife in 1864, & she subsequently became entitled to certain moneys under the wills of her father & grandfather. These moneys she lent to her husband for the purposes of his business, upon the terms that he would execute a settlement of the moneys upon her, which was done. Upon

PART VIII.

r. *Liability of husband for solicitor's costs—Wife separated from husband.*]—GRAY *v.* WYLIE (1840), 2 Dunl. (Ct. of Sess.) 1205; 15 Fac. Coll. 1300.—**SCOT.**

PART VIII. SECT. 5, SUB-SECT. 1.

s. *Undue influence—Presumption as to.*]—A married woman, when contracting otherwise than for the benefit of her husband, has all the capacity of a *feme sole* to bind her separate estate, & there can be no ground for presuming that the husband abused the confidence of his wife by exercising undue marital influence for the benefit of a stranger.—SAWYER-MASSEY CO. *v.* HODGSON (1909), 18 O. L. R. 333; 13 O. W. R. 980.—**CAN.**

t. ——.]—In an action brought to recover moneys secured by a mortgage given by husband & wife, for the price of a machine sold by pltfs. to the husband, & for foreclosure or sale in default of payment:—*Held:* undue influence on the part of the husband could not be presumed from the fact that the wife had no independent advice.—REEVES & CO. *v.* FRIEL (1911), 18 W. L. R. 539; 4 Sask. L. R. 198.—**CAN.**

a. ——*Burden of proof.*]—Where a wife without independent advice joins in an agreement to secure her husband's indebtedness created thereby, & is aware of the nature & effect of her obligations thereunder, she is liable thereon unless undue influence is shown by those alleging it.—ADVANCE RUMELY THRESHER CO.,

Sect. 5. Contracts with husband: Sub-sects. 1, 2, 3 & 4.]

the bkpcy. of H. a proof was tendered upon the settlement & rejected on five grounds, three of which were discussed, the remainder being abandoned. The first ground was, that this deed was voluntary within the terms of 13 Eliz. c. 5; the second, that it was a voluntary settlement within Bkpcy. Act, 1869 (c. 71), s. 91; the third, that the circumstances were covered by Married Women's Property Act, 1882 (c. 75), s. 3:—*Held:* this settlement was not invalidated by Married Women's Property Act, 1882 (c. 75), s. 3, since that sect. was not retrospective, & could not affect previously existing rights.—*Re* HOME, *Ex p.* HOME (1885), 54 L. T. 301.

1821. Relationship ex contractu not created—Allowance to wife.]—Pltf. sued deft., her husband, for money due under an alleged verbal agreement, whereby he undertook to allow her £30 a month in consideration of her agreeing to support herself without calling upon him for any further maintenance. The parties were married in 1900. The husband was resident in Ceylon, where he held a govt. appointment. Pltf. accompanied him to Ceylon, but in 1915 they returned to England, he being on leave. In 1916 he went back to Ceylon, leaving her in England, where she had to remain temporarily under medical advice. Pltf. alleged that deft. before returning to Ceylon entered into the above agreement. The parties remaining apart, pltf subsequently obtained a decree *nisi* for restitution of conjugal rights, & an order for alimony:—*Held:* the alleged agreement did not constitute a legal contract, but was only an ordinary domestic arrangement which could not be sued upon. Mutual promises made in the ordinary domestic relationship of husband & wife do not of necessity give cause for action on a contract.—BALFOUR *v.* BALFOUR, [1919] 2 K. B. 571; 88 L. J. K. B. 1054; 121 L. T. 316; 35 T. L. R. 609; 63 Sol. Jo. 661, C. A.

Annotation:—**Refd.** Rose & Frank Co. *v.* Crompton, [1923] 2 K. B. 261.

Contracts of separation.]—*See* Part XI., *post.*

SUB-SECT. 2.—CONTRACTS BETWEEN HUSBAND AND WIFE.

See, now, Married Women's Property Act, 1882 (c. 75), s. 3.

1822. Loan by wife to husband.]—HOLLIS'S (LORD) CASE (1680), 2 Vent. 345; 86 E. R. 477.

Annotation:—**Refd.** Crawford *v.* Crawford (1867), 16 W. R. 411.

1823. ——.]—The power of the wife to contract with her husband has been established, & although the bare handing over of a sum of money to the husband by the wife out of her separate income would not of necessity raise an *assumpsit;* yet, if the money is handed over upon a contract of loan, the wife may sue her husband in respect of that contract.—WOODWARD *v.* WOODWARD (1863), 3 De G. J. & Sm. 672; 8 L. T. 749; 9 Jur. N. S. 882; 11 W. R. 1007; 46 E. R. 797, L. C.

Annotation:—**Refd.** Butler *v.* Butler (1885), 14 Q. B. D. 831.

1824. ——.]—A *feme covert* can sue her husband in respect of money lent to him out of her separate estate. Pltf. lent to her husband £1,000, out of money left by will to her sole & separate use, upon the security of his promissory note:—*Held:* she was entitled to recover.—HORRELL *v.* HORRELL (1882), 46 J. P. 295, D. C.

1825. Purchase of wife's property by husband.]—A wife may, in many respects, enter into a contract for valuable consideration with her husband; so, conversely, a husband may become a purchaser from his wife of property belonging to her.—HEWISON *v.* NEGUS (1853), 16 Beav. 594; 1 Eq. Rep. 230; 22 L. J. Ch. 655; 21 L. T. O. S. 203; 17 Jur. 567; 51 E. R. 909, L. JJ.

Annotations:—**Apld.** Teasdale *v.* Braithwaite (1876), 4 Ch. D. 85; *Re* Foster & Lister (1877), 6 Ch. D. 87. **Refd.** Butler *v.* Butler (1885), 14 Q. B. D. 831.

1826. Money paid by husband for wife—Remedy against separate estate.]—Before the coming into operation of Married Women's Property Act, 1882 (c. 75), a husband in a ct. of equity might make his wife a deft. to a suit respecting her separate estate, & might obtain a decree against her for breach of any contract, whereby she had intended to bind the same, & that statute has not deprived a husband of any right or remedy, to which, if it had not been passed, he would have been entitled as against his wife in respect of her separate estate; & therefore it is now competent to a husband to maintain an action against his wife, & to charge her separate estate for money lent by him to her after their marriage, & for money paid by him for her after their marriage at her request made before or after their marriage.—BUTLER *v.* BUTLER (1885), 16 Q. B. D. 374; 55 L. J. Q. B. 55; 54 L. T. 591; 31 W. R. 132; 2 T. L. R. 132, C. A.

Annotation:—**Refd.** *Re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148.

INCORPORATED *v.* MANSKE, [1920] 3 W. W. R. 78.—**CAN.**

b. —— ——.]—In a husband & wife transaction there is no presumption of undue influence; there is no burden cast on the person sustaining such a transaction to prove that the wife had independent advice; on the contrary the burden is upon the person attacking the transaction to prove affirmatively undue influence by the husband & knowledge thereof by the creditor.—BANK OF MONTREAL *v.* HOLOBOFF, [1924] 2 W. W. R. 675; 3 D. L. R. 418.—**CAN.**

c. —— *Sufficiency of.*]—A husband & wife joined in signing a contract for the purchase of a tractor:—*Held:* although undue influence & pressure was exercised by the husband upon the wife to induce her to sign the contract, & although probably, as between the husband & wife, the wife was a mere surety, yet it was not a case in which the wife could be relieved from her contract.—SMITH *v.* MAROHN, [1923] 2 W. W. R. 1155; 4 D. L. R. 206.—**CAN.**

PART VIII. SECT. 5, SUB-SECT. 2.

d. *General rule.*]—A conveyance direct from husband to wife is not necessarily void to all intents & purposes; in equity it may be valid.—JONES *v.* MCGRATH (1888), 15 O. R. 189.—**CAN.**

e. —— *Without intervention of trustee.*]—A married woman can make a contract with her husband for value without the intervention of a trustee or other third party. It is necessary, however, in order to establish a gift or sale between a husband & wife, that more absolute evidence be supplied than in ordinary cases between strangers. In all such transactions the evidence must be unequivocal & beyond suspicion.—SULLIVAN *v.* SCHOOL DISTRICT NUMBER ELEVEN, PARISH OF KENT TRUSTEES (1920), 47 N. B. R. 514.—**CAN.**

1822 i. *Loan by wife to husband.*]—The widow of the intestate claimed against his estate a sum of $700, which she alleged he had borrowed from her after her marriage, & about ten years before his death, for the purpose of buying a stock-in-trade. The money was deposited in a bank at the time of the marriage, which took place before C. S. U. C., c. 73:—*Held:* C. S. U. C., c. 73, gave her right to assert her proprietorship as against her husband.—*Re* LAWS, LAWS *v.* LAWS (1881), 28 Gr. 382.—**CAN.**

1825 i. *Purchase of wife's property by husband.*]—A married woman is not entitled by M. W. R. E. Act, 1873, to convey land to her husband. The requirement that the husband shall be a party to & execute such deed, means that he must be a grantor.—OGDEN *v.* MCARTHUR (1875), 36 U. C. R. 246.—**CAN.**

f. —— *Promise to re-transfer.*]—A wife claimed from her husband $1,600 being the purchase-money of lands transferred by her to him in 1918, or in the alternative the cancellation of the transfer. Deft. alleged that the lands were formerly his property & had been transferred to his wife by him fraudulently with intent to defeat his creditors, & for no consideration, & that she had

1827. Application of Statute of Frauds—Money provided by husband—At request of wife—Purchase of lease.]—A wife residing with her husband, & desirous of moving into a larger house, requested him to buy the residue of the lease of a particular house, & made a verbal promise to him that if he did so she would pay to him the amount of the purchase money. The husband bought the lease, & the parties moved into the house & resided there. In an action by the wife against her husband he counterclaimed for the amount that he had paid:—*Held:* as the husband was not bound by the terms of the contract to acquire any interest in land, the promise to pay if he did so was not a contract to which Stat. Frauds, s. 4, applied.—BOSTON *v.* BOSTON, [1904] 1 K. B. 124; 73 L. J. K. B. 17; 89 L. T. 468; 52 W. R. 65; 20 T. L. R. 23; 48 Sol. Jo. 32, C. A.

Annotation:—**Apld.** *Re* Banks, Weldon *v.* Banks (1912), 56 Sol. Jo. 362.

1828. Indemnity to husband by wife—In respect of rent.]—A verbal agreement by a wife to keep her husband indemnified in respect of the rent of a house is not an agreement or contract to which Stat. Frauds, s. 4, applies.—*Re* BANKS, WELDON *v.* BANKS (1912), 56 Sol. Jo. 362.

Stat. Frauds, *see* CONTRACT, Vol. XII., pp. 118 *et seq.*

1829. Money kept in joint account—Rights of husband & wife.]—On Dec. 4, 1902, a marriage took place. The husband at that time had an account at a bank in S. This account was on Dec. 17, 1902, transferred to the joint names of himself & his wife, & drawn on by both husband & wife. On May 18, 1903, when the husband was absent, the wife deposited with the bank the deeds of a house belonging to her, & charged them for the debt then or thereafter to become due to the bank from her either solely or jointly with any other person & agreed to execute a legal mtge. containing a covenant for payment & a power of sale & other proper clauses. The wife died on Aug. 27, 1904, leaving furniture worth £300 to the husband absolutely, & the house she had mortgaged to the bank, worth about £1,400 to her husband for life, with remainder to her next of kin. The overdraft on May 18, 1903, was £107 & at the date of her death it was £414. The wife had paid in about £100 into the account:—*Held:* the inference was that the husband & wife agreed to provide jointly for current household expenses, & each of them ought to pay one moiety of the overdraft.—*Re* SHAW, SHAW *v.* JONES (1906), 94 L. T. 93.

1830. —— ——.]—Since Married Women's Property Act, 1882 (c. 75), a gift of chattels can be made to a husband & wife jointly as effectively as it can to two persons between whom the marriage relationship does not exist. A husband & wife can make a valid contract with respect to the ownership or enjoyment of chattels in their joint possessions as effectively as two persons can between whom the marriage relationship does not exist, & such a contract & its terms may be inferred from the terms & manner on & in which the parties have dealt & acted. If a husband & wife each have some cash & income, & they mutually arrange that her money & his shall form a joint fund kept in an account in the husband's name for the purpose of their joint establishment, & the ct. can infer that things have been purchased by the two & paid for out of the joint fund, such things are not exclusively the husband's in the sense that on deserting his wife he can bring an action to recover possession of them & claim to be entitled to deprive her of any right to them.—HUNT *v.* HUNT (1908), 25 T. L. R. 132.

SUB-SECT. 3.—LOANS FOR PURPOSE OF BUSINESS.

See Married Women's Property Act, 1882 (c. 75), s. 3.

See, now, Bkpcy. Act, 1914 (c. 59), s. 36 (2).

Postponement of wife's claim in bankruptcy.]—*See* BANKRUPTCY, Vol. IV., pp. 481, 482, Nos. 4335–4341.

Proof in administration of insolvent estate.]—*See* EXECUTORS, Vol. XXIV., p. 815, No. 8484.

Right of retainer as representative.]—*See* EXECUTORS, Vol. XXIII., p. 379, Nos. 4484, 4485.

4.—LIMITATION OF ACTIONS.

See, generally, LIMITATION OF ACTIONS.

1831. Applicability of statute.]—In 1875 a arried woman borrowed money from her husband a pa greement to repay him the amount with inte out of her separate estate. She in ... without having paid anything in respect either of interest or principal & without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—*Held:* the debt was barred by analogy to Stat. Limitations.—*Re* HASTINGS (LADY), HALLETT *v.* HASTINGS). 94; 56 L. J. Ch. 631; 57 L. T. ; 52 J. P. 100; 35 W. R. 584; 3 T. L. R. 499, C. A.

Beck *v.* Pierce (1889), 23 Q. B. D. 316; springs Bleaching & Dyeing Co., [1922]

promised to retransfer them upon his request. Pltf. alleged that the transfer was made to her by deft. in consideration of certain stock bought by deft. with pltf.'s money:—*Held:* it was immaterial whether transfer had been made in exchange for stock or with intent to defeat creditors. In either case pltf. became absolute owner, & had a right to dispose of the same, & she was not bound by any promise to retransfer.—TUCKER *v.* TUCKER (1921), 67 D. L. R. 762.—**CAN.**

g Wife indorsee of husband's promissory note.]—Under M. W. P. Acts of Nova Scotia, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband.—MICHAELS *v.* MICHAELS (1900), 30 S. C. R. 547.—**CAN.**

h. *Contract of partnership—Validity.*]—As regards her power to contract & to hold & dispose of property, the wife is for all purposes in the same position as a feme sole; she can contract with her husband as with any other person as a feme sole, & there seems to be no possible reason why she should not enter into a contract of partnership either with her husband or with any other person, so far as to be, to all intents & purposes a partner entitled by virtue of her contract to a share in the profits, & subject as a partner to the partnership debts & liabilities.—ENGLAND *v.* ENGLAND (1901), 5 Terr. L. R. 204.—**CAN.**

.]—A wife cannot enter into a contract of copartnership with her husband to carry on a trade with him, though possessed of funds independently of him.—MACARA *v.* WILSON (1848), 10 Dunl. (Ct. of Sess.) 707; 20 Sc. Jur. 227.—**SCOT.**

l. *Undue influence—Burden of proof.*]—In transaction between husband & wife, the burden of proving undue influence lies upon those who allege it.—EUCLID AVENUE TRUSTS Co. *v.* HOUS (1911) 19 O. W. R. 991; 3 O. W. N. 3 24 O. L. R. 447.—**CAN.**

m. —— ——.]—In regard to a transaction between husband & wife for the benefit of the husband, there is no presumption of undue influence, & no burden is cast on the person sustaining such a transaction to prove that the wife had independent advice; on the contrary, it lies upon the person attacking the transaction to prove affirmatively undue influence by the husband & knowledge thereof by the creditor.—HUTCHINSON *v.* STANDARD BANK OF CANADA (1917), 39 O. L. R. 286; 36 D. L. R. 378.—**CAN.**

n. —— ——.]—There is a duty upon the husband or the person endeavouring to uphold a transaction between husband & wife to prove that the nature of the transaction was explained to the wife.—BANK OF MONTREAL *v.* HOLOBOFF, [1924] 2 W. W. R. 675; 3 D. L. R. 418.—**CAN.**

5.—*Contracts with husband: Sub-sect.* 4. *Parts IX. & X. Sects.* 1 & 2: *Sub-sect.* 1.]

2 Ch. 268. **Mentd.** *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482.

1832. —— Husband & wife living together—Non-payment of interest.]—By a marriage settlement, dated in 1847, a fund belonging to the wife was vested in trustees in trust for investment "on real or personal securities bearing interest," with power of varying investments with the written consent of the husband & wife or the survivor, & to pay the income to the wife for her separate use without power of anticipation, then to the husband for life, & after the death of the survivor, as to the capital, upon the trusts therein mentioned. In 1852 the trustees, on the written consent of the wife, lent the trust fund in cash to the husband on the security of his bond in a penal sum, conditioned for repayment to the trustees of the sum advanced with interest at 4 per cent. *per annum* six months after date. The bond contained no stipulation in terms for payment of interest beyond the six months. The husband & wife lived together in amity for more than twenty years after the date of the bond, the wife dying in 1876 & the husband in 1896. At his death the bond was found in his possession. He never, either during his wife's lifetime or afterwards, paid any interest on the bond or gave any written acknowledgment of his indebtedness under it:—*Held:* the bond debt was not barred by Stat. Limitations, s. 5, on the grounds that the bond, being a penalty bond, was an interest-bearing security carrying interest, though not mentioned, beyond the date fixed for payment of the debt; that as the husband & wife had lived together in amity it was unnecessary, in order to prevent the statute from running, to go through the formality of the husband paying the interest to the trustees, the trustees paying it to the wife, & the wife paying it to the husband; & that, as the husband took with full notice that the money lent was trust money & liable to investment on interest bearing security, he was in the position of an express trustee.—*Re* DIXON, HEYNES *v.* DIXON, [1900] 2 Ch. 561; 69 L. J. Ch. 609; 83 L. T. 129; 48 W. R. 665; 44 Sol. Jo. 515, C. A.

Annotations:— **Apld.** *Re* Eyre-Williams, Williams *v.* Williams, [1923] 2 Ch. 533. **Mentd.** *Re* Drax, Savile *v.* Drax, [1903] 1 Ch. 781.

1833. Non-payment of capital money to trustees of settlement.]—Testator, who was entitled to a mtge. debt vested in a trustee for him, assigned the same to the trustees of his marriage settlement in 1886 upon trusts under which he took the first life interest, & his wife a life interest after his death, subject to a restraint upon anticipation, with an ultimate trust in default of children, as happened, for testator absolutely. The trustees of the mtge. debt was neither a party to, nor informed of, the settlement. In 1887 the mtge. money was paid to testator, who never accounted for it to the settlement trustees. He died in 1916, & the trustees & widow now claimed the mtge. moneys:—*Held:* (1) testator was a constructive trustee who had constituted himself such by receiving trust property with the knowledge that it was trust property & the persons representing his estate were not entitled to avail themselves, by analogy, of Stat. Limitations, but must make good the mtge. money to the trustees of the settlement; (2) no acquiescence on the part of the wife while she was restrained from anticipation could prejudicially affect her claim.—*Re* EYRE-WILLIAMS, WILLIAMS *v.* WILLIAMS, [1923] 2 Ch. 533; 92 L. J. Ch. 582; 129 L. T. 218; 67 Sol. Jo. 500.

Part IX.—Contracts of Woman passing as Wife.

1834. Authority to pledge credit—Implied from cohabitation.]—CAR *v.* KING, No. 1723, *ante.*

1835. —— ——.]—JEWSBURY *v.* NEWBOLD, No. 1521, *ante.*

1836. —— ——.]—The mere fact that a man has allowed a woman to call herself by his name, he not cohabiting with her nor otherwise holding her out as his wife, will not suffice to make a *primâ facie* case against him of liability for her debts.—GOMME *v.* FRANKLIN (1859), 1 F. & F. 465.

1837. —— Knowledge of creditor.]—If a man allows a woman to use his name, & pass for his wife, he shall be bound to pay for goods furnished to her, even by a man who knew that the parties were not married.—WATSON *v.* THRELKELD (1798), 2 Esp. 637, N. P.

1838. —— —— Bigamous marriage.]—If a man marries a woman, & holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself & another woman still alive; unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife.—ROBINSON *v.* NAIION (1808), 1 Camp. 245, N. P.

1839. —— ——.]—Deft. & a Mrs. S., his mistress, lived together as husband & wife four years, & occupied three residences successively. At each time of their coming into a house, pltf. was employed to do work & furnish materials for the fitting up. Mrs. S. as well as deft. gave directions; & deft. sanctioned her orders & paid the bills. Pltf. knew that she was only his mistress. While residing in the third house they separated; but Mrs. S., without deft.'s sanction, sent for pltf. to that house, which she had not yet left, & ordered fittings up for a new house of her own. Pltf. did the work, & had not, in the mean time, any notice of the separation:—*Held:* in an action for the last-mentioned work & goods, it was a proper question for the jury, whether or not deft. had given pltf. reason to believe that Mrs. S. at the time of the orders, continued to be deft.'s agent; & that, on their finding in the affirmative, deft. was liable.—RYAN *v.* SAMS (1848), 12 Q. B. 460; 17 L. J. Q. B. 271; 11 L. T. O. S. 221; 12 Jur. 745; 116 E. R. 940.

Annotation:— **Refd.** Miss Gray, Ltd. *v.* Cathcart (1922), 38 T. L. R. 562.

1840. —— Revocation by separation.] — Although a man is conclusively liable for necessaries supplied to a woman while he is living with her as his wife, when they have separated he is not liable for necessaries supplied to her on

PART IX.

o. *Recognition as wife.*] A recognition by a person that A. is his wife is sufficient to charge him with necessaries although she may not *stricti juris* be his wife.—HAWLEY *v.* HAM (1826), Tay. 385.—**CAN.**

the ground that he has lived with her & represented her as his wife, if he can show that in point of fact they were not married.—MUNRO *v.* DE CHEMANT (1815), 4 Camp. 215, N. P.

Annotation :— **Consd.** Ryan *v.* Sams (1848), 12 Q. B. 460.

1841. —— ——.]—RYAN *v.* SAMS, No. 1839, *ante.*

1842. —— **Revocation by death of paramour.**]—A., having for some years cohabited with B. who passed for his wife, went abroad, leaving B. & her family at his residence in this country, & died abroad :—*Held :* (1) B. might have the same authority to bind A. by her contracts for necessaries as if she had been his wife ; (2) A.'s exor. was not bound to pay for any goods supplied to B. after his death, although before information of his death had been received.

There is no doubt that a man may make an express contract for goods to be supplied to his wife or mistress after his death, for which his estate would be liable (BAYLEY, J.).—BLADES *v.* FREE (1829), 9 B. & C. 167 ; 4 Man. & Ry. K. B. 282 ; 7 L. J. O. S. K. B. 211 ; 109 E. R. 63.

Annotations :—*As to* (1) **Consd.** Bradbury *v.* Morgan (1862), 1 H. & C. 249. *As to* (2) **Refd.** Smout *v.* Ilbery (1842), 10 M. & W. 1 ; Bradbury *v.* Morgan (1862), 1 H. & C. 249 ; Salton *v.* New Beeston Cycle Co. (1899), 69 L. J. Ch. 20.

1843. ——.]—A man went with a woman to a mercer's, bought some goods for her, & had them sent to his house. The woman afterwards went alone & ordered other goods, which were sent to the same place :—*Held :* if the man in any way represented her to be his wife, he was liable for the last-mentioned goods.—GRAHAM *v.* BRETTLE (1851), 18 L. T. O. S. 185, N. P.

Part X.—Wrongs of Wife during Coverture.

SECT. 1.—CRIMES AND OFFENCES.

See CRIMINAL LAW, Vol. XIV., pp. 69–74, Nos. 337–415.

1844. Offence against revenue—Authority of husband.]—A wife possessed authority from her husband, a paper maker, to give in his absence certain requisite excise notices & receipts, without which paper could not legally be removed from the mill, though the making it might continue. She had also paid excise duty by his authority. But it did not appear that she had any other authority from him respecting the manufacture, or to remove paper at all. She afterwards removed paper in an illegal manner & pledged it, stating that she wished to make up a sum to pay duty with. The husband having been proceeded against for such removal :—*Held :* her former acts were evidence to be left to the jury to decide whether or not the illegal act was done by his authority.—A.-G. *v.* RIDDLE (1832), 2 Cr. & J. 493 ; 2 Tyr. 523 ; 1 L. J. Ex. 182 ; 149 E. R. 209.

Annotations :—**Expld.** Lyons *v.* Martin (1838), 8 Ad. & El. 512. **Refd.** The Druid (1842), 1 Wm. Rob. 391.

1845. Offence against Licensing Act—Liability of husband.]—A. was charged under Licensing Act, 1872 (c. 94), s. 3, with selling intoxicating liquor without a license. A. kept a tobacco shop & refreshment house, but had no license to sell liquors by retail. A.'s wife sold bottles of ale to customers, but there was no evidence that A. knew anything of her so acting. The justices held A. liable for the acts of his wife, & convicted A. :—*Held :* the justices were wrong.—ALLEN *v.* LUMB (1893), 57 J. P. 377, D. C.

1846. Offence against local market Act—Liability of husband—Taunton Market Act, 1769 (c. lxiv).]—Above Act prohibits the sale of meat within a prescribed distance of the bounds of the market place, & imposes a penalty on anyone who shall, without licence, vend meat or expose it for sale in any shop :—*Held :* this prohibition included the sale by the butcher himself, or his servant or agent. But where the facts found by justices were that the wife of a butcher, licensed to sell pork only, & not mutton, at his shop, acted without his consent or authority, expressed or implied, in selling mutton from the carcase of a sheep not intended for sale, but accidentally in the shop owing to other premises being closed, the justices were right in holding that the butcher was not responsible for the act of his wife, to which he was in no way party.—WAKE *v.* DYER (1911), 104 L. T. 448 ; 75 J. P. 210 ; 9 L. G. R. 348 ; 22 Cox, C. C. 413, D. C.

Annotation :—**Mentd.** Director of Public Prosecutions *v.* Wilkowski (1911), 104 L. T. 453.

SECT. 2.—TORTS.

SUB-SECT. 1.—IN GENERAL.

See, now, Married Women's Property Act, 1882 (c. 75), s. 1 (2).

1847. General rule.]—In an action for the false & fraudulent representation of a married woman, that certain acceptances were the acceptances of her husband, whereby pltfs. were induced to discount them, & sustained loss through their turning out to be forgeries :—*Held :* (WILLIAMS & WILLES, JJ.), the husband was properly joined as a deft. ; (ERLE, C.J., & BYLES, J.), he was not, the false representation being in substance a warranty of a debt, & so in the nature of a contract.

As a general rule a married woman is answerable for her wrongful acts, including frauds, & she may be sued in respect of such acts jointly with her husband or separately if she survives him. The liability is hers, though, living with her husband, it must be enforced in an action against her & him, which, to charge him must be brought to a conclusion during their joint lives (WILLES, J.).—WRIGHT *v.* LEONARD (1861), 11 C. B. N. S. 258 ; 30 L. J. C. P. 365 ; 5 L. T. 110 ; 8 Jur. N. S. 415 ; 9 W. R. 944 ; 142 E. R. 796.

Annotations :—**Consd.** Bartlett *v.* Wells (1862), 1 B. & S. 836 ; Earle *v.* Kingscote, [1900] 2 Ch. 585 ; Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Burnard *v.* Haggis (1863), 14 C. B. N. S. 45.

PART X.

p. *Married Women's Property Acts —Husband liable.*]—A husband is still liable for the torts of his wife if the marriage took place before July 1, 1884. The provisions of M. W. P. Act, 1884, applicable to persons married before that date, do not relieve him from liability.—TRAVISS *v.* HALES (1903), 24 C. L. T. 12 ; 6 O. L. R. 574 ; 2 O. W. R. 309, 1037.—**CAN.**

q. —— ——.]—Action against a husband & wife alleged to have been married before 1884, for a tort committed by the wife :—*Held :* the husband was properly joined as a party.—LEE *v.* HOPKINS (1890), 20 O. R. 666.—**CAN.**

r. —— ——.]—Under the law of Alberta a husband is liable for the torts of his wife.—MCARTHUR *v.* TYAS, [1920] 2 W. W. R. 485.—**CAN.**

s. —— ——.]—A husband is responsible for the negligent acts of his wife done in the course of his business while she is acting as manager thereof during his absence.—KENEALY

Sect. 2.—Torts: Sub-sects. 1, 2, 3, 4, 5 & 6.]

1848 Married Women's Property Act, 1882 (c. 75), s. 1 (2)—Joint liability of husband.]—Above Act does not abolish the liability of a husband for his wife's wrongful acts, & pltf. may sue the husband & wife jointly or the wife alone for wrongs committed by her after the marriage.—SEROKA *v.* KATTENBURG (1886), 17 Q. B. D. 177; 55 L. J. Q. B. 375; 54 L. T. 649; 34 W. R. 542, D. C.

Annotations:—**Apprvd.** Earle *v.* Kingscote, [1900] 2 Ch. 585. **Dbtd.** Cuenod *v.* Leslie, [1909] 1 K. B. 880. **Consd.** Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Beaumont *v.* Kaye, [1904] 1 K. B. 292.

1849. —— ——.]—EARLE *v.* KINGSCOTE, No. 1880, *post.*

1850. —— - —.]—Sect. 1 (2) of above Act has not abolished the common law right to sue both husband & wife for a tort committed by the wife during coverture, & in such an action the husband & wife cannot put in separate & inconsistent defences. A husband & wife were sued in the old common law form of action for a libel written & published by the wife during coverture. One statement of defence was delivered. In paragraph 1 the husband said that so far as he was liable, as the husband of the other deft., he paid money into ct. in satisfaction of the claim. In paragraphs 2 to 5 the wife pleaded a denial of liability:—*Held:* there could be only one defence to the action, namely, the one which the husband put on the record, & the inconsistent defence of the wife must be struck out.—BEAUMONT *v.* KAYE, [1904] 1 K. B. 292; 73 L. J. K. B. 213; 90 L. T. 51; 52 W. R. 241; 20 T. L. R. 183; 48 Sol. Jo. 206, C. A.

Annotation:—**Consd.** Edwards *v.* Porter, [1925] A. C. 1.

1851. —— ——.]—Notwithstanding above Act, which provides that a married woman shall be capable of suing or being sued as if she were a *feme sole*, a husband is still liable to be sued with his wife for a tort committed by her during coverture, unless the tort is directly connected with a contract with her & is the means of enforcing it.

A married woman, by fraudulently misrepresenting that her husband wanted money to pay rates & do repairs to his house property, induced certain persons to advance a sum of money, which she spent for her own purposes. The husband never authorised his wife to borrow the money or make the representation on his behalf. In an action by the lenders against the husband & wife for the fraud of the wife:—*Held:* the husband was not liable: (LORD FINLAY, ATKINSON & SUMNER, L.JJ.), on the ground that the wife impliedly warranted that she had her husband's authority to borrow the money on his behalf, & therefore the fraud was connected with a contract; (LORD CAVE, C., LORD BIRKENHEAD), on the ground that the Married Women's Property Act, 1882, had abrogated the common law rule as to the husband's liability for his wife's torts.—EDWARDS *v.* PORTER, [1925] A. C. 1; 94 L. J. K. B. 65; 132 L. T. 496; 41 T. L. R. 57; 69 Sol. Jo. 87, H. L.; *affg.* S. C. *sub nom.* EDWARDS *v.* PORTER, MCNEALL *v.* HAWES, [1923] 2 K. B. 538, C. A.

1852. Tort of wife against husband—Liability of husband.]—A legacy was bequeathed in trust for tenant for life, & after her decease to be distributed amongst a class of persons, one of whom was a female, H. During the lifetime of the tenant for life, H., representing herself to the trustee as a married woman, requested him to make two several advances, amounting to nearly the value of the whole of her share, to R., her reputed husband. This the trustee did, relying on the representations of H. & R. as to their being married, & on receiving the consent of R. to pay interest on one of the sums so advanced, & that both sums, together with interest on the other advance, should be allowed in account as part of H.'s, then reversionary, share. No interest was paid to the trustee; but he continued to pay the income of the fund to the tenant for life out of his own pocket. Upon the death of the tenant for life, the fund fell into possession, & it then came to light that H. had been married to pltf. many years prior to the advance, had deserted her husband, & not having, as she said, seen or heard of him for many years had married R. Pltf. claiming the share in right of his wife, the trustee asked to be allowed to set off the advances, on the ground that pltf. was liable for the torts of his wife. The ct. considered that pltf. could not be held liable for the wrongs of his wife committed against himself, & held, as the trustee had been guilty of a breach of trust, he was liable to make good to pltf. the whole fund, with costs of the suit.—SPORLE *v.* BARNABY (1864), 11 L. T. 412; 10 Jur. N. S. 1142; 13 W. R. 151.

SUB-SECT. 2.—TROVER AND CONVERSION.

Trover & conversion generally, *see* TROVER.

1853. Joint liability of husband—Conversion by wife.]—An action of trover brought against baron & *feme* for a conversion during the coverture by the wife:—*Held:* good, for although *feme covert* cannot make a contract for goods nor be charged for them, yet she may convert them.—NEWMAN *v.* CHEYNEY (1603), Noy, 79; 74 E. R. 1046.

1854. —— ——.]—DRAPER *v.* FULKES (1609), Yelv. 165; 80 E. R. 110.

1855. —— ——.]—WOOD *v.* SUCKLING (1617), Cro. Jac. 439; 3 Bulst. 150; 1 Roll. Rep. 293; 79 E. R. 375.

Annotation:—**Mentd.** Gregory *v.* Brunswick (1846), 3 C. B. 481.

1856. —— —— **Must be alleged to use of husband.**]—In trover against husband & wife, the conversion must be alleged to the use of the husband, & not to her or their use.—BERRY *v.* NEVYS (1623), Cro. Jac. 661; W. Jo. 16; Palm. 343; 79 E. R. 572, Ex. Ch.

Annotation:—**Consd.** Vine *v.* Saunders (1837), 4 Bing. N. C.

1857. -.]—Trover lies against husband & wife for a conversion by the wife only; but if it be alleged *ad usum ipsorum*, it is bad.—RHEMES *v.* HUMPHREYS (1632), Cro. Car. 254; 79 E. R. 821; *sub nom.* BULLENS CASE, W. Jo. 264.

1858. —— —— ——.]—Judgment in trover against husband & wife reversed because the conversion was stated to be *ad usum ipsorum.*—PERRY *v.* DIGGS (1638), Cro. Car. 494; 79 E. R. 1027.

1859. —— —— ——.]—Declaration in trover against husband & wife stated that defts. converted the property to their own use:—*Held:* sufficient after verdict.—KEYWORTH *v.* HILL (1820), 3 B. & Ald. 685; 106 E. R. 811.

Annotation:—**Consd.** Vine *v.* Saunders (1837), 4 Bing. N. C.

v. KARAKA (1906), 26 N. Z. L. R. 1118.—**N.Z.**

t. —— *Husband not liable.*]—Since M. W. P. Act, 1882, a husband is not liable for his wife's torts.—BROWN *v.* HOLLOWAY (1909), 10 C. L. R. 89.—**AUS.**

a. ——.]—In Alberta a husband cannot be made liable for his wife's separate torts, since he is not a necessary or proper party deft. to the action against her.—QUINN *v.* BEALES, [1924] 3 W. W. R. 337; 4 D. L. R. 635.—**CAN.**

1860. .]—Bailiffs charged to execute process against the goods of J. wrongfully took pltf.'s cattle in execution, & lodged them in the stable of an inn kept by deft. K. Pltf. demanded them of deft.'s wife, he being absent; the wife said she would consider, & make inquiry; & on a subsequent demand, told pltf. that she was indemnified by the attorney who had issued the process, & that pltf. need not apply again. The cattle were detained, & sold under the execution, K. continuing absent during the whole transaction. In trover against K. & his wife:—*Held:* the above facts were evidence on which a jury might find a conversion by the wife, for which trover lay against both defts.—CATTERALL *v.* KENYON (1842), 3 Q. B. 310; 2 Gal. & Dav. 545; 11 L. J. Q. B. 260; 6 Jur. 507; 114 E. R. 525.

Annotations:—**Mentd.** Marshall *v.* Newsom (1843), 7 Jur. 991; Towne *v.* Lowis (1849), 7 C. B. 608; Pillott *v.* Wilkinson (1864), 3 H. & C. 345.

SUB-SECT. 3.—LIBEL AND SLANDER.

Libel & slander generally, *see* LIBEL & SLANDER.

1861. Joint liability of husband—Slander by wife.]—QUELSH *v.* CARPENTER (1615), 3 Bulst. 62; 81 E. R. 53; *sub nom.* CARPENTER *v.* WELTCH, 1 Roll. Rep. 216.

1862. —— ——.]—BROWN *v.* AUDLEY (1620), Palm. 68; 81 E. R. 982.

1863. —— **Libel by wife.**]—BEAUMONT *v.* KAYE, No. 1850, *ante*.

1864. Liability of wife—Where no separate property.]—If a married woman be taken in execution for the damages & costs of an action of slander, the ct. will not discharge her, unless she shows that she has no separate property; & the burden of showing that lies upon her.—FERGUSON *v.* CLAYWORTH (1844), 6 Q. B. 269; 2 Dow. & L. 165; 13 L. J. Q. B. 329; 3 L. T. O. S. 185, 221; 8 Jur. 709; 115 E. R. 104.

Annotation:—**Refd.** Newton *v.* Boodle, Newton *v.* Rowe & Norman (1847), 11 Jur. 628.

1865. Joint liability of wife—Costs of unsucessful action.]—A married woman is liable to be taken in execution under a *ca. sa.* issued upon a judgment for deft. in an action for libel brought by her husband, in which she is joined; & therefore an action will not lie by husband & wife against deft. for maliciously & without reasonable & probable cause suing out a *ca. sa.* against the wife upon the judgment in the action of libel.—NEWTON *v.* BOODLE (1847), 9 Q. B. 948; 115 E. R. 1538; *sub nom.* NEWTON *v.* ROWE, NEWTON *v.* BOODLE, 16 L. J. Q. B. 146; 8 L. T. O. S. 364; 11 Jur. 628.

Annotations:—**Consd.** Morris *v.* Freeman (1878), 3 P. D. 65; Scott *v.* Morley (1887), 20 Q. B. D. 120. **Refd.** Clarkson *v.* Waterhouse (1860), 6 Jur. N. S. 326; Edwards *v.* Porter, [1925] A. C. 1.

1866. Pleading—Inconsistent defences by husband & wife.]—BEAUMONT *v.* KAYE, No. 1850, *ante*.

SUB-SECT. 4.—TRESPASS.

Trespass generally, *see* TRESPASS.

1867. Trespass of wife alone—Liability of husband.]—Judgment against husband & wife for a battery by the wife, the *capias* shall be against the husband only.—ANON. (1638), Cro. Car. 513; 79 E. R. 1042.

Annotation:—**Refd.** Newton *v.* Boodle, Newton *v.* Rowe & Norman (1847), 8 L. T. O. S. 364.

1868. —— ——.]—HARE *v.* WHITE (1692), 12 Mod. Rep. 19; 88 E. R. 1137.

1869. —— ——.]—Where judgment has been recovered in an action against husband & wife for an assault committed by the wife, who alone was in custody under a writ of *ca. sa.*, the husband having obtained his discharge as a bkpt., the ct. refused to interfere by ordering the wife's discharge, although she had no separate property.—LARKIN *v.* MARSHALL (1850), 4 Exch. 804; 1 L. M. & P. 186; 19 L. J. Ex. 161; 14 L. T. O. S. 352; 14 Jur. 46; 154 E. R. 1441.

Annotations:—**Consd.** Edwards *v.* Martyn (1851), 17 Q. B. 693. **Refd.** Ivens *v.* Butler (1857), 7 E. & B. 159; Scott *v.* Morley (1887), 20 Q. B. D. 120; Edwards *v.* Porter, [1925] A. C. 1.

1870. Joint trespass by husband & wife—Joint liability.]—Trespass against husband & wife. Upon not guilty pleaded, verdict for pltf. It was moved in arrest of judgment, that the wife could not be charged for the trespass of the husband, no more than they can be charged for the conversion of goods *ad usum ipsorum*. But the ct. overruled the exception.—WHITE *v.* ELDRIDGE (1699), 1 Ld. Raym. 443; 91 E. R. 1194.

1871. —— ——.]—Husband & wife may be jointly sued in trespass for their joint act.—VINE *v.* SAUNDERS (1837), 4 Bing. N. C. 96; 6 Dowl. 233; 3 Hodg. 291; 5 Scott, 359; 7 L. J. C. P. 30; 2 Jur. 136; 132 E. R. 725.

SUB-SECT. 5.—DEATH OF WIFE.

1872. General rule.]—WRIGHT *v.* LEONARD, No. 1847, *ante*.

1873. Husband not liable—Death after verdict & before judgment.]—Where after verdict in an action for slander by husband & wife against husband & wife for scandalous words spoken by one of the women of the other woman, the ct. was informed that one of the women was dead, judgment was stayed.—COWLEY *v.* POULTON (1616), Hob. 129; 80 E. R. 279.

1874. —— .]—CAPEL *v.* POWELL, No. 1875, *post*.

SUB-SECT. 6.—DIVORCE, JUDICIAL SEPARATION AND PROTECTION ORDER.

1875. Divorce—Tort committed during coverture—Husband not liable.]—A., a married woman, who, without the knowledge of her husband, B., had given pltf. into custody, was subsequently divorced *a vinculo* from her husband. Pltf. having, after such divorce, brought an action of false imprisonment against A. & B. jointly:—*Held:* B., having a divorce *a vinculo* from A., was not liable.

As a wife has no separate subsistence apart from her husband, if she commits a wrong, although

---

PART X. SECT. 2, SUB-SECT. 3.

1861 i. *Joint liability of husband—Slander by wife.*]—In an action brought for slander uttered by a wife her husband is a proper party & liable on a judgment against her.—QUINN *v.* BEALES, [1923] 3 W. W. R. 561; 4 D. L. R. 299.—**CAN.**

1861 ii. —— ——.]—BAILLIE *v.* CHALMERS (1791), 3 Pat. App. 213.—**SCOT.**

1861 iii. —— ——.]—MARTIN *v.* MURRAY (1803), Hume, 619.—**SCOT.**

1863 i. —— *Libel by wife.*]—MACKENZIE *v.* CUNNINGHAM (1901), 22 C. L. T. 43; 8 B. C. R. 206.—**CAN.**

b. *Liability of wife.*]—Under R. S. O. 1877, c. 125, in an action for slander committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone.—AMER *v.* ROGERS (1880), 31 C. P. 195.—**CAN.**

c. ——.]—Neither a husband nor his estate is answerable in damages for his wife's slander.—BARR *v.* NEILSON (1868), 6 Macph. (Ct. of Sess.) 651; 40 Sc. Jur. 337.—**SCOT.**

d. ——.]—A husband is not liable in damages for slander uttered by his wife.—MILNE *v.* SMITH (1892), 20 R. (Ct. of Sess.) 95; 30 Sc. L. R. 105.—**SCOT.**

Sect. 2.—Torts: Sub-sects. 6, 7, 8 & 9.]

she is liable for it, her husband must be joined in the action; . . . If, however, the wife dies the cause is put an end to & the husband is no longer liable; but if the husband dies the action does not abate (ERLE, C.J.).—CAPEL *v.* POWELL (1864), 17 C. B. N. S. 743; 5 New Rep. 131; 34 L. J. C. P. 168; 11 L. T. 421; 29 J. P. 8; 10 Jur. N. S. 1255; 13 W. R. 159; 144 E. R. 298.

Annotations:—**Consd.** Cuenod *v.* Leslie, [1909] 1 K. B. 880; Edwards *v.* Porter, [1925] A. C. 1. **Refd.** *Re* Beauchamp, *Ex p.* Beauchamp, [1901] 1 K. B. 572.

1876. Judicial separation—After action brought—Before judgment—Husband not liable.]—The intention & effect of Matrimonial Causes Act, 1857 (c. 85), s. 26, is to put the wife for all civil purposes in the same position as if her husband were dead during all the time that the decree of judicial separation is in force, &, therefore, the pronouncement of the decree, after the commencement of an action against a husband & wife for the wife's tort, but before judgment, entitles the husband to be discharged from the action to which he was a party only for the sake of a rule of conformity which no longer applies to the woman who is being sued. In an action against husband & wife for fraudulent representations by the wife after the marriage whereby pltf. sustained damage it appeared that the husband had no knowledge of or connection with the fraud, & that the wife had obtained a decree absolute for judicial separation from him after the commencement of the action but before judgment:—*Held:* upon the proper construction of Matrimonial Causes Act, 1857 (c. 35), s. 26, the husband was entitled to judgment.—CUENOD *v.* LESLIE, [1909] 1 K. B. 880; 78 L. J. K. B. 695; 25 T. L. R. 374; 53 Sol. Jo. 340; *sub nom.* CUENOD *v.* LESLIE, 100 L. T. 675, C. A.

Annotations:—**Distd.** Burdett *v.* Horne (1911), 27 T. L. R. 402. **Consd.** Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Ill *v.* Hawes, [1923] 1 K. B. 273.

1877. —— Separation obtained to escape liability—Husband liable.]—Pltf. sued defts., who were husband & wife, to recover £3,590, which he alleged he had been induced to pay by reason of certain false & fraudulent statements of the female deft. Defts. were living together at the time the money was so paid by pltf., but subsequently the male deft. obtained a judicial separation from his wife. At the trial the jury found that the alleged misrepresentations were made by the female deft. to the pltf.; that the alleged misrepresentations were not made by her as agent for her husband, that they were not made at his instigation, but that they were made with his knowledge, authority, & acquiescence; that the male deft. derived benefit by receiving £240 from his wife knowing it to be derived from the swindle; that the motive of the male deft. in petitioning for a decree of judicial separation from his wife was to avoid liability:—*Held:* there was evidence upon which the jury could find that the male deft. & his wife were joint tortfeasors.—BURDETT *v.* HORNE (1911), 28 T. L. R. 83, C. A.

Annotation:—**Consd.** Edwards *v.* Porter, [1925] A. C. 1.

——.]—*See* Matrimonial Causes Act, 1857 (c. 85), s. 26.

Protection order.]—*See* Matrimonial Causes Act, 1857 (c. 85), s. 21.

SUB-SECT. 7.—HUSBAND AND WIFE LIVING APART.

1878. Husband liable—Whether separation permanent or temporary.]—A man is answerable to a third person for what is done by his wife, so long as the relation of husband & wife continues, though they may be permanently living apart; at least, if it be not shown that the wife at the time was living in adultery.

Whether the separation be permanent or temporary it does not affect the question, unless it operates so upon the marriage as to make that civil relation cease; for, you cannot bring an action against the wife without joining the husband, & a man would be without remedy if he could not sue the husband (TINDAL, C.J.).—HEAD *v.* BRISCOE (1833), 5 C. & P. 484; 2 L. J. C. P. 101.

Annotations:—**Apld.** Capel *v.* Powell (1864), 17 C. B. N. S. 743. **Consd.** Edwards *v.* Porter, [1925] A. C. 1.

1879. —— Deed of separation.]—A husband, who is living apart from his wife under a separation deed, is liable to be sued jointly with his wife for torts committed by her.—UTLEY *v.* MITRE PUBLISHING CO. (1901), 17 T. L. R. 720.

SUB-SECT. 8.—TORTS ARISING OUT OF CONTRACT.

See, now, Married Women's Property Act, 1882 (c. 75), s. 1 (2).

1880. General rule.]—(1) Although a husband is not liable on his wife's contract, he is liable for any fraud or other tort committed by her during the coverture, unless it is directly connected with the contract & is the means of effecting or inducing it & is part of the same transaction. That liability, which existed before Married Women's Property Act, 1882 (c. 75), is not affected by the Act nor is the remedy of the party injured limited by the Act to the wife's separate estate, if any. Thus, where since the Act a contract had been entered into by K., a married woman, with E., under which E. was to pay K. a sum of money in a certain event, & subsequently K. induced E. to pay her the money by a false representation that the event had happened:—*Held:* as the contract had not been induced by the fraud & was altogether independent of it, K.'s husband was liable to E. in damages for his wife's fraud; & Married Women's Property Act, 1882 (c. 75), did not exempt the husband from his liability.

(2) The expression "need not be joined" in Married Women's Property Act, 1882 (c. 75), s. 1 (2), does not mean that, whenever a pltf. is suing a married woman in contract or in tort, he "shall not" join the husband with her, but only that the joinder, which was formerly necessary, is now unnecessary if pltf. is seeking to obtain satisfaction out of the wife's separate estate alone.—EARLE *v.* KINGSCOTE, [1900] 2 Ch. 585; 69 L. J. Ch. 725; 83 L. T. 377; 49 W. R. 3; 16 T. L. R. 511; 44 Sol. Jo. 625, C. A.

Annotations:—*As to* (1) **Folld. & Dbtd.** Cuenod *v.* Leslie, [1909] 1 K. B. 880. **Apld.** Burdett *v.* Horne (1911), 27 T. L. R. 402; Cole *v.* De Trafford, [1917] 1 K. B. 911. **Folld.** Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538. **Apprvd.** Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Beaumont *v.* Kaye, [1901] 1 K. B. 292; Leslie *v.* Shiell (1913), 29 T. L. R. 554.

1881. ——.]—EDWARDS *v.* PORTER, No. 1851, *ante.*

1882. Husband not liable—Fraudulent repre-

PART X. SECT. 2, SUB-SECT. 7.

1879 i. *Husband liable—Deed of separation.*]—A husband is still liable for his wife's tort though living apart from her under a deed of separation.—THOMAS *v.* PERHAM & PERHAM (1901), 21 N. Z. L. R. 199.—**N.Z.**

sentation by wife—That feme sole—Contract to marry.]—Case against the husband, for that the wife affirming herself to be *sole* procured pltf. to marry her.—COOPER *v.* WITHAM (1668), 1 Lev. 247 ; 1 Sid. 375 ; 2 Keb. 399 ; 83 E. R. 390.

Annotations :—**Apld.** Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854), 9 Exch. 422. **Consd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258 ; Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538. **Mentd.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88.

1883. —— —— —— Procuring advance to third party.]—A *feme covert* is responsible for all torts committed by her during coverture, & the husband must be joined as a deft. ; & consequently they are liable for frauds committed by her, as for other personal wrongs ; but when the fraud is directly connected with the contract with the wife, & is the means of effecting it, & parcel of the same transaction, the wife cannot be responsible, & the husband be sued for it together with the wife. Therefore an action will not lie against a husband & wife for a false & fraudulent representation by the wife to pltf., that she was *sole* & unmarried at the time of her signing a promissory note as surety to him for a third person, whereby pltf. was induced to advance a sum of money to that person.—LIVERPOOL ADELPHI LOAN ASSOCN. *v.* FAIRHURST (1854), 9 Exch. 422 ; 2 C. L. R. 512 ; 22 L. T. O. S. 318 ; 18 Jur. 191 ; 2 W. R. 233 ; *sub nom.* FAIRHURST *v.* LIVERPOOL ADELPHI LOAN ASSOCN., 23 L. J. Ex. 163.

Annotations :- **Consd.** Wright *v.* Leonard (1861), 11 C. B. N. S. 258. **Apprvd.** Earle *v.* Kingscote, [1900] 2 Ch. 585. **Distd.** Burdett *v.* Horne (1911), 27 T. L. R. 402. **Folld.** Cole *v.* De Trafford, [1917] 1 K. B. 911. **Consd.** Edwards *v.* Porter, McNeall *v.* Hawes, [1923] 2 K. B. 538. **Apld.** Edwards *v.* Porter, [1925] A. C. 1. **Refd.** Bartlett *v.* Wells (1862), 1 B. & S. 836 ; De Roo *v.* Foster (1862), 12 C. B. N. S. 272 ; *Re* Beauchamp, *Ex p.* Beauchamp (1901), 73 L. J. K. B. 311 ; Leslie *v.* Sheill, [1914] 3 K. B. 607.

1884. —— —— Acceptances acceptances of husband.]—WRIGHT *v.* LEONARD, No. 1847, *ante*.

1885. —— —— Of authority to contract for husband.]—A married woman, to enable a friend to borrow money, handed him a life insurance policy belonging to her husband &, at the request of the intending borrower, signed her husband's name to a document drawn up by the proposed lender authorising him to hold the policy as collateral security for the borrower's promissory note. Relying on this document the lender advanced the money to the borrower, who did not repay it. These acts of the wife were done without the knowledge or authority of her husband. In an action by the husband against the lender to recover the policy the lender counterclaimed against the husband & wife for the fraud of the wife :—*Held :* the wife warranted either that the document was a genuine document or that she had her husband's authority to sign it ; her fraud was therefore connected with a contract, & the husband was not liable.—MCNEALL *v.* HAWES. [1923] 2 K. B. 538 ; 92 L. J. K. B. 729 ; 129 L. T. 170 ; 39 T. L. R. 362 ; 67 Sol. Jo. 483, C. A.

Annotation :—**Consd.** Edwards *v.* Porter, [1925] A. C. 1.

1886. —— —— ——.]—EDWARDS *v.* PORTER, No. 1851, *ante*.

1887. —— Employment of servant by wife—Injury in course of employment.]—A chauffeur employed by a married woman in & about her garage was injured in the course of his employment through the defective condition of the garage. He brought an action against the married woman & her husband for an alleged tort committed by the former :—*Held :* the tort, if any, arose out of the contract of employment & the husband was not liable.—COLE *v.* DE TRAFFORD, [1917] 1 K. B. 911 ; 86 L. J. K. B. 764 ; 117 L. T. 224 ; 33 T. L. R. 249 ; 61 Sol. Jo. 354, D. C.

Annotation :—**Consd.** Edwards *v.* Porter, [1925] A. C. 1.

1888. Liability of married woman—Sued in tort—On obligation arising from contract.]—The rule is plain, both as to married women & infants, that you cannot by suing *ex delicto* change the nature & extent of their liability (BYLES, J.).—BURNARD *v.* HAGGIS (1863), 14 C. B. N. S. 45 ; 2 New Rep. 126 ; 32 L. J. C. P. 189 ; 8 L. T. 320 ; 9 Jur. N. S. 1325 ; 11 W. R. 644 ; 143 E. R. 360.

Annotations :—**Apprvd.** Leslie *v.* Sheill, [1914] 3 K. B. 607. **Refd.** Walley *v.* Holt (1876), 35 L. T. 631 ; Earle *v.* Kingscote, [1900] 1 Ch. 203 ; Fawcett *v.* Smethurst (1914), 84 L. J. K. B. 473.

SUB-SECT. 9.—TORTS AUTHORISED BY HUSBAND.

Liability of principal for torts of agent, *see* AGENCY, Vol. I., pp. 591 *et seq.*

1889. Husband liable.]—A baker was desirous of disposing of his shop & the goodwill of his business, & in consequence an advertisement was inserted in a newspaper, stating that the house was doing twelve sacks a week. The advertisement was inserted by the broker in consequence of a conversation with the baker's wife, who managed the business for him, in which conversation she told the broker that they did between nine & ten sacks a week, upon which he said : "We must make it twelve for the paper." In consequence of the advertisement, a person desirous of purchasing, went to the wife, & said to her : "Are you really doing anything like this business ?" to which she replied : "Yes, we are doing eleven sacks," & appealed to the man in the shop who confirmed her statement. The baker himself did not appear at all in any part in the transaction, except that he received the purchase money, & paid the broker his commission. In an action brought by the purchaser on the representation contained in the advertisement :—*Held :* the baker was personally & individually answerable in damages, inasmuch as though he did not make any representation himself, yet he made the wife his agent, & was bound by her statements.—TAYLOR *v.* GREEN (1837), 8 C. & P. 316, N. P.

1890. ——.]—Testator by will bequeathed the income of a fund in trust for his niece, a married woman, for life, for her separate use, without power of anticipation, & subject thereto for her children. By a codicil testator, after reciting that his niece's husband was dead, directed, that if she should marry again without the consent of the trustees, the benefit given to her under the will should cease, & she should take an annuity of £50 a year. The niece married again without the trustees' knowledge, & after they had refused their consent. She afterwards filed a bill describing herself as a widow, & made an affidavit declaring she was not married. In that suit certain orders were made in her favour. After her death the trustees discovered the marriage & filed a bill against the surviving husband, charging against him fraud, & subornation of perjury. It appearing from the evidence that the husband was cognisant of his wife's rights, & of the filing of the bill, he was decreed to recoup to the estate the sums that had been paid on the false statement of his late wife, & to pay the costs of pltfs., so far as they arose out of the allegations of fraud which had been established.—CHARLTON *v.* COOMBES (1863), 4 Giff. 382 ; 8 L. T. 653 ; 9 Jur. N. S. 904 ; 11 W. R. 1038 ; 66 E. R. 754.

1891. ——.]—Under what circumstances is a

Sect. 2.—*Torts: Sub-sects.* 9 & 10. *Sect.* 3. *Part XI. Sect.* 1: *Sub-sect.* 1.]

wife the agent of the husband in order to render him liable for the consequences of orders in his business given by her in his absence:—*Held:* a husband was liable in damages to a servant who had sustained injury by riding in a defective cart by the directions of the wife.—MIELL *v.* ENGLISH (1866), 15 L. T. 249, N. P.

1892. ——.]—BURDETT *v.* HORNE, No. 1877, *ante*.

SUB-SECT. 10.—PLEADING.

1893. Inconsistent defences by husband & wife—Libel by wife.]—BEAUMONT *v.* KAYE, No. 1850, *ante*.

SECT. 3.—BREACHES OF TRUST AND DEVASTAVIT.

See, generally, TRUSTS & TRUSTEES.

See, now, Married Women's Property Act, 1882 (c. 75), ss. 1 (2), 24.

1894. Breach of trust—Liability of husband—Though separated.]—Husband, though parted from his wife, charged in equity with his wife's wasting of goods, which were devised to her for her life only.—PAGET (LORD) *v.* READ (1682), 1 Vern. 143 1 Eq. Cas. Abr. 61; 23 E. R. 375.

1895. —.]—Testator bequeathed an annuity, charged upon certain real estate, to A., an unmarried woman, in trust to pay & apply the same in her discretion for the benefit of B., then an infant, during his life, & for his advancement, maintenance, or support, or otherwise for his benefit, & without being responsible or answerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode & extent of expending & laying out the same. After the death of the testator, A. married, & on the occasion of the marriage certain property was settled for her separate use. Her husband allowed her to receive the annuity or legal rentcharge, & she misapplied it:—*Held:* A.'s separate estate was not chargeable with the moneys so misapplied, but the husband only was liable, the tort being his, & there being no difference between general torts in reference to trusts & general torts at law.—WAINFORD *v.* HEYL (1875), L. R. 20 Eq. 321; 33 L. T. 155; 39 J. P. 709; *sub nom.* WAYNFORD *v.* HEYL, 44 L. J. Ch. 567; *sub nom.* WARNFORD *v.* HEYL, 23 W. R. 848.

Annotations:—**Refd.** *Re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180; Edwards *v.* Porter, [1925] A. C. 1. **Mentd.** Collett *v.* Dickinson (1878), 26 W. R. 403.

1896. —— ——.]—The defaults of a *feme* trustee during coverture are chargeable to her husband. Testator appointed his wife & two others exors. & trustees; directed his business & a leasehold house to be sold, & gave the residue, which was principally leasehold property, to his wife, directing that if she married again it should be settled to her separate use for life; then he bequeathed the house if not sold, & the money settled as above stated & all money, etc., so settled upon her for her lifetime, to certain other persons; but if his wife should not marry again he left the property to her own disposal at her death. The widow married again two years after testator's death; the leaseholds were not converted, & she received the entire income till her death, twenty-nine years afterwards, by which time the greater portion of the terms of years had run out. Her second husband, who survived his wife & her co-trustees, never acted in the trust:—*Held:* the leaseholds ought to have been converted upon the widow's second marriage, & the second husband was liable as a trustee having legal control over the trust property, for a breach of trust in permitting the tenant for life to receive the entire income of the unconverted property. The husband was ordered to recoup to the trust estate the difference between the income of the leaseholds received by himself or his wife during the coverture, & the dividends which would have been produced by a sale thereof at the time of her marriage & investment of the proceeds in Consols. *Semble:* the excess of income thus received by the tenant for life must be held as received by her husband through her hands.—*Re* SMITH'S ESTATE, CLIFFORD *v.* WASHINGTON (1879), 48 L. J. Ch. 205; 40 L. T. 389.

1897. —— —— **Breach arising from negligence.**]—A husband's liability for his wife's breaches of trust extends to breaches of trust arising from negligence & is not confined to losses caused by her active misconduct.—BAHIN *v.* HUGHES (1886), 31 Ch. D. 390; 55 L. J. Ch. 472; 54 L. T. 188; 34 W. R. 311; 2 T. L. R. 276, C. A.

Annotations:—**Mentd.** *Re* Partington, Partington *v.* Allen (1887), 57 L. T. 651; Bacon *v.* Camphausen (1888), 58 L. T. 851; Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337; Elvidge *v.* Bellingham (1893), 37 Sol. Jo. 600; Chillingworth *v.* Chambers, [1896] 1 Ch. 685; Robinson *v.* Harkin, [1896] 2 Ch. 415; *Re* Turner, Barker *v.* Ivimey, [1897] 1 Ch. 536; *Re* Taylor, Atkinson *v.* Lord (1900), 81 L. T. 812.

1898. —— **Liability of wife—Trust funds becoming assets of wife.**]—The rights of married women may be barred, & their estates affected, by active participation in breaches of trust, & if, their powers having been exercised by will, the trust funds become their assets, they must be liable for those breaches of trust. But the fact of a married woman having permitted her husband to receive the trust funds does not preclude a right to relief by her or her appointee, for that would be to defeat the purpose for which the trust was created, the protection of the wife against the husband.—HUGHES *v.* WELLS (1852), 9 Hare, 749; 20 L. T. O. S. 136; 16 Jur. 927; 68 E. R. 717.

Annotations:—**Refd.** Vaughan *v.* Vanderstegen (1853), 2 Drew. 165; Johnson *v.* Gallagher (1861), 3 De G. F. & J. 494. **Mentd.** Campbell *v.* Ingilby (1857), 29 L. T. O. S. 287; Shattock *v.* Shattock (1866), 14 L. T. 452 London Chartered Bank of Australia *v.* Lemprière (1873), L. R. 4 P. C. 572; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216; *Re* Armstrong, *Ex p.* Gilchrist (1886), 17 Q. B. D. 521; *Re* Whitaker, Ainley *v.* Ainley (1897), 41 Sol. Jo. 209.

1899. —— ——.]—In 1876 deft., a married woman, agreed to grant a lease of a piece of land to V., when he should have built a messuage thereupon, V. to have an option of purchasing the freehold. In 1877 V. assigned the agreement to pltfs. by way of mtge. In 1878 deft. conveyed the land to V.:—*Held:* (1) assuming that deft. had notice of the assignment of 1877, she had not committed a tort, but a breach of trust or implied contract which was not such an engagement as would have bound her separate estate before Married Women's Property Act, 1882 (c. 75); (2) Married Women's Property Act, 1882 (c. 75), s. 1 (2), is not retrospective as to engagements by a married woman.—DAVIES *v.* STANFORD (1889), 61 L. T. 234.

Devastavit.]—*See* EXECUTORS, Vol. XXIV., pp. 658 *et seq.*

Part XI.—Contracts for Separation.

SECT. 1.—VALIDITY.

SUB-SECT. 1.—IN GENERAL.

1900. Presumption of legality—Until contrary proved—Onus of proof of illegality.]—A separation deed recited that divers unhappy differences subsisted between the husband & wife, in consequence of which they had agreed to live separate. The husband then covenanted to pay an annuity to a trustee for the wife during her life; but there was no covenant on the part of the trustee, or any other person, to indemnify the husband against the debts of the wife. The husband died, & the annuity became in arrear:—*Held:* the covenant might be enforced against the husband's exors.; for, there being no evidence to the contrary, there might have been circumstances, alluded to by the recital, which would have warranted a divorce *a mensâ et thoro;* but that the covenant, being voluntary, could not be enforced against the husband's creditors.—CLOUGH *v.* LAMPERT (1839), 10 Sim. 174; 3 Jur. 672; 59 E. R. 579.

Annotations:—**Refd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538. **Mentd.** Fletcher *v.* Fletcher (1844), 4 Hare, 67; *Re* Cavendish Browne's Settlmt. Trusts, Horner *v.* Rawle (1916), 61 Sol. Jo. 27.

1901. Execution of deed as consideration for promise to pay.]—A deed of separation between a husband & his wife having been drawn up, but not executed by the husband:—*Held:* his executing such deed was a legal consideration for an agreement, by a third person, to pay a sum of money to the husband towards the discharge of certain debts & expenses, for which the husband was solely liable.—JONES *v.* WAITE (1842), 9 Cl. & Fin. 101; 4 Man. & G. 1104; 5 Scott, N. R. 951; 6 Jur. 653; 8 E. R. 353, H. L.; *affg.* (1839), 5 Bing. N. C. 341, Ex. Ch.; *sub nom.* WAITE *v.* JONES (1835), 1 Bing. N. C. 656.

Annotations:—**Consd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538. **Refd.** Evans *v.* Jones (1838), 3 J. P. 274 Clough *v.* Lambert (1839), 10 Sim. 171; Lound *v.* Grimwade (1888), 39 Ch. D. 605.

See, also, Nos. 1924, 1925, *post.*

1902. Deed partly valid & partly invalid—Whether divisible.]—*Qu.:* Whether an ante-nuptial contract, whereby the intended husband agreed to secure to the intended wife an annuity for her separate maintenance in the event of his death, or any separation taking place between them during their lives, is void; &, if not, whether such contract is valid so far as it is intended to secure an annuity to the wife in case of a separation or divorce for any cause; or whether it is valid to the extent of securing the annuity to the wife in case of desertion by the husband, or divorce without misconduct on the part of the wife; or whether it is valid only to the extent of securing the annuity to the wife in the event of her surviving the husband.—COCKSEDGE *v.* COCKSEDGE (1845), 5 Hare, 397; 67 E. R. 966.

1903. —— —— Deed & agreement for separation distinguished.]—(1) A married woman having instituted proceedings against her husband in the ecclesiastical ct. for a divorce, on the ground of adultery & cruelty, an agreement for a separation was made & signed by husband & wife, but not by any trustee on the lady's part, although a trustee was nominated in the agreement. Upon this the wife abandoned her suit. A deed, to which the trustee was made a party, was afterwards, in conformity with the agreement, prepared & engrossed, but the husband refused to execute it. The agreement, amongst other things, contained provisions as to the custody of the children, by which two would remain in the wife's custody & to the exclusion of the husband, & by which, in case one of the children residing with her should die, the husband should resign to her one of those residing with him. A demurrer for want of equity to a bill filed by the lady for specific performance of the agreement having been allowed, pltf. appealed:—*Held:* the provisions as to the custody of the children being against public policy, & an agreement for separation only having been executed, the ct. was bound to allow the demurrer.

(2) Where a deed of separation has been executed, the ct. will enforce such parts of it as are valid, & reject the rest; but *secus* in a mere agreement, which must be enforced in its entirety, if at all.

(3) Agreements for a separation between husband & wife are rather tolerated than encouraged by a ct. of equity (*per* CUR.).—VANSITTART *v.* VANSITTART (1858), 2 De G. & J. 249; 27 L. J. Ch. 289; 31 L. T. O. S. 4; 22 J. P. 704; 4 Jur. N. S. 519; 6 W. R. 386; 44 E. R. 984, L. C. & L. JJ.

Annotations:—*As to* (1) **Consd.** Swift *v.* Swift (1865), 34 Beav. 266; Hart *v.* Hart (1881), 18 Ch. D. 670; *Re* Ullee, Nawab Nazim of Bengal's Infants (1885), 53 L. T. 711. **Refd.** Walrond *v.* Walrond (1858), John. 18; *Re* Mathew's Settlmt. Trusts (1859), 5 Jur. N. S. 184; Hamilton *v.* Hector (1871), 6 Ch. App. 701; Cahill *v.* Cahill (1883), 8 App. Cas. 420. *As to* (2) **Consd.** Hamilton *v.* Hector (1872), L. R. 13 Eq. 511. **Refd.** Crouch *v.* Waller (1859), 4 De G. & J. 302; Hunt *v.* Hunt (1862), 31 L. J. Ch. 161; Cahill *v.* Cahill (1883), 8 App. Cas. 420; Butler *v.* Butler (1885), 16 Q. B. D. 374. *As to* (3) **Refd.** Clark *v.* Clark (1885), 10 P. D. 188.

1904. —— ——.]—MERRYWEATHER *v.* JONES, No. 1940, *post.*

1905. ——.]—A husband who, by his misconduct, had proved himself unfit to have the custody of his children, executed a separation deed, by which he covenanted that his wife should live separate, & that his children should at all times be under her sole care & management, & that he would pay her certain annuities for her own maintenance & that of the children:—*Held:* (1) under the circumstances, the covenant excluding the paternal right was not void as opposed to public policy; (2) it did not vitiate the rest of the deed; & accordingly a decree made by the M. of the R., at the suit of the wife, for payment of the annuities, & restraining the husband from removing or interfering with the children, was affirmed, on appeal, with a variation, however, making the injunction operate until further order only.

(3) The covenant was that the children should at all times thereafter be under the sole care, management & protection of the wife. There might thereafter be misconduct on her part, or other circumstances might arise to render it inexpedient that this covenant, although perfectly valid, should be strictly enforced (TURNER, L.J.).—SWIFT *v.* SWIFT (1865), 4 De G. J. & Sm. 710; 6 New Rep. 137; 34 L. J. Ch. 394; 12 L. T. 435; 29 J. P. 613; 11 Jur. N. S. 458; 13 W. R. 731; 46 E. R. 1095, L. JJ.

Annotations:—*As to* (1) **Consd.** Hamilton *v.* Hector (1872) L. R. 13 Eq. 511. **Refd.** Hamilton *v.* Hector (1871), 6 Ch. App. 701.

1906. —— ——.]—B. *v.* B. (1892), 8 T. L. R. 636; *sub nom.* BRUNTON *v.* DIXON, 36 Sol. Jo. 556.

Sect. 1.—*Validity: Sub-sects.* 1, 2 & 3, *A.*

1907. Proof of validity—Prior to appointment of new trustees.]—Upon a petition to appoint new trustees of a separation deed, on the death of the sole trustee, it was objected that the deed was void, in consequence of the father's thereby abandoning his right to the custody of his children. The ct. declined on this occasion deciding as to its validity, but appointed new trustees to protect the property.—*Re* MATTHEWS (1859), 26 Beav. 463; 28 L. J. Ch. 295; 32 L. T. O. S. 289; 5 Jur. N. S. 184; 7 W. R. 224; 53 E. R. 976.

1908. Provisions separated into two deeds.]—Pltf. & her husband, owing to unhappy differences, agreed to separate, the husband by a memorandum of agreement covenanting with trustees to settle £60 a year upon her for her life for her separate use. This annuity not being paid, pltf.'s mother brought an action against the husband for necessaries which she had supplied to pltf. & her children. A verdict was taken by consent, & the matters in dispute referred to arbitration. Under the award of the arbitrator a deed of separation was executed whereby, amongst other things, it was agreed that the wife should maintain & educate the children so long as the annuity of £60 a year was paid to her. There was also a proviso that if the husband & wife again cohabited the deed was to be void. By a deed of same date, & also made in pursuance of the award, an annuity of £60 was given to the wife for her separate use. The husband & the wife sometime afterwards cohabited for a few weeks, but again separated. The annuity not being paid, the wife filed a bill against the trustee, which the M.R. dismissed, he considering that the two deeds must be treated as one transaction, & that as the separation deed contained a clause, the maintenance of the children by the mother, contrary to public policy, both deeds were void:—*Held:* (1) the deed of settlement was independent of the deed of separation, & therefore the annuity of £60 was absolute; (2) the husband, by cohabiting again with his wife, had put an end to the agreement that she should maintain the children.—CROUCH *v.* WALLER (1859), 4 De G. & J. 302; 33 L. T. O. S. 215; 7 W. R. 523; 45 E. R. 117, L. C.

Annotation:—*As to* (1) **Refd.** Nicol *v.* Nicol (1886), 31 Ch. D 524.

1909. Necessity for stamp—Admissibility in evidence of agreement—In proceedings for separation.]—On an application by a wife for an order of separation from her husband, a written agreement of separation between the parties, if it is unstamped, is not admissible in evidence to prove that their separation was by agreement.—FENGL *v.* FENGL, [1914] P. 274; 84 L. J. P. 29; 112 L. T. 173 31 T. L. R. 45; 59 Sol. Jo. 42, D. C.

SUB-SECT. 2.—CONTRACTS FOR IMMEDIATE SEPARATION.

1910. Whether court will support.]—The ct. will not establish an agreement between a man & his wife to live separate.—WILKES *v.* WILKES (1757), 2 Dick. 791; 21 E. R. 478.

1911. ——.]—The ct. will not interfere in an agreement between *baron* & *feme*, whereby the *feme* is to give up part of her separate property to the husband in consideration of their living separate, although the application be made to the ct. by the *feme*.—DURAND *v.* DURAND (1789), 2 Cox, Eq. Cas. 207; 30 E. R. 96, L. C.

1912. ——.]—Agreements by husband & wife to live separate are legal. If you intend to set up adultery to avoid such agreement you ought to plead it. If the parties live together after the agreement, that will put an end to it. The wife's conduct towards her husband on coming back, is evidence on action by her trustee for the separate maintenance.—SCHOLEY *v.* GOODMAN (1823), 1 C. & P. 36, N. P.: *subsequent proceedings*, 1 Bing. 349.

Annotation:—**Mentd.** Fearon *v.* Aylesford (1881), 14 Q. B. D. 792.

1913. ——.]—SANDERS *v.* RODWAY, No. 2138, *post.*

1914. ——.]—WILSON *v.* WILSON, No. 2139, *post.*

1915. ——.]—VANSITTART *v.* VANSITTART, No. 1903, *ante.*

1916. -.]—*Qu.:* whether this ct. can sanction or consider as binding any agreement for a husband & wife to live apart.—HAYWARD *v.* HAYWARD (1859), 1 Sw. & Tr. 333; 164 E. R. 753.

1917. —— Civil & ecclesiastical law distinguished.]—HUNT *v.* HUNT, No. 2141, *post.*

1918. ——.]—A mutual agreement between husband & wife to live separate refused to be made an order of ct.—KIRKALDY *v.* KIRKALDY (1864), 4 New Rep. 447.

1919. ——.]—BESANT *v.* WOOD, No. 2090, *post.*

1920. ——.]—(1) A deed of separation between husband & wife is not contrary to public policy, & may be so framed as to be a good answer to a suit for restitution of conjugal rights.

(2) Renunciation by the husband of his rights in his wife's property constitutes a valuable consideration sufficient to support the engagements entered into with him (SIR JAMES HANNEN, P.).—MARSHALL *v.* MARSHALL (1879), 5 P. D. 19; 48 L. J. P. 49: 39 L. T. 610; 27 W. R. 399.

Annotations:—*As to* (1) **Consd.** Besant *v.* Wood (1879), 12 Ch. D 605; Clark *v.* Clark (1885), 10 P. D. 188; Welch *v.* Welch (1916), 85 L. J. P. 188. **Refd.** Aldridge *v.* Aldridge (1888), 13 P. D. 210; McGregor *v.* McGregor (1888), 20 Q. B. D. 529; Russell *v.* Russell, [1895] P. 315; Gleig *v.* Gleig (1906), 22 T. L. R. 716; Kennedy *v.* Kennedy, [1907] P. 49.

1921. Agreement on compromise of legal proceedings—Proceedings for assault.]—(1) The ct. will decree specific performance of an agreement for separation between husband & wife, although the agreement was made on a compromise of indictments preferred by the wife against the husband & others, for assaults on her. It is not illegal to compromise indictments for a misdemeanour; *secus*, as to indictments for felony.

(2) Where, in an agreement for a separation between husband & wife, trustees covenant to indemnify the husband against the wife's debts, that is a sufficient consideration for the agreement; & the ct. will not refuse to carry such an agreement into effect.—ELWORTHY *v.* BIRD (1825), 2 Sim. & St. 372; 3 L. J. O. S. Ch. 190; 57 E. R. 388.

Annotations:—*As to* (1) **Refd.** Keir *v.* Leeman (1844), 6 Q. B. 308; Wilson *v.* Wilson (1845), 14 Sim. 405. *Generally*, **Mentd.** Swinfen *v.* Swinfen (1857), 24 Beav. 549.

PART XI. SECT. 1, SUB-SECT. 2.

1910 i. *Whether court will support.*]—An agreement on good consideration between a husband & wife for immediate separation is binding & will be enforced.—CHRISTOFFERSON *v.* CHRISTOFFERSON, [1924] 3 W. W. R. 545; 4 D. L. R. 967.—**CAN.**

1910 ii. ——.]—A contract between spouses to live separate & apart is one which may be upheld & enforced.—COURTNEY *v.* COURTNEY, [1923] 2 I. R. 31.—**IR.**

e. *Agreement on compromise of legal proceedings for slander.*]—S. & K. agreed by deed to live apart. K. agreed to pay S. a certain sum per month, no period being mentioned for the continuance of the payments. S. agreed, in consideration of the monthly payment, to withdraw proceedings pending against K. upon a complaint which on the same day

1922. —.]—MCGREGOR *v.* MCGREGOR, No. 2004, *post.*

1923. —— Threatened proceedings.]—By post-nuptial settlement all the husband's property was vested in a trustee, in trust for the wife for life, for her separate use, but without power of anticipation, remainder to the husband absolutely; with a proviso, that if she should leave him on any account, except by his permission, or by reason of his breach of the laws against her, she should forfeit all interest under the settlement. Differences having arisen, articles of arrangement were agreed upon, by which the parties were to live separate & the wife was to have a fixed income, & a formal deed of separation was to be drawn up & executed. The husband threatened, unless this arrangement were carried out, to impeach the wife's interest under the settlement in various ways, & in particular it was clear that the whole of the premises were in his power, the settlement being voluntary, & that he might sell the whole to any purchaser for valuable consideration, & waste the proceeds:—*Held:* the arrangement was beneficial to the lady & ought to be carried out, the deed of separation to be settled, if necessary, by the judge.—SMITH *v.* SMITH (1854), 18 Jur. 1021.

1924. Separation in fact must take place.]—(1) Where a deed was made between husband, wife, & a trustee, providing a separate maintenance for the wife, & purporting to be made in contemplation of an immediate separation, but, in fact, no separation then took place, nor was intended to take place at that time:—*Held:* the deed was void.

(2) *Semble:* where, in pursuance of articles of separation securing a maintenance to the wife, she quits her husband's house against his wishes, & continues to live apart from him, although he is willing, & wishes to receive her back, & provide for her in his own house, he is not liable to be sued by tradesmen for debts contracted by her, even for necessaries.

(3) A deed providing for an immediate, &, in some cases, for a future separation of husband & wife, may be valid in law.—HINDLEY *v.* WESTMEATH (MARQUIS) (1827), 6 B. & C. 200; 9 Dow. & Ry. K. B. 351; 5 L. J. O. S. K. B. 115; 108 E. R. 427.

Annotations: *As to* (1) & (3) **Consd.** Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339. **Refd.** Wilson *v.* Mushett (1832), 3 B. & Ad. 743; Jones *v.* Waite (1839), 5 Bing. N. C. 311. *Generally,* **Mentd.** Mizen *v.* Pick (1838), 3 M. & W. 481

1925. ——.]—By a deed, which recited that B. & his wife had agreed to live apart from each other during the remainder of their lives "upon the terms & conditions thereinafter contained," B. covenanted with trustees to allow his wife to live separate, & settled a sum of money upon trust for his wife for her life, & for their children after her death, with a proviso that if B. & his wife should afterwards agree by writing under their hands, attested by two witnesses, to cohabit together, the income of the trust fund should be paid to B. during such cohabitation, & the trustees covenanted to indemnify B. against his wife's acts & engagements. No separation took place between B. & his wife:—*Held:* the deed was a separation deed & not a voluntary settlement, & as no separation took place it was wholly void.—BINDLEY *v.* MULLONEY (1869), L. R. 7 Eq. 343; 20 L. T. 263; 17 W. R. 510.

Annotations:—**Consd.** *Re* Spark's Trusts, Spark *v.* Massey, [1904] 1 Ch. 451. **Refd.** Ruffles *v.* Alston (1875), 44 L. J. Ch. 308.

1926. Agreement for purpose of facilitating divorce.]—(1) A man, a native of England, married in England a woman, a native of France, & went to reside with her in France, where their children were born. Differences having arisen, the wife instituted a suit in England, where the husband was then residing, for a divorce, on the ground of cruelty & adultery, to which the husband filed a responsive allegation, & also caused a suit in Chancery to be instituted to obtain possession of the two youngest children, who had remained in France with their mother. The Lord Chancellor made an order for delivery of the children to their father, & a ct. in France made an order for carrying it out. The wife appealed against both orders. An agreement was then signed by the wife in France, & by the husband in England, by which it was stipulated that the youngest child should be left with the mother; that the wife's appeals should be abandoned, & also her suit for a divorce, & that she would facilitate the husband's proceedings for a divorce, & that the husband would pay her an annuity & allow her access to all her children. The wife abandoned her appeals & her suit for a divorce, & the husband's responsive allegation was also dismissed. The wife filed a bill to obtain access to her children, & to have the annuity paid her:—*Held:* assuming the agreement to be one which was to be judged of by French law, & that it was valid by French law, it would not be enforced here, inasmuch as the stipulations that the youngest child should, in contravention of the order of the Lord Chancellor, be delivered to his mother, & that the wife would facilitate the husband's proceedings for a divorce, were contrary to the laws & policy of England.

(2) The case of *Wilson* v. *Wilson*, No. 2139, *post*, does not alter the rule, that husband & wife cannot effectually contract for a separation without the intervention of a third party.—HOPE *v.* HOPE (1857), 8 De G. M. & G. 731; 26 L. J. Ch. 417; 29 L. T. O. S. 4; 3 Jur. N. S. 454; 5 W. R. 387; 44 E. R. 572, L. JJ.

Annotations:—*As to* (1) **Consd.** Vansittart *v.* Vansittart (1858), 2 De G. & J. 249; Hart *v.* Hart (1881), 50 L. J. Ch. 697. **Refd.** Childers *v.* Childers (1857), 30 L. T. O. S. 3; Walrond *v.* Walrond (1858), John. 18; *Re* Mathew's Settlmt. Trusts (1859), 5 Jur. N. S. 184; Kaufman *v.* Gerson, [1904] 1 K. B. 591; Saxby *v.* Fulton, [1909] 2 K. B. 208; Ertel Bieber & Rio Tinto Co., Dynamit Act. *v.* Same, Vereinigte Königs & Laura-Hütte Act. *v.* Same, [1918] A. C. 260; Aksionairnoye Obschestvo A. M. Luther *v.* Sagor, [1921] 3 K. B. 532.

1927. Agreement in contravention of order of court.]—HOPE *v.* HOPE, No. 1926, *ante.*

SUB-SECT. 3.—CONTRACTS FOR FUTURE SEPARATION

A. In General.

1928. Whether valid.]—How far a ct. of equity will allow of agreements for a separate maintenance.

Where agreements have been made for pin

she had laid against him for unlawfully publishing oral defamatory matter about her:—*Held:* (1) such agreement was not void for uncertainty, as it must be construed as meaning that K. would pay S. the specified monthly sum during their joint lives; (2) as the offence the subject-matter of the prosecution was not of a public nature, but was one for which the injured person could sue & recover damages, the general rule of law that an agreement to stifle a prosecution is contrary to public policy & void did not apply.—KERRIDGE *v.* SIMMONDS (1906), 4 C. L. R. 253.—**AUS.**

PART XI. SECT. 1, SUB-SECT. 3.—A.

1928 i. *Whether valid.*]—An agreement for future separation is contrary to public policy & will not be enforced.—CHRISTOFFERSON *v.* CHRISTOFFERSON, [1924] 3 W. W. R. 545; 4 D. L. R. 967.—**CAN.**

Sect. 1.--*Validity: Sub-sect.* 3, *A. & B.*]

money, or separate maintenance, if the wife refuses to live with her husband without having sufficient reason for doing so, the ct. always refuses to aid her (LORD HARDWICKE, L.C.).—VANE (LORD) *v.* VANE (LADY) (1740), Barn. Ch. 135; 27 E. R. 585, L. C.

1929. ——.]—A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees or their exors., etc., is valid in law.—RODNEY (LORD) *v.* CHAMBERS (1802), 2 East, 283; 102 E. R. 377.

Annotations:—**Expld.** Chambers *v.* Caulfield (1805), 2 Smith, K. B. 356. **Consd.** St. John *v.* St. John (1805), 11 Ves. 526; Jones *v.* Waite (1839), 5 Bing. N. C. 341. **Refd.** Jee *v.* Thurlow (1824), 2 B. & C. 547; Vandergucht *v.* De Blaquiere (1839), 5 My. & Cr. 229; Hunt *v.* Hunt (1861), 31 Beav. 89; *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311.

1930. ——.]—*Qu.:* as to the validity in law or equity of articles between husband & wife for future separation, even with trustees, in this instance, providing that the wife may at any time with the assent of the trustees or the survivor, his exors. or administrators, separate, & take away the children.—ST. JOHN (LORD) *v.* ST. JOHN (LADY) (1803), 11 Ves. 526; 32 E. R. 1192, L. C.

Annotations:—**Consd.** Westmeath *v.* Westmeath (1821), Jac. 126; Jee *v.* Thurlow (1824), 2 B. & C. 547. **Refd.** Worrall *v.* Jacob (1817), 3 Mer. 256; Jones *v.* Waite (1839), 5 Bing. N. C. 341; Frampton *v.* Frampton (1841), 4 Beav. 287; Wilson *v.* Wilson (1848), 1 H. L. Cas. 538; Hope *v.* Hope (1857), 8 De G. M. & G. 731. **Mentd.** Vansittart *v.* Vansittart (1858), 2 De G. & J. 249.

1931. ——.]—*Semble:* a deed made between husband & wife & a third person, a trustee, with a covenant by the husband to pay such third person an annuity, in case the wife should live separate & apart from her husband, & should take one of her children to reside with her, is void, as being a deed made in contemplation of a future separation at the pleasure of the wife, & therefore contrary to the policy of marriage.—DURANT *v.* TITLEY (1819), 7 Price, 577; 146 E. R. 1066, Ex. Ch.

Annotations:—**Distd.** Jee *v.* Thurlow (1824), 2 B. & C. 547. **Consd.** Hindley *v.* Westmeath (1827), 6 B. & C. 200. **Apprvd.** Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339. **Consd.** Vandergucht *v.* De Blaquiere (1839), 5 My. & Cr. 229. **Refd.** Westmeath *v.* Westmeath (1821), Jac. 126; *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311. **Mentd.** Scholey *v.* Goodman (1823), 1 Bing. 349.

1932. ——.]—Injunction to restrain proceedings at law for recovering an annuity secured to the wife by a deed of separation, not containing any covenant to indemnify the husband from her debts, refused.

Qu.: whether a gift of an annuity to the separate use of a married woman on condition of her living apart from her husband is good.

This is not only a deed contemplating a separation to commence at a future time, but it also endeavours to avoid the effect of that doctrine, by which it has been held that a deed of separation . . . shall be rendered void by any future reconciliation. . . . It has always seemed to me very difficult to hold these deeds legal (LORD ELDON, C.). — WESTMEATH (EARL) *v.* WESTMEATH (COUNTESS) (1821), Jac. 126; 37 E. R. 797, L. C.

Annotations:—**Distd.** Webster *v.* Webster (1853), 4 De G. M. & G. 437. **Refd.** Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339; Vandergucht *v.* De Blaquiere (1839), 3 Jur. 1116; Cartwright *v.* Cartwright (1853), 3 De G. M. & G. 982; Hope *v.* Hope (1857), 8 De G. M. & G. 731; Vansittart *v.* Vansittart (1858), 2 De G. & J. 249; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone (1904), 73 L. J. Ch. 321. **Mentd.** *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122.

1933. ——.]—HINDLEY *v.* WESTMEATH (MARQUIS), No. 1924, *ante*.

1934. ——.]—By a deed dated in 1817, after reciting that disputes had existed between W., & E., his wife, & that they had been on the point of separation, it was witnessed, that in consideration that the wife had consented to cohabit with the husband, he had covenanted with S., a trustee, to convey estates to his use, etc., for ninety-nine years, etc. The trusts of this term were, that in case the wife should find herself compelled by a renewal of the disputes, to cease to cohabit with her husband, or live apart from him, that a sufficient annuity for her separate maintenance should be raised out of the rents, or by sale or mtge. of the term; & in that event the husband agreed to execute articles of separation. The deed contained no covenant by the trustee, indemnifying the husband against the debts of the wife. After the execution of this deed, the husband & wife continued to live together. By an indenture in 1818, made between the husband & wife & trustees, after reciting that the husband, at the desire of the wife, had agreed to live separate & apart from her, & to allow her a separate maintenance, the husband demised the estate to trustees for a term, to raise provisions for the wife & an infant daughter; & the husband covenanted that the wife might live separate & apart from him, & free from his authority & control, etc. This deed contained no indemnity against debts. The parties continued to live in the same house, although they slept in separate rooms, & met at board, & appeared in the world as man & wife until June, 1819, when they finally separated. In 1822, the trustees in the deed of 1818, distrained upon the tenants of the land charged with the annuity to the wife. Upon bill filed in equity & appeal:—*Held:* the deeds were void; the first, as providing for a prospective separation; & the second, because there was a reconciliation.—WESTMEATH (MARQUIS) *v.* SALISBURY (MARQUIS) (1831), 5 Bli. N. S. 339; 5 E. R. 349; *sub nom.* WESTMEATH (MARQUIS) *v.* WESTMEATH (MARCHIONESS), 1 Dow. & Cl. 519, H. L.

Annotations: **Distd.** Wilson *v.* Mushett (1832), 3 B. & Ad. 743. **Consd.** Vandergucht *v.* De Blaquiere (1839), 5 My. & Cr. 229. **Distd.** Webster *v.* Webster (1853), 22 L. J. Ch. 837. **Consd.** H. *v.* W. (1857), 3 K. & J. 382; *Re* Hope Johnston, Hope Johnston *v.* Hope Johnston, [1904] 1 Ch. 470. **Refd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538; Wilson *v.* Wilson (1854), 5 H. L. Cas. 40; *Re* Spark's Trusts, Massey *v.* Spark (1904), 73 L. J. Ch. 259; Harrison *v.* Harrison, [1910] 1 K. B. 35; *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311.

1935. ——.]—Any agreement made before or after marriage, which contemplates a voluntary separation of husband & wife, is void as contrary to the policy of the law.

By an ante-nuptial settlement property of the husband was limited during the joint lives of himself & wife, "if she should so long continue to live with him, & should not live separate & apart from him through any fault of her own," in trust for the separate use of the wife, without power of anticipation; & after the decease of either, "or in the event of the wife living separate & apart from her husband through any such fault," for the survivor, or for the husband, as the case might be; & after the death of the survivor, "or in the event of the wife living separate & apart from her husband through any such fault as aforesaid," for the children of the marriage:—*Held:* the limitations over upon the separation of the wife & husband were void as contrary to the policy of the law; for such a limitation in favour of the husband, if valid, would be a direct inducement to permit a state of separation, capriciously commenced by the wife, to continue.—H. *v.* W. (1857), 3 K. & J. 382; 69 E. R. 1157.

Annotations:—**Distd.** Marlborough *v.* Marlborough (1900),

83 L. T. 578. **Consd.** *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470. **Refd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138.

1936. ——.]—Deed by which a husband makes a provision for his wife in case of a future separation is radically defective.—PROCTOR *v.* ROBINSON (1866), 35 Beav. 329; 14 L. T. 42; 14 W. R. 381; 55 E. R. 922; *on appeal*, 15 L. T. 431, L. JJ.

1937. —— **Subsequent confirmatory agreement.**]—Wife's petition for restitution of conjugal rights. The husband pleaded agreement that the parties might live apart. The agreement produced was signed before the marriage ceremony, & provided that the parties might at all times after the marriage live separate & apart. This purported to be confirmed by an indorsed agreement signed by both parties immediately after the ceremony. The confirming agreement was indorsed upon the first agreement before the marriage, & the parties had at the same time agreed to execute it after the marriage:—*Held:* the two documents formed only one agreement, &, their object being against public policy, the agreement was void & afforded no defence to the wife's petition. The first document being void could not be confirmed by the second.—BRODIE *v.* BRODIE, [1917] P. 271; 86 L. J. P. 140; 117 L. T. 542; 33 T. L. R. 525; 62 Sol. Jo. 71.

1938. —— **Proviso in settlement—Ante-nuptial settlement.**]—By articles before marriage, the husband covenanted to settle an annuity on the wife after marriage to be paid in the event of his death or any separation taking place:—*Held:* such a covenant was contrary to public policy & morality, & could not be enforced by a ct. of equity.—COCKSEDGE *v.* COCKSEDGE (1844), 14 Sim. 244; 13 L. J. Ch. 384; 3 L. T. O. S. 374; 8 Jur. 659; 60 E. R. 351; *subsequent proceedings* (1845), 5 Hare, 397.

Annotations:—**Distd.** Marlborough *v.* Marlborough (1900), 83 L. T. 578. **Refd.** Brodie *v.* Brodie, [1917] P. 271.

1939. —— —— ——.]—By an ante-nuptial settlement, the father of the husband conveyed freehold hereditaments to the use of trustees during the life of the wife, in trust for her separate use, subject to a proviso, whereby it was declared that, if a separation should take place by reason of any disagreement between the husband & wife, or otherwise, the rents & profits should, from the time of such separation, during the joint lives of the husband & wife, be paid to the husband:—*Held:* the proviso was in the nature of a condition, & not of a limitation; & that it was void, as being contrary to public policy.—CARTWRIGHT *v.* CARTWRIGHT (1853), 3 De G. M. & G. 982; 1 Eq. Rep. 22 L. J. Ch. 841; 31 L. T. O. S. 214; 17 Jur. 584; 1 W. R. 245; 43 E. R. 385, L. JJ.

Annotations:—**Apld.** H. *v.* W. (1857), 3 K. & J. 382. **Distd.** Marlborough *v.* Marlborough, [1901] 1 Ch. 165. **Consd.** *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470. **Refd.** *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122. **Mentd.** Spiers *v.* Hunt, [1908] 1 K. B. 720.

1940. —— —— **Post-nuptial settlement.**]—Where pltf., a married woman, when a minor, executed a post-nuptial settlement for the benefit of herself, her husband & the issue of the marriage, of property devised to her separate use, & on coming of age executed a subsequent deed for the appointment of new trustees to same, & afterwards, on the petition of her husband, by whom she had one child living, became divorced & married a second time. On a bill filed by pltf., by her next friend, seeking to set aside the settlement, on the ground (*inter alia*) that it contained a proviso defeating her interest under it in the event of her separating from her husband, & calling upon him to allow her alimony:—*Held:* the proviso was bad, & must be declared void; but there was no pretence for setting aside the settlement, & the bill was ordered to be dismissed with costs, to be paid by the next friend, excepting so much as related to the proviso.—MERRYWEATHER *v.* JONES (1864), 4 Giff. 509; 10 L. T. 62; 10 Jur. N. S. 290; 12 W. R. 524; 66 E. R. 807.

1941. What amounts to—Trust for wife so long as she continues cohabitation.]—A trust for a wife so long as she shall continue the cohabiting wife of her husband, with a gift over to the husband, is a limitation & not a gift defeasible on the performance or non-performance of a condition. Such a trust is not void as being against public policy on the ground that it contemplates a future separation.—*Re* HOPE JOHNSTONE, HOPE JOHNSTONE *v.* HOPE JOHNSTONE, [1904] 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253; 20 T. L. R. 282.

B. In Reconciliation Agreements.

1942. Whether valid.]—Husband & wife, who were separated, entered into an agreement in writing, providing for their living together again, & stipulating that, in the event of a future separation for a particular cause, the wife should receive the income of her own fortune, which her husband was entitled to receive, & that her mother should indemnify him against her debts. They afterwards separated, for the cause referred to by the agreement, & the wife obtained a divorce in the Ecclesiastical Ct., & a sentence for permanent alimony to an amount exceeding the income of her fortune. That alimony was regularly paid by the husband, & he received the income of her fortune. The wife accepted a bill of exchange in favour of a creditor of her own. In a suit by that creditor, an injunction was granted to restrain the husband from paying to the wife the annual amount of the income of her fortune, as the validity of the agreement for future separation, under which she was entitled to such income, was not in dispute between the husband & wife. *Qu.:* whether such an agreement as equity will support.—HOARE *v.* HOARE (1790), 2 Ridg. Parl. Rep. 268.—**IR.**

f. — *Provision for wife's separate use—Notwithstanding future reconciliations or separations.*]—*Semble:* a provision of a deed of separation that the maintenance secured to the wife for life, & her children during her residence with her, should continue notwithstanding a renewal of cohabitation, & that in the event of the parties again separating for any the like causes as induced the first parting, the whole of the provisions of the deed should revive, does not render the deed void, on the ground that it is the contrary to the policy of the law, as being a provision for future separation.—MERER *v.* WILLIAMS (1879), 27 Gr. 154.—**CAN.**

g. —— ——.]—A deed providing for prospective separation is invalid; & a separation deed being put an end to by a reconciliation, a clause to revive the provision for the wife on a second separation is invalid; but a provision for her separate use, notwithstanding future reconciliations or separations, is good.—BYRNE *v.* CAREW (1849), 13 I. Eq. R. 1.—**IR.**

PART XI. SECT. 1, SUB-SECT. 3.—B.

h. *Whether valid — Provision for future separation.*]—An agreement entered into between a husband & a wife while living separate & apart, providing for their resuming cohabita-

1938 i. —— *Proviso in settlement—Ante-nuptial settlement.*]—The parties to an intended marriage executed an indenture of settlement providing for disposal of trust funds in case the parties should cease to cohabit:—*Held:* the agreement was void as being against public policy.—NELSON *v.* NELSON (1909), 14 B. C. R. 406.—**CAN.**

1938 ii. —— —— ——.]—An agreement by deed executed before marriage, that in case of separation, at the desire of the intended wife, the husband should receive the moiety of an annuity of which the wife was possessed; & if such separation should take place by means of the husband, then the wife should receive the whole annuity,

Sect. 1.—*Validity: Sub-sect.* 3, *B.; sub-sect* 4. *Sect.* 2.]

agreement would be held valid. if disputed.—VANDERGUCHT *v.* DE BLAQUIERE (1839), 3 My. & Cr. 229; 3 Jur. 1116; 41 E. R. 358, L. C.

Annotations:—**Consd.** *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311. **Refd.** Cartwright *v.* Cartwright (1853), 10 Hare, 630. **Mentd.** *Ex p.* Bremner (1866), L. R. 1 P. & D. 254; *Re* Robinson (1884), 27 Ch. D. 160; Anderson *v.* Hay (1890), 7 T. L. R. 113.

1943. ——.]—Pltf. was deft.'s wife. Deft. had been convicted of cruelty to pltf., & a separation order had been made by justices. Upon the making of the order pltf. lived apart from her husband. He subsequently entreated her to return & live with him, which she agreed to do on the terms of a deed whereby he covenanted not to assault her or conduct himself in such a way as to entitle her to obtain a further separation order, & that if he committed a breach of that covenant he would pay her a sum of £150, & pltf. covenanted that on payment by him of the £150 she would not demand or receive any weekly sum that might be ordered by justices to be paid to her under any further separation order that she might obtain. Pltf. returned to live with deft., who again assaulted her, whereupon she obtained a further separation order from the justices. She then brought her action for the recovery of the £150 due under the covenant:—*Held:* the covenant was not void as against public policy & pltf. was entitled to recover.—HARRISON *v.* HARRISON, [1910] 1 K. B. 35; 79 L. J. K. B. 133; 101 L. T. 638; 26 T. L. R. 29.

1944. ——.]—A provision contemplating future separation of spouses in a deed executed by them, while living apart, with the object & result of bringing them together as man & wife, is not void on the ground of public policy.—*Re* MEYRICK'S SETTLEMENT, MEYRICK *v.* MEYRICK, [1921] 1 Ch. 311; 90 L. J. Ch. 152; 121 L. T. 531; 65 Sol. Jo. 155.

1945. Agreement not contemplating reconciliation—Occasional visits by husband.]—WEBSTER *v.* WEBSTER, No. 2155, *post.*

SUB-SECT. 4.—WHERE MARRIAGE INVALID.

1946. Whether separation deed affected—Marriage with deceased wife's sister—Annuity to wife—Proviso for reconciliation.]—A man went through the ceremony of marriage with a sister of his deceased wife, & lived with her as his wife. They afterwards separated, & a separation deed in the ordinary form was executed, in which she was described as his wife, & he covenanted with the trustees of the deed to pay her an annuity for their joint lives. There was a proviso that, if the parties should live together again by mutual consent, the deed should become void. The annuity was paid for twelve years, & then the man became bkrpt.:—*Held:* as the parties never could legally live together as husband & wife, the proviso, making the deed void in the event of their doing so, must be disregarded.—*Re* WOOD, *Ex p.* NADEN (1874), 9 Ch. App. 670; 43 L. J. Bcy. 121; 30 L. T. 743; 22 W. R. 936, L. JJ.

Annotation:—**Refd.** *Re* Abdy, Rabbeth *v.* Donaldson, [1895] 1 Ch. 455.

See, now, Deceased Wife's Sister Marriage Act, 1907 (c. 47); *&, generally,* Part II., Sect. 5, sub-sect. 2, B., *ante.*

1947. —— **Mistake of fact.**]—BUTCHER *v.* VALE (1891), 8 T. L. R. 93.

1948. .]—If the parties to an agreement make a mutual mistake of fact which is material to the existence of an agreement the agreement is void.

Pltf. & deft. believing, as was not the fact, that they were lawfully married, entered into a deed of separation:—*Held:* the deed of separation was void.—GALLOWAY *v.* GALLOWAY (1914), 30 T. L. R. 531, D. C.

Annotation:—**Folld.** Law *v.* Harragin (1917), 33 T. L. R. 381.

1949. —— ——.]—Deft. had not heard of her first husband for some years, & pltf., believing that she was a widow, went through a form of marriage with her. Afterwards the parties entered into a deed of separation, under which pltf. allowed deft. £300 a year. At the date of the deed neither party believed that deft.'s first husband was alive, but in fact he was alive at that date:—*Held:* as the deed was based on the existence of a valid marriage, the deed was void.—LAW *v.* HARRAGIN (1917), 33 T. L. R. 381; 61 Sol. Jo. 546.

SECT. 2.—**CONSIDERATION.**

See, generally, CONTRACT, Vol. XII., pp. 172 *et seq.*

1950. Sufficiency of—As between husband & wife.]—Lord R. by will gave an annuity of £50 to pltf., who afterwards, in 1726, married deft. F.; in 1728 they agreed to part; by a deed of separation, the husband covenanted to allow her £14 *per annum* out of his own estate, & £24 more, to be paid quarterly, out of the annuity of £50, & £12 a year to his daughter, by pltf., for her maintenance, to be paid quarterly. The bill is brought against the husband, & S., a creditor of his, since the execution of the deed of separate maintenance, to have the trusts of that deed performed. Decreed according to the prayer of the bill as against the husband; & as to S., that he should not release his claim upon the annuity, till the pltf. had paid him his debt.—FITZER *v.* FITZER (1743), 2 Atk. 511; 26 E. R. 708, L. C.

Annotations:—**Consd.** Hobbs *v.* Hull (1788), 1 Cox, Eq. Cas. 446; Frampton *v.* Frampton (1841), 4 Beav. 287. **Refd.** Compton *v.* Collinson (1788), 2 Bro. C. C. 377; Guth *v.* Guth (1792), 3 Bro. C. C. 614; Legard *v.* Johnson (1797), 3 Ves. 352; Worrall *v.* Jacob (1817), 3 Mer. 256; Wilson *v.* Wilson (1845), 14 Sim. 405.

1951. —— —— **Mere agreement to live apart.**]—LOGAN *v.* BIRKETT, No. 1975, *post.*

1952. —— ——.]—CLOUGH *v.* LAMBERT, No. 1900, *ante.*

1953. —— —— **No valuable consideration.**]—(1) A deed of separation between husband & wife, containing no covenant on the part of a trustee

tion, & further that, in the event of a future separation, provision should be made for the wife, is legal & enforceable.—PURSER *v.* PURSER, [1913] 1 I. R. 422.—**IR.**

k. —— ——.]—MACMAHON *v.* N, [1913] 1 I. R. 154.—**IR.**

PART XI. SECT. 2.

1950 i. *Sufficiency of—As between husband & wife.*]—Pltf. claimed the enforcement of parol agreement by her husband to pay her maintenance alleged to have been made shortly before a divorce suit between the parties which was undefended & in which the husband obtained a decree. The wife alleged that the promise was made in consideration of her undertaking to make no claims for alimony or maintenance in the divorce proceedings:—*Held:* as a claim for alimony in the divorce suit could not have been advanced with any hope of success, either the real object of the agreement was apparently to facilitate the divorce proceedings, in which case it would have been illegal & void, or it was mere gratuity by the husband, & the agreement was void as being made without consideration.—HALDANE *v.* HALDANE, [1921] N. Z. L. R. 612.—**N.Z.**

to indemnify the husband, or other valuable consideration, is not on that account void.

On the separation between a husband & wife, the former by deed made between himself, his wife, & trustees, assigned the dividends of some funds standing in the names of trustees to other trustees, for the benefit of the wife, & he covenanted that she might live apart from him, etc.; & the wife agreed to accept the provision in lieu of alimony, dower, etc.; & to exonerate her husband from all her debts, & to forfeit her rights under the deed if she violated the agreement. The deed contained no covenant on the part of the trustees, & was supported by no further consideration:—*Held:* the deed was not invalid, & the wife was entitled to the provision made for her by the deed.

(2) Such an agreement may be waived or abandoned by the conduct of the parties, as if they live together again.

Conceiving the deed to be valid, I have considered the admitted facts & the correspondence, with the view to the question whether the deed was subsequently waived or abandoned. . . . The separation remained, the wife performed the species of condition imposed upon her by her husband, & although no hostility remained, & a correspondence by letter, which, under the circumstances, must be considered as creditable to both parties, took place, in the latter part of F.'s [the husband's] life, there was no change in the circumstances, under which the deed was executed, & no waiver or abandonment; & I am therefore of opinion, that pltf. is entitled to the relief which she asks (LORD LANGDALE, M.R.).—FRAMPTON *v.* FRAMPTON (1841), 4 Beav. 287; 5 Jur. 980; 49 E. R. 319.

Annotation:—As to (1) **Consd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538.

1954. ——— ——— Agreement voluntary on part of husband.]—A husband, upon a treaty for separation from his wife, agreed with a trustee to pay his wife an annuity for her separate use, & also, during their separation, to permit their daughter, then an infant, but now of age, to reside with, & be under the control of, & educated & supported by, her mother; in consideration whereof the wife, who was entitled under her marriage settlement to property settled to her separate use without power of anticipation, agreed with the same trustee to indemnify her husband in respect of any debt on her own account or on account of their daughter. The trustee declining to enforce payment of arrears of the last-mentioned annuity, or to act any longer as trustee:—*Held:* (1) this was a voluntary agreement on the part of the husband, no consideration moving from the trustee by way of indemnity or otherwise, & the wife having no power to contract so as to bind property as to which, though settled to her separate use, she was restrained from anticipation; (2) the agreement being voluntary on the part of the husband, the ct. could not decree specific performance of it by him, or order him to account in respect of arrears; nor could it appoint a new trustee in the only mode in which a trustee could be effectually appointed, viz., by ordering the husband to enter into a new covenant with the new trustee; (3) there being nothing to implicate the trustee in any concurrence with the husband to avoid payment of the annuity, the ct. could not, under the prayer for general relief, direct that the wife should be at liberty to sue in the name of her trustee upon giving him a proper indemnity.

(4) *Semble:* the stipulation relative to the daughter being contrary to the policy of the law, no action on the agreement would lie; & the circumstance of the daughter's having since attained twenty-one would not affect the question.—WALROND *v.* WALROND (1858), John. 18; 28 L. J. Ch. 97; 32 L. T. O. S. 122; 22 J. P. 754; 4 Jur. N. S. 1099; 7 W. R. 33; 70 E. R. 322.

Annotations:—As to (1) **Distd.** Gibbs *v.* Harding (1870), 39 L. J. Ch. 374. **Refd.** Crouch *v.* Waller (1859), 4 De G. & J. 302.

1955. ——— regards creditors.]—FITZER *v.* FITZER, No. 1950, *ante*.

1956. ——— ———.]—WORRALL *v.* JACOB, No. 1960, *post*.

1957. ——— ———.]—CLOUGH *v.* LAMBERT, No. 1900, *ante*.

1958. ——— As regards subsequent mortgagees.]—In a separation deed there was a covenant by the trustees that the husband should be at liberty to reimburse himself any expenses which he might be put to, out of an annuity secured by the deed to the wife:—*Held:* this was a voluntary instrument, & void as against subsequent mtgees.—COWX *v.* FOSTER (1860), 1 John. & H. 30; 29 L. J. Ch. 886; 2 L. T. 797; 6 Jur. N. S. 1051; 70 E. R. 649.

Annotations:—**Mentd.** Ferrier *v.* Jay (1870), L. R. 10 Eq. 550; Maunsell *v.* Maunsell (1871), 24 L. T. 698; *Re* Teape's Trust (1873), L. R. 16 Eq. 442; Busk *v.* Aldam (1874), L. R. 19 Eq. 16; Thornton *v.* Thornton (1875), L. R. 20 Eq. 599; Scotney *v.* Lomer (1885), 29 Ch. D. 535; *Re* Denton, Bannerman *v.* Toosey (1890), 63 L. T. 105; *Re* Paget, *Re* Mellor, Mellor *v.* Mellor, [1898] 1 Ch. 290; *Re* Milner, Bray *v.* Milner, [1899] 1 Ch. 563; *Re* Redgate, Marsh *v.* Redgate, [1903] 1 Ch. 356; *Re* Ackersley, Chapman *v.* Andrew, [1913] 1 Ch. 510; *Re* Mackenzie, Bain *v.* Mackenzie, [1916] 1 Ch. 125.

As to sufficiency of consideration generally, *see* CONTRACT, Vol. XII., pp. 211 *et seq.*: FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 163 *et seq.*

1959. What is good consideration—Indemnity by trustees against wife's debts.]—On a deed of separation, the trustees indemnifying the husband against the wife's future debts, is a valuable consideration, & takes the conveyance out of 13 Eliz. c. 5.—STEPHENS *v.* OLIVE (1786), 2 Bro. C. C. 90; 29 E. R. 51.

Annotations:—**Consd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; St. John *v.* St. John (1805), 11 Ves. 526; Worrall *v.* Jacob (1817), 3 Mer. 256. **Refd.** Copis *v.* Middleton (1817), 2 Madd. 410; Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339; Brailey *v.* Brailey, [1922] P. 15. **Mentd.** Lush *v.* Wilkinson (1800), 5 Ves. 384; Scarf *v.* Soulby (1849), 1 H. & Tw. 426.

1960. ——— ———.]—By deed of separation the husband, a trader liable to the bkpt. laws, covenanted with a trustee for the wife, in consideration of being indemnified from all debts & engagements which might be contracted by her during the separation, to release his remainder in fee in certain estates, of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee, to such uses, etc., as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executes the power by deed, which she retains in her possession, & afterwards alters, & re-executes:—*Held:* (1) the covenant, although entered into on occasion of a separation between husband & wife, was yet binding in equity, being made to a third party; (2) it might be supported against creditors, under 1 Jac. c. 15, by the consideration of indemnity against the wife's debts and engagements.—WORRALL *v.* JACOB (1817), 3 Mer. 256; 36 E. R. 98.

Annotations:—As to (1) **Refd.** Jee *v.* Thurlow (1824), 2 B & C. 547; Wilson *v.* Wilson (1845), 14 Sim. 405; Brailey *v.* Brailey, [1922] P. 15. *As to* (2) **Consd.** Jones *v.* Waite (1839), 5 Bing. N. C. 341; Frampton *v.* Frampton (1841), 4 Beav. 287. **Refd.** Roberts *v.* Williams (1841), 11 L. J. Ch. 65. *Generally*, **Mentd.** Hall *v.* Hall, Hall *v.* Hall (1872), L. R. 14 Eq. 365.

Sect. 2.—*Consideration.* *Sect.* 3 : *Sub-sect.* 1.]

1961. —— — -.]- deed of three parts, between husband, wife, & trustee, reciting that differences existed, & that the husband & wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, & the trustee covenanted to indemnify the husband against the wife's debts, & that she should release all claim of jointure, dower, & thirds :—*Held :* this deed was legal & binding, & a plea by the husband, that the wife sued in the Ecclesiastical Ct. for restitution of conjugal rights, & he put in an allegation & exhibits, charging her with adultery, & that a decree of divorce *a mensâ et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity.—JEE *v.* THURLOW (1824), 2 B. & C. 547 ; 4 Dow. & Ry. K. B. 11 ; 2 L. J. O. S. K. B. 81 ; 107 E. R. 487.

Annotations :—**Apld.** Wilson *v.* Mushett (1832), 3 B. & Ad. 743. **Consd.** Jones *v.* Waite (1839), 5 Bing. N. C. 341. **Apld.** Randle *v.* Gould (1857), 8 E. & B. 457 ; Negus *v.* Forster (1882), 30 W. R. 671. **Folld.** Fearon *v.* Aylesford (1884), 14 Q. B. D. 792. **Consd.** Nicol *v.* Nicol (1885), 30 Ch. D. 143. **Folld.** Sweet *v.* Sweet [1895] 1 Q. B. 12. **Refd.** Hindley *v.* Westmeath (1827), 6 B. & C. 200 ; Vandergucht *v.* De Blaquiere (1839), 5 My. & Cr. 229 ; Gandy *v.* Gandy (1882), 51 L. J. P. 41 ; *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311.

1962. —— ——.]—ELWORTHY *v.* BIRD, No. 1921, *ante*.

1963. —— —— **Conditional on husband securing annuity to wife.**]—By articles of separation, the husband covenanted with his wife's trustee to secure to her an annuity of £1,000, on or before a certain day ; & the trustee covenanted with the husband that, on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts :—*Held :* the latter covenant, though conditional, was sufficient to support the articles.—WELLESLEY *v.* WELLESLEY (1839), 10 Sim. 256 ; 59 E. R. 612 ; *on appeal*, 4 My. & Cr. 561 ; 9 L. J. Ch. 21 ; 4 Jur. 2, L. C.

Annotations :—**Refd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538. **Mentd.** Langton *v.* Horton (1842), 11 L. J. Ch. 299 ; Hoare *v.* Dresser (1859), 7 H. L. Cas. 291 ; Trevor *v.* Hutchins (1897), 76 L. T. 183.

1964. —— ——.]—GIBBS *v.* HARDING, No. 2126, *post*.

See, also, CONTRACT, Vol. XII., p. 187, Nos. 1427, 1428.

1965. —— ——.]—The stopping of a suit in the Ecclesiastical Ct. for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation ; & so, it seems, is a covenant by a third party to pay his debts.—WILSON *v.* WILSON (1848), 1 H. L. Cas. 538 ; 12 Jur. 467 ; 9 E. R. 870, H. L. ; *subsequent proceedings* (1854), 5 H. L. Cas. 40, H. L.

Annotations :—**Folld.** Vansittart *v.* Vansittart (1858), 2 De G. & J. 249. **Consd.** Hunt *v.* Hunt (1862), 4 De G. F. & J. 221. **Folld.** Gibbs *v.* Harding (1870), 5 Ch. App. 336 ; Besant *v.* Wood (1879), 12 Ch. D. 605 ; Marshall *v.* Marshall (1879), 5 P. D. 19. **Consd.** Clark *v.* Clark (1885), 10 P. D. 188 ; McGregor *v.* McGregor (1888), 21 Q. B. D. 424. **Apld.** Aldridge *v.* Aldridge (1888), 13 P. D. 210. **Refd.** Shrewsbury & Chester Ry. *v.* Shrewsbury & Birmingham Ry. (1851), 1 Sim. N. S. 410 ; Hart *v.* Hart (1881), 18 Ch. D. 670 ; Cahill *v.* Cahill (1883), 8 App. Cas. 420 ; Kennedy *v.* Kennedy, [1907] P. 49 ; Wilson *v.* Carnley (1908), 98 L. T. 265.

1966. —— **Waiver of dower & jointure.**]—JEE *v.* THURLOW, No. 1961, *ante*.

See, also, CONTRACT, Vol. XII., pp. 182 *et seq.*

1967. —— **Waiver of right of action.**]—A husband having lived in a state of adultery, a separation took place between him & his wife, & upon that occasion the husband settled real estates to the amount of £300 *per annum* on the wife for her separate maintenance, & on the children of the marriage. Under these circumstances the settlement is not fraudulent as against creditors under 13 Eliz. c. 5.

When the wife in this case agrees to accept this settlement instead of resorting to the enforcing of her rights in the Ecclesiastical Ct., surely she is giving up something for it (LORD ALVANLEY, M.R.).—HOBBS *v.* HULL (1788), 1 Cox, Eq. Cas. 445 ; 29 E. R. 1242.

1968. —— ——.]—Twenty years after the marriage of A. & B., & when they had three children living, a deed of arrangement was executed by them respectively, by which B. the wife was to have paid to her annually out of A.'s estate conveyed to trustees certain pin money, & also a sum of money as the means of maintaining an establishment, which was to be for her separate use, independent of A., & so much thereof as B. should desire to expend was to be applied by her in a particular manner, leaving the remainder of it, if any, for A. The establishment was to be for B. & for the accommodation of her children, enabling her husband to partake of it. Previously to the execution of the deed a suit had been instituted by B., for a divorce from A. for cruelty, & same was pending at the date of the deed. The discontinuance of the suit, the prevention of disputes, & the waiver by B. against A. of other proceedings then in contemplation, for the purpose of obtaining a proper provision for B. & her children, were the considerations for the deed. A. was entitled to estates, yielding an income exceeding the amount of that granted to the trustees in favour of B. On demurrer, filed by A. to the bill of B., to enforce the trusts of the deed :—*Held :* same was not an illegal one, & was capable of being enforced in a ct. of equity.—JODRELL *v.* JODRELL (1845), 9 Beav. 45 ; 15 L. J. Ch. 17 ; 6 L. T. O. S. 186 ; 9 Jur. 1022 ; 50 E. R. 259 ; *subsequent proceedings* (1851), 14 Beav. 397.

1969. —— ——.]—In a petition by husband against wife praying that the marriage celebrated between them might be declared null & void on the ground of her incapacity, resp. pleaded that she & petitioner after a year's cohabitation had agreed to live apart, & had bound themselves not to make any claim against each other either in a ct. of law or equity ; & that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if resp. committed a breach of the agreement petitioner should be entitled to proceed in this ct. for a declaration of nullity. Averment—that there had been no breach of the agreement on the part of resp. :—*Held :* resp.'s agreement not to sue was a sufficient consideration for the husband's engagement to do the like, & such an agreement although not by deed was therefore a bar to a petition for declaration of nullity.—ALDRIDGE *v.* ALDRIDGE (OTHERWISE MORTON) (1888), 13 P. D. 210 ; 59 L. T. 896 ; 37 W. R. 240 ; *sub nom.* A. *v.* M., 58 L. J. P. 8.

Annotation :—**Refd.** *Re* Weston, Davies *v.* Tagart, [1900] 2 Ch. 164.

1970. —— ——.]—A deed of separation was entered into between a husband & wife after the latter had been subjected to treatment at the hands of her husband which would have justified her in taking proceedings for assault against him before a magistrate. Such proceedings were not in fact taken. By the terms of the deed of separation the husband agreed to make his wife a weekly allowance. In an action by the wife to recover arrears of the allowance due to her :—*Held :* the

fact that the wife refrained from taking proceedings against her husband when she was legally entitled to do so was a sufficient consideration to support the agreement for separation, which was accordingly not void as being against public policy, & deft. was liable thereunder upon his covenant to make his wife an allowance.—HULSE *v.* HULSE (1910), 103 L. T. 804, D. C.

See, also, CONTRACT, Vol. XII., pp. 182 *et seq.*

1971. —— Discontinuance of pending suit.]—JODRELL *v.* JODRELL, No. 1968, *ante.*

1972. —— ——.]—WILSON *v.* WILSON, No. 1965, *ante.*

1973. —— ——.]—HART *v.* HART, No. 2118, *post.*

1974. —— ——.]—MCGREGOR *v.* No. 2004, *post.*

See, also, CONTRACT, Vol. XII., pp. 189 *et seq.*

1975. —— Release by husband of rights over wife's after acquired property.]—In a deed executed, upon a separation between husband & wife, by them & the trustees of their marriage settlement, the wife charged her separate property comprised in the settlement with the payment of an annuity to the husband, & the husband released his marital rights in respect of all future property acquired by the wife. The release by the husband is a good consideration for the grant of the annuity by the wife, & the ct. will enforce the payment of the annuity.

Separation deeds are not valid without some other consideration than the agreement to live separate.—LOGAN *v.* BIRKETT (1833), 1 My. & K. 220; 2 L. J. Ch. 52; 39 E. R. 664.

Annotation :—**Refd.** Wilson *v.* Wilson (1845), 14 Sim. 405.

1976. —— ——.]—MARSHALL *v.* MARSHALL, No. 1920, *ante.*

See, also, CONTRACT, Vol. XII., pp. 182 *et seq.*

1977. —— Covenant by wife binding separate property—Restrained from anticipation.]—WALROND *v.* WALROND, No. 1954, *ante.*

1978. —— Covenant void against public policy—Custody of children.]—WALROND *v.* WALROND, No. 1954, *ante.*

See, also, CONTRACT, Vol. XII. pp. 237 *et seq.*

1979. —— Agreement to live separate.]—LOGAN *v.* BIRKETT, No. 1975, *ante.*

1980. —— —— Consideration implied from recitals.]—By a separation deed, after reciting that the husband & wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, & then to sell & hold the proceeds, in the events which happened, in trust for himself, & he covenanted to make up the wife's income to £300 a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, & in 1868 he was adjudicated a bkpt. The trustees proved for arrears due down to the date of the bkpcy., but there were further arrears due to them since that date. On the death of the wife the husband's assignee in bkpcy. claimed the leaseholds :—*Held :* a covenant by the wife to live apart ought to be implied from the recital; consequently there was valuable consideration for the husband's covenant; & the trustees were entitled to retain the leaseholds until the arrears were satisfied.—*Re* WESTON, DAVIES *v.* TAGART, [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591; 48 W. R. 467.

Annotation :—**Mentd.** *Re* Jewell's Settlmt. Watts *v.* Public Trustee, [1919] 2 Ch. 161.

SECT. 3.—EFFECT OF FRAUD AND DURESS.

SUB-SECT. 1.—FRAUD.

See, generally, MISREPRESENTATION & FRAUD.

1981. Effect of — Deed unenforceable.]—By deed of three parts between husband, wife, & trustee, reciting that differences existed, & that the husband & wife had agreed to live separate, the husband covenanted to pay to the trustee an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false & fraudulent misrepresentations made by pltf. to him, *i.e.*, by pltf., before the making of the deed, falsely & fraudulently representing to him that E., the wife, was a virtuous person, whereas in truth the said E. was not a virtuous person, & pltf. "had then carnally known the said E., so then being the wife of deft., & subsequently to the intermarriage of the said E. & deft., & before the making of the deed," which last-mentioned facts pltf. concealed from deft., & induced him to make the deed, in order that pltf. might continue an adulterous intercourse with the said E. At the trial, the plea was proved, & the verdict thereon entered for deft. On motion to enter judgment for pltf. *non obstante veredicto :— Held :* (1) although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that pltf. knew them to be false, or that he knew that E. was deft.'s wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action; (2) it was not necessary to allege that the wife, as *cestui que trust,* was a party to the fraud upon deft., as a ct. of law can only look to the legal rights of the parties to the deed.

(3) *Semble :* if pltf., intending to deceive deft. for pltf.'s own advantage & deft.'s disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which pltf. knew nothing, that would amount to fraud, & avoid the deed.—EVANS *v.* EDMONDS (1853), 13 C. B. 777; 1 C. L. R. 653; 22 L. J. C. P. 211; 21 L. T. O. S. 155; 17 Jur. 883; 1 W. R. 412; 138 E. R. 1407.

Annotations :—*As to* (1) **Apld.** Evans *v.* Carrington (1860), 2 De G. F. & J. 481. **Refd.** Feret *v.* Hill (1854), 15 C. B. 207; Canham *v.* Barry (1855), 15 C. B. 597; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Hulton *v.* Hulton, [1916] 2 K. B. 642. *As to* (3) **Refd.** Higgins *v.* Samels (1862), 2 John. & H. 460; Hart *v.* Swaine (1877), 7 Ch. D. 42; Mathias *v.* Yetts (1882), 46 L. T. 497; Dempster *v.* Dempster (1887), 3 T. L. R. 299; Derry *v.* Peek (1889), 14 App. Cas. 337.

1982. —— ——.]—(1) Non-disclosure of antenuptial incontinence on the part of a wife :—*Held :* not to be such a fraud upon the husband as to entitled him to set aside a settlement made upon the marriage.

(2) *Semble :* adultery committed before separation will invalidate a separation deed.

(3) A deed of separation between husband & wife is not invalidated by the subsequent adultery of the wife.

(4) The circumstance of a wife having induced her husband to execute a deed of separation, in contemplation of a renewal of the illicit intercourse : —*Held :* sufficient to invalidate the deed.—EVANS *v.* CARRINGTON (1860), 2 De G. F. & J. 481; 30 L. J. Ch. 364; 4 L. T. 65; 25 J. P. 195; 7 Jur. N. S. 197; 45 E. R. 707, L. C.

Annotations :—*As to* (4) **Refd.** Fearon *v.* Aylesford (1884), 14 Q. B. D. 792; Wasteneys *v.* Wasteneys, [1900] A. C. 446; Hulton *v.* Hulton, [1916] 2 K. B. 642; Ord *v.* Ord, [1923] 2 K. B. 432. *Generally,* **Refd.** Fitzgerald *v.* Chapman (1875), 1 Ch. D. 563.

Sect. 3.—*Effect of fraud and duress: Sub-sects.* 1 & 2. *Sects.* 4 & 5.]

1983. —— ——.]—By a deed of separation between husband & wife, it was provided that no proceedings should be taken by either party with respect to any cause of complaint then existing, or which had arisen before the deed, & every offence committed by either party should be considered as, & the same was thereby, condoned. The husband, who alleged that he became a party to this deed in consequence of repeated protestations of his wife's innocence, discovered that she had, previous to the execution of the deed, been guilty of adultery, &, on the ground of fraudulent concealment, presented a petition to the Divorce Ct., for dissolution of marriage for adultery. The wife then filed a bill to restrain the divorce suit, on the ground that the deed was a complete bar to it, & moved for an injunction:—*Held:* the deed was procured by fraud, & therefore could not stand; it could be pleaded in the Divorce Ct.; & motion refused with costs.—BROWN *v.* BROWN (1868), L. R. 7 Eq. 185; 38 L. J. Ch. 153; 19 L. T. 594; 17 W. R. 98.

Annotations:—**Refd.** Fearon *v.* Aylesford (1884), 32 W. R. 718. **Mentd.** Hood *v.* N. E. Ry. (1870), L. R. 11 Eq. 116.

1984. —— Action of rescission maintainable.]—In 1910 a deed of separation was executed by a husband & wife under which the husband agreed to pay to the wife during her life or until she should marry again the annual sum of £500, & the wife agreed to maintain herself & to keep indemnified the husband against her debts & torts, & not to take proceedings for restitution of conjugal rights nor for the divorce or conjugal separation in respect of any previous marital offence; & it was also agreed that all letters between the parties should be destroyed. The letters were accordingly destroyed & the husband paid his wife the £500 a year. In 1915 the wife brought an action against the husband claiming to have the deed rescinded upon the ground that she had been induced to execute it by his false fraudulent representations & concealment as to his means:—*Held:* before Married Women's Property Act, 1882 (c. 75), such a claim was maintainable; the wife in claiming the relief was not suing her husband for a tort within sect. 12 of the Act; & therefore the Act had not taken away her right to maintain the action.

The ct. ordered the deed to be rescinded though the letters had been destroyed & could not be restored to the respective parties, & refused to make it a condition of rescission that the wife should repay to the husband the annual sums of £500 which he had paid to her under the deed, the husband having received corresponding benefits under the deed.—HULTON *v.* HULTON, [1917] 1 K. B. 813; 86 L. J. K. B. 633; 116 L. T. 551; 33 T. L. R. 197; 61 Sol. Jo. 268, C. A.

1985. —— Action for tort not maintainable—Married Women's Property Act, 1882 (c. 75), s. 12.]—HULTON *v.* HULTON, No. 1984, *ante.*

1986. What amounts to—Wife represented to be virtuous & moral—Previous adultery of wife with trustee—Whether wife's privity to misrepresentation need be shown.]—EVANS *v.* EDMONDS, No. 1981, *ante.*

1987. —— Misconduct of wife—Not disclosed before marriage.]—EVANS *v.* CARRINGTON, No. 1982, *ante.*

1988. —— —— Denied by wife.]—BROWN *v.* BROWN, No. 1983, *ante.*

1989. Denial must be believed in.]—A deed of separation & annuity will not be set aside at the instance of the husband on the ground of fraudulent representations by the wife as to her innocence which were discredited by him at the time of its execution, nor on the ground of subsequent adultery, when the deed contains no condition as to chasity.—WASTENEYS *v.* WASTENEYS, [1900] A. C. 446; 69 L. J. P. C. 83, P. C.

1990. —— Separation induced in order to facilitate adultery.]—EVANS *v.* CARRINGTON, No. 1982, *ante.*

1991. —— Concealment of wife's pregnancy.] To an action on a covenant by the husband, contained in a deed of separation, to pay pltf., his wife's trustee, a yearly sum for her maintenance, it is no defence at law or in equity that the deed contains a covenant of licence to the wife to live as if she was sole & unmarried, in such way as she might think fit, free from all restraint in her way of living; nor, if the deed has been acted upon, is it any defence to such an action, that at the instance of pltf. the wife concealed from the husband the fact of her pregnancy, in order that he might be induced by such ignorance to execute the deed, & that he was induced by such ignorance to execute it.—KENDALL *v.* WEBSTER (1862), 1 H. & C. 410; 31 L. J. Ex. 492; 158 E. R. 957.

1992. —— Separation induced by show of agreement not intended to be fulfilled.]—*Semble:* if a husband, determining to abandon his wife, were fraudulently, by a show of an agreement which he never intended to fulfil, to induce her to consent to a separation, such consent would be no answer to the charge of desertion.—CRABB *v.* CRABB (1868), L. R. 1 P. & D. 601; 37 L. J. P. & M. 42; 18 L. T. 153; 16 W. R. 650.

Annotations:—**Refd.** Parkinson *v.* Parkinson (1869), L. R. 2 P. & D. 25; Piper *v.* Piper, [1902] P. 198; Williams *v.* Williams, [1921] P. 131.

1993. Concealment by husband as to means.]—HULTON *v.* HULTON, No. 1984, *ante.*

SUB-SECT. 2.—DURESS.

See, generally, CONTRACT, Vol. XII., pp. 92 *et seq.*

1994. Effect of—Agreement not binding on party intimidated.]—Where a husband by force, etc. compels his wife to execute a deed of separation,

PART XI. SECT. 3, SUB-SECT. 1.

1984 i. *Effect of—Action for maintainable.*]—Where, in the absence of independent legal advice & under duress a wife is induced by her husband to execute an agreement for a separation to execute an agreement for a separation, she is entitled to an order rescinding the same, notwithstanding delay in bringing her action, if the ct. is satisfied that there has been a continuance of the circumstances in which the execution was brought about, such as undue influence or other such circumstance.—BULLICK *v.* BULLICK (1922), 68 D. L. R. 212.—**CAN.**

l. *What amounts to.*]—Pltf. had deserted deft. before the separation deed was executed, & under the deed she was to have an allowance from deft., & the custody of one of the two children of the marriage. Deft. had carried out all the obligations undertaken by him in the deed:—*Held:* there was no ground for setting aside the deed for fraud, duress, or undue influence.—TUXFORD *v.* TU (1913), 24 W. L. R. 611; 4 W. W. R. 894; 12 D. L. R. 380; 6 L. R. 96.—**CAN.**

m. *Evidence of—Unchastity of wife.*]—HALDANE *v.* HALDANE, [1921] N. Z. L. R. 612.—**N.Z.**

PART XI. SECT. 3, SUB-SECT. 2.

n. *What amounts to.*]—In an action for alimony, brought by a wife who had been living apart from her husband for more than ten years, he set up in his defence a deed of separation whereby they agreed to live separate & apart for their natural lives. Pltf. admitted that she signed the deed, but alleged that it was obtained by fraud, duress, & fear; that it was misrepresented to her; & that she had no opportunity of obtaining independent advice; & that it was without consideration & void:—*Held:* the separation deed could not, on the evidence, be avoided

& thereby to accept of a very small maintenance, much inferior to his rank & fortune, a ct. of equity will relieve the wife against this deed, & refer it to a master, to settle a proper maintenance.—LAMBERT *v.* LAMBERT (1767), 2 Bro. Parl. Cas. 18; 1 E. R. 764, H. L.

Annotation :- **Refd.** Hulton *v.* Hulton, [1917] 1 K. B. 813.

1995. —— ——.]—A husband, before leaving his wife, told her that, if she would sign a deed of separation, he would make her an allowance of £1 a week, otherwise he would give her nothing. He thereupon took her to his solr.'s office, where the deed of separation was already drawn up. The solr. told her that the only way to get any money from her husband was to sign the deed. At first she refused to do so, but at length consented, her child being then three months old. She had no independent advice. She received the allowance under the deed for some years. The husband having subsequently committed adultery, she brought an action for divorce, alleging adultery & desertion :—*Held :* the wife was not a consenting party to the deed, having been forced into signing it by the circumstances of her position, & she was not prevented from relying on the desertion.—ADAMSON *v.* ADAMSON (1907), 23 T. L. R. 431.

Annotation : **Consd.** Holroyd *v.* Holroyd (1920), 36 T. L. R. 479.

1996. —— ——.]—A husband for four years before deserting his wife pressed her continuously to sign a paper under which he agreed to pay her a small weekly sum for the maintenance of herself & her three young children, but she always refused to do so. Finally, in 1917, he left her, taking with him all the money in the house with the exception of a sum of 4*d*. Some weeks later, when she discovered his whereabouts, he declined to come home or to provide her with any money unless she signed a document which he had prepared after consulting a solr. He threatened if she did not sign to leave the country & let her & her children starve or go into the workhouse. In these circumstances she signed the paper & had been receiving a small weekly sum which had become wholly inadequate :—*Held :* the wife was not a consenting party, but had been forced into signing the document by her husband's threats, her own ill-health & destitution, & she was not prevented from relying on desertion, coupled with the husband's adultery.—HOLROYD *v.* HOLROYD (1920), 36 T. L. R. 479.

1997. What amounts to—Threat to send wife to asylum.]—BIFFIN *v.* BIGNELL, No. 1660, *ante*.

1998. —— Wife threatened with desertion & destitution—Not independently advised.]—ADAMSON *v.* ADAMSON, No. 1995, *ante*.

1999. —— —— ——.]—HOLROYD *v.* HOLROYD, No. [illegible]

SECT. 4.—WIFE'S POWER TO BIND PROPERTY.

2000. Property restrained from anticipation.]—WALROND *v.* WALROND, No. 1954, *ante*.

2001. Property acquired after date of agreement.]—STOGDON *v.* LEE, No. 2035, *post*.

2002. Necessity for acknowledgment of deed—Release of jointure in separation deed.]—A married woman was entitled by an ante-nuptial settlement to a jointure rentcharge after her husband's death, secured upon his real estate in Ireland. The wife having left him, the husband commenced a suit for restitution of conjugal rights; with a view to a compromise by an agreement for separation, a document was drawn up & signed by the husband which stipulated that the wife should release part of her jointure. The wife signed this document with a qualification that no further steps were taken in the matrimonial suit; but it was not stayed or dismissed. A deed was prepared to carry out the terms of the compromise, & was executed by the husband, but the wife refused to execute it or to return to her husband, & the husband afterwards died :—*Held :* the wife was not, when she signed the document, in all respects in the same position as a *feme sole*, & even if any final agreement had been come to she would not have been bound by it, there having been no acknowledgment as required by Fines & Recoveries (Ireland) Act, 1834 (*c.* 92), ss. 68, 71; & specific performance of the agreement to release her jointure could not be decreed against her.—CAHILL *v.* CAHILL (1883), 8 App. Cas. 420; 49 L. T. 605; 31 W. R. 861, H. L.

Annotations :- **Consd.** Butler *v.* Butler (1885), 16 Q. B. D. 374. **Refd.** *Re* Wheatley, Smith *v.* Spence (1884), 27 Ch. D. 606; Clark *v.* Clark (1885), 10 P. D. 188; *Re* Vardon's Trusts (1885), 31 Ch. D. 275; Harle *v.* Jarman, [1895] 2 Ch. 419.

2003. —— Release of reversionary interest.]—A separation deed executed in 1875, not acknowledged by the wife, provided for payment by the husband of an annuity to the wife, who covenanted to release, when *discovert*, a reversionary life interest in real & personal estate :—*Held :* on the death of the husband the wife was not bound to release her life interest by having received the annuity.

The doctrine of election by a married woman discussed.—HARLE *v.* JARMAN, [1895] 2 Ch. 419; 64 L. J. Ch. 779; 73 L. T. 20; 43 W. R. 618; 13 R. 610.

See, now, Law of Property Act, 1925 (*c.* 20), s. 167.

SECT. 5.—FORM OF AGREEMENT.

2004. Need not be in writing—Statute of Frauds, s. 4.]—A husband & wife, having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses & to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, & the wife agreeing to maintain herself & her children, & to indemnify the husband against any debts contracted by her. An action having been brought in the county ct. by the wife against the husband for six weeks arrears of maintenance under the agreement :—*Held :* (1) the husband & wife had power to make a contract for separation without the intervention of a trustee, by way of compromise of legal proceedings, the husband's

on any of the grounds set up in the reply; it was not contrary to public policy; the pltf. had sufficient capacity to understand it, & did understand it; & it was a complete answer to the action, especially after a delay of ten years.—DITCH *v.* DITCH (1911), 19 W. L. R. 497; 21 Man. L. R. 507.—**CAN.**

PART XI. SECT. 4.

o. *Agreement to sell property—Power to mortgage until* separation deed V. agreed to transfer & did subsequently transfer certain lands to his wife, who agreed to "proceed to sell" the same at not less than certain specified prices & with one quarter of the proceeds repay V. moneys he had advanced to her :—*Held :* the wife became the absolute owner of the lands; her agreement to proceed to sell was satisfied by endeavouring to sell at the prices fixed which she had up to date been unable to do, & she had the right to [illegible]e. the lands in order to pay taxes until she could sell them.—VAN AALST *v.* VAN AALST (1916), 34 W. L. R. 1222.—**CAN.**

PART XI. SECT. 5.

p. *No particular form necessary.*]—A contract between spouses to live separate & apart need not be in any particular form provided there is evidence of an agreement made for valuable consideration; nor is it necessary that it should contain an

Sect. 5.—*Form of agreement.* *Sect.* 6 : *Sub-sects.* 1, 2, 3 & 4.]

contract to pay the wife a weekly sum for maintenance was binding, & the action was maintainable ; (2) the agreement was not an agreement "not to be performed within one year" within above sect. & therefore need not be in writing.—McGREGOR *v.* McGREGOR (1888), 21 Q. B. D. 424 ; 57 L. J. Q. B. 591 ; 52 J. P. 772 ; 37 W. R. 45 ; 4 T. L. R. 760, C. A.

Annotations :—*As to* (1) **Apld.** Hulse *v.* Hulse (1910), 103 L. T. 801. *As to* (2) **Consd.** Hanau *v.* Ehrlich, [1911] 2 K. B. 1056. **Refd.** Aldridge *v.* Aldridge (1888), 13 P. D. 210 ; Wilkinson *v.* Rushton (1889), 53 J. P. 440 ; Lavalette *v.* Riches (1908), 24 T. L. R. 336 ; Reeve *v.* Jennings, [1910] 2 K. B. 522 ; Cayme *v.* Allan, Jones (1919), 35 T. L. R. 453.

—— ——.]—*See, generally,* CONTRACT, Vol. XII., pp. 118 *et seq.*

2005. Need not be by deed.]—ALDRIDGE *v.* ALDRIDGE (OTHERWISE MORTON), No. 1969, *ante.*

2006. Necessity for trustee.]—FREEMAN *v.* MORE (1728), 1 Bro. Parl. Cas. 237 ; 1 E. R. 538, H. L. ; *affg.* S. C. *sub nom.* MORE *v.* FREEMAN (1726), Bunb. 205.

Annotations :—**Refd.** Wilson *v.* Wilson (1845), 14 Sim. 405 ; Vansittart *v.* Vansittart (1858), 4 Jur. N. S. 276.

2007. ——.]—WORRALL *v.* JACOB, No. 1960, *ante.*

2008. ——.]—HOPE *v.* HOPE, No. 1926, *ante.*

2009. ——.]—McGREGOR *v.* McGREGOR, No. 2004, *ante.*

2010. — Married Women's Property Act, 1882 (c. 75).]—SWEET *v.* SWEET, No. 2018, *post.*

SECT. 6.—CONSTRUCTION AND OPERATION.

SUB-SECT. 1.—IN GENERAL.

2011. Operation of ordinary rules of construction.]—A separation deed whereby husband & wife agree not to institute proceedings in respect of past matrimonial offences, & containing an express condonation of such offences, being valid, the clauses in such deed must be interpreted according to the ordinary rules of construction.—BOURNE *v.* BOURNE, [1913] P. 164 ; 82 L. J. P. 117 ; 108, L. T. 1039 ; 29 T. L. R. 657.

Annotations :—**Mentd.** Lipman *v.* Lipman, [1916] P. 25 ; Thompson *v.* Thompson, [1916] P. 165.

2012. Effect of agreement—Parties continue in state of cohabitation—3 Geo. 4, c. 75.]—Married persons separating, by mere voluntary agreement, without any legal sanction, are still, in the eye of the law, in a state of matrimonial cohabitation, how locally situate soever ; & upon what terms soever of matrimonial intercourse. The actual separation of the parties, in this case, was without any reference, apparently, to doubts entertained by both, or either, as to the legal validity of their marriage. On the contrary, they separate, by virtue, to some extent, of a deed, in which the party proceeded against, is expressly recognised as the wife of the party proceeding, in this suit, & by which a separate maintenance is provided for her, expressly in that character. It is, in short, just such a mere separation as might have taken place between the parties, had their marriage not been faulty in its original construction, had the husband, for instance, been a major at that time ; or, being a minor, had his father's consent been obtained ; or had this, lastly, been a marriage had, or celebrated, in virtue of banns duly published. Accordingly, their separation is one to which the law, as administered in these cts., can be no party, it is a separation, in short, to which it can give no heed, & can show no countenance. Under these circumstances, admitting it to be proved that these parties were not actually cohabiting up to the time of the passing of above Act ; still, in my judgment, they did "continue to live together as husband & wife," in legal construction, within its true intent & meaning, up to that time, sufficiently to bring the marriage within the retrospective provisions of that Act. The retrospective provisions of that Act, if applicable to, clearly rendering this a good & valid marriage, I am bound, as deeming them so applicable, to withhold the declaratory sentence of its nullity, now prayed by the husband (SIR CHRISTOPHER ROBINSON).—KING *v.* SANSOM (OTHERWISE KING) (1826), 3 Add. 277 ; 162 E. R. 481.

Annotation :—**Distd.** Poole *v.* Poole (1831), 2 Cr. & J. 66.

2013. Inconsistent clauses — Rectification by court—Effect given to intention of parties.]—WILSON *v.* WILSON, No. 2139, *post.*

2014. Construed as post-nuptial settlement—Matrimonial Causes Act, 1859 (c. 61), s. 5.]—WORSLEY *v.* WORSLEY & WIGNALL, No. 2174, *post.*

Submission to arbitration.]—*See* ARBITRATION, Vol. II., pp. 322, 354, Nos. 72, 284.

Construction of deeds generally, *see* DEEDS, Vol. XVII., pp. 242 *et seq.*

SUB-SECT. 2.—USUAL CLAUSES.

2015. How construed — Surrounding circumstances.]—HART *v.* HART, No. 2118, *post.*

2016. "Dum casta" clause—Not usual clause—Separation as compromise of divorce suit.]—HART *v.* HART, No. 2118, *post.*

2017. —— Cannot be implied.]—FEARON *v.* AYLESFORD (EARL), No. 2019, *post.*

—— **Subsequent adultery of wife.**]—*See* No. 1989, *ante*, Nos. 2018, 2019, 2076, *post.*

Indemnification of husband against wife's debts.]—*See* Sub-sect. 5, *post.*

Covenant not to molest or annoy.]—*See* Sub-sect. 3, *post.*

Covenant to pay annuity to wife.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 3.—COVENANT NOT TO MOLEST OR ANNOY.

2018. Annoy—Whether distinguishable from "molest."]—(1) A separation deed between husband & wife may, since Married Women's Property Act, 1882 (c. 75), be entered into by the husband & wife without the intervention of a trustee, & the wife can sue in her own name upon such deed.

By a separation deed, executed by husband & wife alone, without a trustee, the husband covenanted to pay an annuity to the wife, & she covenanted not to molest, annoy, or interfere with him. There was no *dum casta* clause. In an action by the wife against the husband to recover arrears of the annuity :—*Held :* pltf. could maintain the action, & her adultery, resulting in the birth of a child, afforded no defence.

express covenant not to sue to be a bar to subsequent proceedings for divorce, if that can be shown to have been the real character of the agreement entered into by the parties.—COURTNEY *v.* COURTNEY, [1923] 2 I. R. 31.—IR.

PART XI. SECT. 6, SUB-SECT. 3.

q. *What amounts to molestation—Proceedings for divorce.*]—A covenant by a husband in a separation agreement "not to molest or interfere in any way whatsoever" with his wife, is not broken by his taking proceedings for divorce ; & he may in such proceedings set up a release in the separation agreement as a bar to her claim for alimony or interim alimony.—KUHLER *v.*

(2) Another point was raised, founded on the use of the word "annoy" in the wife's covenant; but I cannot distinguish that word from "molest," & it is clear from *Fearon* v. *Aylesford* (*Earl*), No. 2019, *post*, that adultery is not molestation within the meaning of such a covenant as this (MATHEW, J.).—SWEET *v.* SWEET, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; 71 L. T. 672; 59 J. P. 373; 43 W. R. 303; 15 R. 146, D. C.

2019. What amounts to molestation—Necessity for intent to annoy.]—(1) In a separation deed a covenant by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste is good & is not against public policy, & the covenant remains in force & the annuity continues payable, although the wife afterwards commits adultery.

(2) *Semble:* if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void.

(3) Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife & the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent; & therefore a breach of the covenant that a wife shall not molest the husband is not an answer to an action for the annuity.

(4) Neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed against molestation by the wife.

(5) *Semble:* adultery by the wife followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her.

(6) In order to constitute a breach of a covenant in a separation deed against molestation by a wife some act must be done by her or by the authority with intent to annoy her husband, & which is in fact an annoyance to him or at least some act must be done by her or by her authority with a knowledge that it must of itself without more annoy her husband or annoy a husband with reasonable & proper feeling.

(7) In a separation deed a *dum casta* clause cannot be implied.—FEARON *v.* AYLESFORD (EARL) (1884), 14 Q. B. D. 792; 54 L. J. Q. B. 33; 52 L. T. 954; 49 J. P. 596; 33 W. R. 331; 1 T. L. R. 68, C. A.

Annotations:—*As to* (1) **Apld.** Sweet *v.* Sweet, [1895] 1 Q. B. 12. *As to* (3) **Refd.** Kennedy *v.* Kennedy, [1907] P. 49. *As to* (6) **Folld.** Hunt *v.* Hunt, [1897] 2 Q. B. 547.

KUHLER, [1920] 3 W. W. R. 875; 54 D. L. R. 875.—**CAN.**

r. ——.]—A wife by a separation agreement agreed among other things not to molest, annoy or interfere in any manner with her husband:—*Held:* this agreement was not broken by her agent the morning after the date of the agreement hauling away & stacking on the farm which belonged to the wife & on which the parties had been living oats belonging to the husband.—OVEROCKER *v.* OVEROCKER, [1920] 2 W. W. R. 341; 52 D. L. R. 393.—**CAN.**

s. *Nature of covenant.*]—The covenant "not to molest" is an independent covenant & not a condition precedent.—MARSHALL *v.* MARSHALL, [1923] 2 W. W. R. 820; 4 D. L. R. 175.—**CAN.**

2020. ·.]—Where a deed of separation between husband & wife contains a covenant by the former not to molest the latter, the taking proceedings in a foreign ct. to procure a divorce is not of itself, & without evidence of an intention to annoy, a breach of the covenant.—HUNT *v.* HUNT, [1897] 2 Q. B. 547; 67 L. J. Q. B. 18; 77 L. T. 421; 14 T. L. R. 53, C. A.

2021. —— Proceedings for restitution of conjugal rights.]—WILSON *v.* WILSON, No. 2139, *post.*

2022. —— ——.]—FLOWER *v.* FLOWER, No. 2137, *post.*

2023. —— Proceedings for judicial separation.]—A deed of separation between husband & wife contained a covenant by the trustees of the wife that she would not molest or disturb her husband:—*Held:* a suit in the Divorce Ct. for a judicial separation was no breach of the covenant.—THOMAS *v.* EVERARD (1861), 6 H. & N. 448; 30 L. J. Ex. 214; 158 E. R. 184.

Annotations:—**Folld.** Hunt *v.* Hunt, [1897] 2 Q. B. 547. **Refd.** Fearon *v.* Aylesford (1884), 32 W. R. 718.

2024. —— Adultery.]—FEARON *v.* AYLESFORD (EARL), No. 2019, *ante.*

2025. —— —— Birth of bastard to wife—Bastard held out as child of husband.]—FEARON *v.* AYLESFORD (EARL), No. 2019, *ante.*

2026. —— —— ——.]—SWEET *v.* SWEET, No. 2018, *ante.*

2027. —— Proceedings for divorce—Foreign proceedings.]—HUNT *v.* HUNT, No. 2020, *ante.*

Molestation by wife—Whether defence to action for arrears of annuity.]—*See* No. 2019, *ante.*

SUB-SECT. 4.—COVENANT TO PAY ANNUITY TO WIFE.

2028. Whether apportionable — Payable in arrear.]—Separate maintenance, payable quarterly, at the end of each quarter, is to be apportioned at the death of the wife.—HOWELL *v.* HANFORTH (1775), 2 Wm. Bl. 1016; 96 E. R. 597.

Annotation:—**Refd.** R. *v.* Treasury Lords, *Re* Queen Dowager's Annuity (1851), 20 L. J. Q. B. 305.

2029. —— Payable in advance.]—By a separation deed a husband granted to his wife an annuity during their joint lives, if they should so long live separate from each other, the annual sum to be paid by equal half-yearly payments in advance on Mar. 1 & Sept. 1 in every year. The husband & the wife continued to live separate from each other until the death of the husband. After the husband's death his extrix. brought an action against his widow to recover the balance of the last instalment paid by the husband under the deed after deducting an apportioned part in respect of the period between the payment & his death:—*Held:* the annuity was not apportionable, & the

PART XI. SECT. 6, SUB-SECT. 4.

t. *How determined—Death of husband—Construction of deed.*]—M. & his wife executed a deed of separation by which he agreed to pay her $100 monthly, upon her covenanting to support & maintain herself & the children. The sums were not expressed to be payable to the wife during her life nor did the husband covenant on behalf of his exors. or administrators. The husband died:—*Held:* the agreement came to an end with the death of the testator, it being in no sense a post-nuptial settlement.—*Re* MCDOUGALLS' ESTATE (1916), 34 W. L. R. 924; 10 W. W. R. 1001.—**CAN.**

a. —— —— —— *Annuity to wife while living "separate & apart."*]—Testator, upon an agreement with his wife A. for a separation, by deed poll created a trust fund to secure payments to his wife while she should live separate from him:—*Held:* wife's right to receive payments under the trust deed ceased on testator's death.—*Re* IRWIN (1912), 21 O. W. R. 562; 3 O. W. N. 936; 4 D. L. R. 803.—**CAN.**

b. —— —— *Provision of lump sum on husband's death.*]—Although it is provided by a separation deed that an annuity is to be paid to the wife "during her life" for her maintenance it may be held in view of another provision in the deed for the payment to her of a lump sum on her husband's death, that the annuity was to be payable during their joint lives only.—RISSMULLER *v.* BALCOM, [1917] 3 W. W. R. 535.—**CAN.**

c. —— —— *Widow not bound by*

Sect. 6.—*Construction and operation:* 4 & 5.]

extrix. was not entitled to recover.—TREVALION *v.* ANDERTON (1897), 66 L. J. Q. B. 489; 76 L. T. 642; 13 T. L. R. 401, C. A.

2030. Whether assignable.]—Trust in a deed of separation to permit A. to receive the dividends of stock for the maintenance & support of the wife, with a covenant of indemnity to her husband: a grant by her of an annuity out of the dividends:—*Held:* void.—HYDE *v.* PRICE (1797), 3 Ves. 437; 30 E. R. 1093.

Annotations:—**Refd.** Whistler *v.* Newman (1798), 4 Ves. 129; Beard *v.* Webb (1800), 2 Bos. & P. 93; Worrall *v.* Jacob (1817), 3 Mer. 256: Hyde *v.* Price, Hart *v.* Cradock (1837), 8 Sim. 578; Wilson *v.* Wilson (1845), 14 Sim. 405. **Mentd.** Lewis *v.* Lee (1824), 3 B. & C. 291.

2031. How determined—Annuity payable out of husband's official salary—Effect of dismissal from office.]—By a deed of separation, after reciting an agreement by the husband to allow the wife £250 out of his salary as a searcher, the husband covenanted generally to pay her £250 *per annum* during her life:—*Held:* the covenant was controlled by the recital, & dismissal from the office justified non-payment of the annuity.—HESSE *v.* ALBERT (1828), 3 Man. & Ry. K. B. 406.

Annotation:—**Consd.** Crouch *v.* Crouch, [1912] 1 K. B. 378.

2032. —— Deed to be considered as a whole.]—CHAPMAN *v.* GUEST (1887), 3 T. L. R. 438.

2033. —— Gift of annuity by will—Widow put to election.]—ATKINSON *v.* LITTLEWOOD, No. 2067, *post.*

2034. —— Annuity while child residing with wife—Child ceasing to so reside—Midshipman in Navy.]—CHAPMAN *v.* GUEST (1887), 3 T. L. R. 438.

2035. —— Death of husband—Annuity in arrear.]—(1) A married woman cannot contract so as to bind her separate property under Married Women's Property Act, 1882 (c. 75), unless she has some separate property at the date of the contract. If she have some separate estate at the time, a charge on it will affect after-acquired property, but not otherwise.

(2) In an action of contract against a married woman under sect. 1 (2) of Married Women's Property Act, 1882 (c. 75), pltf. must show that deft. had separate estate at the time of entering into the contract.

(3) By a separation deed between husband & wife, the husband covenanted with the trustees of the deed that he would, during the joint lives of himself & his wife, pay to the trustees an annuity of £500; & it was declared that the trustees should stand possessed of the annuity, during the continuance thereof, upon trust to pay the same to the wife "for her separate use, without power of anticipation." There was a proviso that, in case the husband should at any time thereafter obtain a decree absolute for a divorce against the wife in respect of any circumstances occurring after the date of the deed, or in case the wife should at any time thereafter be proved to be leading a notoriously unchaste life, the annuity should absolutely cease & determine:—*Held:* the separate use continued only during the joint-lives of husband & wife, & arrears of the annuity remaining unpaid at the date of the husband's death are not separate property of the wife.—STOGDON *v.* LEE, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669; 64 L. T. 494; 55 J. P. 533; 39 W. R. 467, C. A.

Annotations:—*As to* (1) **Consd.** Paquin *v.* Beauclerk, [1906] A. C. 148; *Re* Fieldwick, Johnson *v.* Adamson, [1909] 1 Ch. 1. **Refd.** Pelton *v.* Harrison, [1891] 2 Q. B. 422; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Johnson *v.* Clark, [1908] 1 Ch. 303. *As to* (3) **Refd.** *Re* Lumley, *Ex p.* Hood Barrs, [1896] 2 Ch. 690; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

2036. —— —— Construction of deed.]—*Re* CLENCH, DRAPER *v.* CLENCH (1894), 38 Sol. Jo. 546.

2037. —— —— —— Annuity to wife while living "separate & apart."]—In a separation deed a husband covenanted to pay to his wife for her sole & separate use during her life if she should "so long continue to live separate & apart," £150 for her maintenance, clothing, & other necessaries. The husband having died, the wife remarried:—*Held:* on the construction of the deed, the annuity ceased to be payable on the death of the husband.—*Re* GILLING, PROCTER *v.* WATKINS (1905), 74 L. J. Ch. 335; 92 L. T. 533; 53 W. R. 427; 49 Sol. Jo. 401.

—— ——.]—*See, also,* No. 1900, *ante.*

2038. —— Decree of divorce—Adultery of wife before separation—Adultery acknowledged in deed.]—A decree of dissolution of marriage by the Divorce Ct., on the ground of adultery, is no answer to an action by the wife's trustee upon a covenant by the husband to pay her an annuity, contained in a deed of separation which recites the wife's acknowledgment of the adultery which was afterwards made the foundation of the suit in the Divorce Ct.—GOSLIN *v.* CLARK (1862), 12 C. B. N. S. 681; 31 L. J. C. P. 330; 6 L. T. 824; 9 Jur. N. S. 520; 142 E. R. 1310.

Annotation:—**Refd.** Grant *v.* Budd (1874), 22 W. R. 544.

—— —— —— **Adultery concealed.**]—*See* Sect. 3, sub-sect. 1, *ante.*

2039. —— —— Absolute covenant.]—By a separation deed reciting that differences existed between deft. & his wife, & that they had agreed to separate, deft. covenanted with trustees to pay them an annuity for his wife's support "during their joint lives & so long as they should live separate & apart." The deed contained clauses which indicated that the parties to the deed contemplated that the marriage relation would continue to exist between deft. & his wife. In an action by the trustees for arrears of the annuity:—*Held:* a plea setting forth the deed & alleging the wife's subsequent adultery, & the dissolution of the marriage in consequence, was bad, there being no express words limiting deft.'s obligation to the period during which the marriage tie subsisted. *Qu.:* whether Matrimonial Causes Act, 1859 (c. 61), s. 5, applies to deeds made before the passing of the Act.

It is contended that the covenant is only operative as long as the parties live apart. . . . But I think the husband's covenant is absolute (BRAMWELL, B.).—CHARLESWORTH *v.* HOLT (1873), L. R. 9 Exch. 38; 43 L. J. Ex. 25; 29 L. T. 617; 22 W. R. 94.

Annotations:—**Consd.** Grant *v.* Budd (1874), 30 L. T. 319; Negus *v.* Forster (1882), 46 L. T. 675. **Expld.** Fearon *v.* Aylesford (1884), 12 Q. B. D. 539. **Distd.** *Re* Gilling, Procter *v.* Watkins (1905), 74 L. J. Ch. 335. **Refd.** Nicol *v.* Nicol (1886), 31 Ch. D. 524.

2040. On wife's petition—Liability of surety.]—By a separation deed reciting that differences had arisen between the husband & wife, in consequence of which they had agreed to live apart, deft. became a surety for the payment by the husband to pltf., as trustee for the wife, of a certain weekly sum during the joint lives of the husband & wife. In an action against deft., as surety, for arrears of the weekly sum:—*Held:*

unfair contract.]—A husband & wife having executed a contract of separation & aliment, whereby the husband bound himself to pay to his wife during her life & separation an annuity of £30 p.a., in consideration of which she renounced all legal claims against him: & the husband having died while the contract of separation was unrevoked:—*Held:* the wife was not bound by that contract of separation, but was .on his death, entitled to her

a plea setting out the deed, & alleging that deft. became a party to it to prevent any public exposure, that the wife had subsequently commenced a suit for a divorce, & that the marriage had been dissolved, was bad.—GRANT *v.* BUDD (1874), 30 L. T. 319; 22 W. R. 544.

Annotation :— **Refd.** Fearon *v.* Aylesford (1884), 12 Q. B. D. 539.

—— **Wife's adultery subsequent to separation.**]—*See* Sub-sect. 11, *post*.

—— **Breach of agreement by wife—Covenant not to molest or annoy.**]—*See* Sub-sect. 3, *ante*.

2041. —— Upon notice—Construction of deed.]—A deed of separation was executed in 1894 by resp. & his wife, the former covenanting to pay to a trustee thereunder an annuity for the separate use of the latter without power of anticipation. Power was reserved to resp. to give notice to the trustee after the expiration of twelve months from the date of the deed of his intention to pay a reduced amount, in which case, unless all the parties agreed as to the amount to be thereafter paid, the covenants in the deed should be void & of no further effect. Before the expiration of twelve months notice of such intention was given to the wife's solrs., & the wife instructed them to waive the stipulated notice to the trustee. In an action brought in 1904 to recover all arrears of annuity due under the deed as a still subsisting arrangement, the Supreme Ct. of the Colony decreed the amount, holding that the wife's waiver of notice to the trustee was in contravention of the restraint clause in the deed:—*Held:* the High Ct. rightly reversed this decree. On the true construction of the deed the restraint clause applied to the annuity so long as it was payable, but not to the notice. Personal service thereof on the trustee was a mere formality which the wife was entitled to waive. Otherwise it was inequitable that she should enforce an obligation from which she had induced her husband to omit to free himself in the manner stipulated.—MACNAGHTEN *v.* PATERSON, [1907] A. C. 483; 76 L. J. P. C. 91; 97 L. T. 442; 25 T. L. R. 727, P. C.

—— **By reconciliation.**]—*See* Sect. 8, *post*.

Variation of allowance.]—*See* Sect. 9, *post*.

2042. Covenant to pay gross sum—Or so much as wife should order or require—Whether wife accountable for surplus.]—To put an end to litigation between a husband & wife, the husband conveyed property to trustees, upon trust to pay his wife £3,700 a year, or so much as she should "order or require." The wife was, out of that sum, to keep up an establishment for herself & children upon such a scale as she should think fit; & the husband was to have the benefit of it under certain restrictions. But if she should not require the whole for the purposes aforesaid, the surplus was to be paid to the husband:—*Held:* (1) so long as she kept up the establishment, she was not liable to account for the surplus in her hands; (2) this was like the case of guardians of infants & committees of lunatics having allowances made to them for maintenance, & who are not accountable for their expenditure, so long as they properly maintain those committed to their care.—JODRELL *v.* JODRELL (1851), 14 Beav. 397; 51 E. R. 339.

Annotations :—*As to* (1) & (2) **Refd.** Hart *v.* Tribe (1854), 23 L. J. Ch. 462; Macrae *v.* Harness (1910), 103 L. T. 629.

Income tax—Whether husband entitled to deduct.]—*See* INCOME TAX.

2043. Deed executed abroad—Partner domiciled in England—Right to payment in England.]—DREXEL *v.* DREXEL, No. 2111, *post*.

SUB-SECT. 5.—COVENANT TO INDEMNIFY HUSBAND AGAINST WIFE'S DEBTS.

2044. A usual clause.]—GIBBS *v.* HAI No. 2126, *post*.

2045. Covenant to indemnify—Whether essential to validity of deed.]—A covenant in a deed of separation, that the husband shall pay the trustee for the wife, an annuity for her maintenance, is binding on the husband, & may be enforced in equity, although there be no covenant on the part of the trustee to indemnify the husband. A general demurrer to a bill for an account of assets & payment of such an annuity overruled.—ROS *v.* WILLOUGHBY (1822), 10 Price, 2; 147 E. R. 222.

Annotation :—**Refd.** Wilson *v.* Wilson (1845), 14 Sim. 405.

2046. —— ——.]—*Qu.:* whether it is essential to the validity of a deed of separation, that it should contain a covenant by the trustee to indemnify the husband against the wife's debts.—HAWORTH *v.* BOSTOCK (1840), 4 Y. & C. Ex. 1; 160 E. R. 894; *on appeal* (1842), 9 Cl. & Fin. 59, H. L.; *subsequent proceedings, sub nom.* BOSTOCK *v.* HUME (1844), 13 L. J. C. P. 225, Ex. Ch.

2047. —— What debts included—Costs incurred in defending actions for necessaries—General covenant.]—Declaration on bond; plea that it was conditioned for performance of covenants, which were to indemnify the obligee from alimony & debts incurred by his wife after their separation, & that deft. had performed the covenant. Replication that a judgment was recovered against the obligee by a creditor of his wife, & he paid debt & costs, of which deft. had notice. Demurrer & joinder. Deft. was liable for the costs as the debt paid by pltf.; for the covenant to indemnify was general; & it was not necessary for pltf. to give notice that an action was commenced. If it had been necessary, pltf. must have recovered on these pleadings; for deft. had admitted notice.—DUFFIELD *v.* SCOTT (1789), 3 Term Rep. 374; 100 E. R. 628.

Annotations :—**Consd.** Amory *v.* Brodrick (1822), 5 B. & Ald. 712. **Refd.** Penley *v.* Watts (1841), 7 M. & W. 601; Lloyd *v.* Mostyn (1842), 6 Jur. 974; Gray *v.* Lewis, Parker *v.* Lewis (1873), 8 Ch. App. 1035. **Mentd.** Smith *v.* Compton (1832), 3 B. & Ad. 407; Tildasley *v.* Stephenson (1834), 10 Bing. 545; Jones *v.* Williams (1841), 9 Dowl. 252.

2048. —— —— Debts contracted prior to separation.]—A deed of separation between husband & wife contained a covenant by the wife & her trustees, that she, her exors. or administrators, or the trustees, or some or one of them, should & would at all times save, defend, & keep harmless & indemnified the husband from & against the debt or debts, sum or sums of money, which she the wife had then, at the time of the making of the indenture, contracted, or which she should at any time thereafter, during the separation,

---

legal provision as his widow, the annuity not being fair, onerous & adequate, in the pecuniary circumstances of the husband.—HUNTER *v.* DIXON (1831), 5 Wils. & S. 455; *affg.* Sh. (Ct. of Sess.) 266.—**SCOT.**

PART XI. SECT. 6, SUB-SECT. 5.

d. *Covenant to indemnify—What debts included—Mortgage debt.*]—A covenant in a separation deed whereby the wife covenanted to indemnify the husband against all debts & liabilities contracted by her held not to recover a covenant in a mortgage made by him, notwithstanding the facts that he had conveyed the mortgaged land to her & she had, subsequently to the execution of the

Sect. 6.—Construction and operation: Sub-sects. 5,

contract:—*Held:* this covenant included debts previously contracted by the wife for necessaries, while living with the husband.—SUMMERS *v.* BALL (1841), 8 M. & W. 596; 10 L. J. Ex. 368; 151 E. R. 1177.

Annotation:—**Refd.** Brailey *v.* Brailey, [1922] P. 15.

2049. —— —— ——.]—In this case the parties had agreed to execute a separation deed containing the usual clauses, to be settled in case of difference by a named counsel. Counsel settled a deed containing a covenant by the wife to keep the husband indemnified against all debts & liabilities heretofore or hereafter incurred by the wife. The wife took out a summons to strike out the words "heretofore or":—*Held:* a covenant by the wife to indemnify the husband against antecedent debts was not a usual covenant & not within the powers of the counsel as reference to insert, & the words objected to must be struck out.—BRAILEY *v.* BRAILEY, [1922] P. 15; 91 L. J. P. 65; 126 L. T. 277; 38 T. L. R. 28; 66 Sol. Jo. (W. R.) 13, C. A.

—— **Whether good consideration.**]—*See* Nos. 1921, 1959–1961, 1963, 1965, *ante*, No. 2126, *post.*

SUB-SECT. 6.—PROVISIONS AS TO WIFE'S PROPERTY.

Effect of separation on.]—*See* Part V., Sect. 2, sub-sect. 1, *ante.*

SUB-SECT. 7.—PROVISION FOR CUSTODY AND MAINTENANCE OF CHILDREN.

See Infants' Custody Act, 1873 (c. 12), s. 2.

2050. Covenant by father to relinquish custody—Whether valid.]—VANSITTART *v.* VANSITTART, No. 1903, *ante.*

2051. —— ——.]—WALROND *v.* WALROND, No. 1954, *ante.*

2052. —— —— **Father's conduct towards child disentitling him to custody—Effect of wife's misconduct.**]—SWIFT *v.* SWIFT, No. 1905, *ante.*

2053. —— ——.]—A wife intended to proceed in the Divorce Ct. for a separation, & had filed a bill against her husband to set aside a certain appointment. By a deed of compromise it was agreed that the proceedings should be stayed, that two of the children should remain at such schools as the husband should direct, & that their holidays should be passed at such places as the trustees should direct:—*Held:* although a father could not by agreement deprive himself of the control of his children, the agreement in this case as to where the holidays of the children should be passed was reasonable, & would be enforced by the ct.—HAMILTON *v.* HECTOR (1871), 6 Ch. App. 701; 40 L. J. Ch. 692; 25 L. T. 146; 19 W. R. 990, L. C.; *subsequent proceedings* (1872), L. R. 13 Eq. 511.

2054. —— —— **Infants' Custody Act, 1873 (c. 12), s. 2.**]—HART *v.* HART, No. 2118, *post.*

2055. —— ——.]—JUMP *v.* JUMP, No. 2176, *post.*

2056. —— **Breach—What amounts to—Concurrence in petition for removal from custody of mother.**]—BESANT *v.* WOOD, No. 2090, *post.*

2057. Covenant by husband to maintain—Extent of liability—Construction of covenant.]—In a deed of separation there was the following covenant by deft. the father of the children therein named: That, for providing for maintenance of the children he would out of his own moneys pay the whole expense of their education, maintenance & support except as thereinafter mentioned, all of whom, it was agreed, should be & remain in the custody & under complete control of deft. Then followed a proviso, that the mother of the children, or her trustees, should pay the expense of the education, maintenance & support of such of the children as should from time to time be permitted by deft. to reside with the mother during the period of such residence:—*Held:* the covenant by deft. to maintain was general, & not limited to the minority of the children, or to the period of their remaining under his control & custody.—DE CRESPIGNY *v.* DE CRESPIGNY (1853), 9 Exch. 192; 2 C. L. R. 404; 23 L. J. Ex. 27; 22 L. T. O. S. 123; 2 W. R. 75; 156 E. R. 82.

Annotation:—**Mentd.** Gardiner *v.* Barber (1854), 2 Eq. Rep. 888.

2058. —— —— —— **Custody transferred by order of court.**]—GANDY *v.* GANDY, No. 2106, *post.*

2059. —— —— **While child under care of wife—Admission of child to school.**]—By a covenant in a separation deed the husband agreed to pay the wife a weekly sum for her sole & separate use, & also a further weekly sum as long as their son should remain under the age of twenty-one & should reside with or under the tutelage or care of the wife, for & towards the support, maintenance, board, lodging, clothing, & education of the son; & the wife covenanted that out of this further sum, & without any further assistance from the husband, she would support, maintain, board, lodge, clothe & educate the son in a suitable manner, & would indemnify the husband from all liability on account thereof. Afterwards the son obtained admission to Christ's Hospital, where he was maintained & educated at very small expense to his mother. Under an originating summons an order was made by consent that the son should spend half his holidays with his father & half with his mother:—*Held:* the husband was not relieved under those circumstances from continuing to pay to the wife the weekly sum covenanted by him to be paid so long as their son should remain under the age of twenty-one, & should reside with or under the tutelage & care of the wife.—ROWELL *v.* ROWELL (1903), 89 L. T. 288; 19 T. L. R. 657; 47 Sol. Jo. 726, C. A.

separation deed, covenanted with the mortgagee to pay him principal & interest.—WALKER *v.* LEES, [1918] 3 W. W. R. 586.—**CAN.**

PART XI. SECT. 6, SUB-SECT. 6.

e. *Repayment of money put into homestead by wife.*]—A separation agreement provided for the payment of money by the husband to his wife for her equity in land owned by him. The land was a homestead & when the parties were married the wife put money of her own into it, although she had no registered or unregistered mtge., charge or encumbrance of any kind on the homestead:—*Held:* the provision was enforceable.—NOLLE *v.* NOLLE, [1921] 1 W. W. R. 88; 55 D. L. R. 712.—**CAN.**

PART XI. SECT. 6, SUB-SECT. 7.

2050 i. *Covenant by father to relinquish custody—Whether valid.*]—An agreement by the husband with his wife not to exercise his right as guardian of the children, is void.—BARRETT *v.* BARRETT (1906), 6 Terr. L. R. 274.—**CAN.**

f. —— *Effect of.*]—Act 13 of 1901 which gives a magistrate jurisdiction in cases of harbouring & keeping wards does not apply where a husband who alleges that his wife is retaining custody of the children as against himself is a party to a deed of separation between himself & his wife which gives the custody to the wife.—BURD *v.* BURD (1919), 40 N. L. R. 256.—**S. AF.**

g. *Custody—Discretion of court—Benefit of child.*]—By a clause in a separation deed it was provided that the child of the marriage should reside alternatively with the husband & the wife during the holidays of the school at which the child was placed. In an action by the wife to enforce performance of the covenant:—*Held:*

2060. Covenant by wife to maintain—To be void on resumption of cohabitation—Subsequent separation after re-cohabitation.]—CROUCH *v.* WALLER, No. 1908, *ante*.

2061. Custody—Clause providing for—Only access intended—Rectification.]—EVERSHED *v.* EVERSHED, No. 2134, *post*.

2062. —— Party having custody—Whether precluded from taking children abroad—Covenant giving right of access.]—By a deed of separation made in 1880 between H., a medical officer in the army, & his wife, provision was made as to the custody of their four children, of whom the eldest was eleven & the youngest three years of age, during the approaching absence of the husband in India, after which he was to resume the entire custody of them, but he covenanted that full & free liberty of access to them should be always accorded to the wife, to the extent at least of her having the opportunity of spending one day in every fortnight with them. In 1884 he was ordered to Egypt & proposed to take the first & third of the children with him. Mrs. H. applied for an injunction to restrain him from doing so:—*Held:* the covenant did not bind H. to keep the children in a place where Mrs. H. could conveniently have access to them, & did not preclude him from taking them with him to any place where he might be ordered in the course of his duties, & the injunction must be dissolved, there being no case made that he was removing them for the purpose of preventing Mrs. H. from having access to them.—HUNT *v.* HUNT (1884), 28 Ch. D. 606; 52 L. T. 302; 33 W. R. 157; 1 T. L. R. 93, C. A.; *subsequent proceedings*, 54 L. J. Ch. 289.

—— Variation of provision for.]—*See* No. 2176,

SUB-SECT. 8.—TRUSTS FOR CHILDREN.

2063. Trusts for children of marriage—Construction—Whether child born after reconciliation included.]—Upon a separation between A. & B., husband & wife, a deed was executed, making a provision for the wife, & all & every the children of A. by B. who should attain twenty-one. A reconciliation took place, & another child was born:—*Held:* upon the construction of the deed, such last-mentioned child did not participate in the provision.—HULME *v.* CHITTY (1846), 9 Beav. 437; 7 L. T. O. S. 278; 10 Jur. 323; 50 E. R. 411.

See, also, No. 2167, *post*.

SUB-SECT. 9.—SATISFACTION OF DOWER, ETC.

See, now, Administration of Estates Act, 1925 (c. 23), s. 45.

2064. Dower & thirds—Provision in separation deed—Construction.]—Proviso in a deed of separation, that the wife surviving shall be entitled to her dower & thirds of all real & personal estates, whereof the husband shall die seised or possessed, construed, not as a covenant to leave her such a portion of the personal estate as she would be entitled to under Statute of Distribution, 1670 (c. 10), had he died intestate, but that she should be in the same situation as if not separate as to dower & thirds, *i.e.* the actual share by the law or custom; not interfering therefore with his testamentary disposition.—COCHRAN *v.* GRAHAM (1811), 19 Ves. 63; 34 E. R. 442, L. C.

2065. —— Covenant by wife to receive annuity in satisfaction—Wife not deprived of share in personalty.]—Husband & wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, &, by a separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity of £180 a year, & it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts & contracts of his wife, & all dower & thirds at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal; & an agreement that the wife should make & execute all such acts, deeds, & matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate:—*Held:* the deed did not deprive the wife of her share of her husband's personal estate, under Statute of Distributions.—SLATTER *v.* SLATTER (1834), 1 Y. & C. Ex. 28; 160 E. R. 12; *subsequent proceedings*, 1 Bing. N. C. 259.

2066. Jointure—Under deed of arrangement—Whether affected by deed of separation.]—By articles of separation, dated in June 1834, deft. agreed that he would, on or before Feb. 1, 1835, effectually, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might be then in his power, secure to pltf., his wife, an annuity of £1,000. In Dec. 1834, a deed of arrangement was executed between deft. & his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as deft. & his son should appoint, & in default of appointment to deft. for life, & then to his son absolutely, with a power for deft. to jointure his then present or any future wife to the extent of £1,000 *per annum*:—*Held:* pltf. was entitled to have her jointure raised out

(1) action for specific performance of such a covenant would lie in a case where there were trustees, but only where the ct. approved of the covenant as being for the benefit of the child; (2) it was doubtful before Married Women's Property Act, 1908, whether an action on a deed between husband & wife without the intervention of trustees (not being an application under Infants Act, 1908) would lie at all, & that Act has made no difference where no question of property arises.—BAIGENT *v.* BAIGENT, [1920] N. Z. L. R. 227.—**N.Z.**

h. — —.]—A deed of separation was executed by which it was agreed that the husband should make the wife a weekly allowance while she remained chaste, & the custody of the child was by deed given to the mother. After the separation the wife gave birth to an illegitimate child, & the husband obtained a decree *nisi* for a divorce on the ground of his wife's adultery, but no order was made as to the custody of the child who still remained with her mother. The husband then applied to the ct. for a writ of *habeas corpus* directed to the mother in respect of the child:—*Held:* although by the deed of separation the legal custody of the child was given to the mother, yet it was the duty of the ct., in deciding as to whom the custody of the child was to be given, to consider whether for the benefit of the infant the deed of separation should not be signed, & that no reason had been shown why the custody of the father should be interfered with.

(2) In any case the deed of separation had become void by the breach on the part of the wife of the provisions of the dum casta clause therein contained, & the father was therefore legally entitled to the custody of the child.—SALAMAN *v.* SALAMAN, [1923] N. Z. L. R. 454.—

Sect. 6.—*Construction and operation: Sub-sects.* 9, 10, 11 & 12.]

of the estates, as against deft. & his son.—WELLESLEY *v.* WELLESLEY, MORNINGTON (COUNTESS) *v.* MORNINGTON (EARL) (1849), 17 Sim. 59; 18 L. J. Ch. 442; 13 L. T. O. S. 419; 60 E. R. 1050; *affd.* (1852), 1 De G. M. & G. 501, L. JJ.; *subsequent proceedings* (1853), 4 De G. M. & G. 537, L. JJ.

Annotation:—**Mentd.** Carson *v.* Pickersgill (1885), 54 L. J. Q. B. 484.

Satisfaction generally, *see* EQUITY, Vol. XX., pp. 449 *et seq.*

SUB-SECT. 10.—SATISFACTION BY LEGACY OF PAYMENTS DUE UNDER DEED.

2067. Annuity—Bequest of similar annuity—Construction.]—A. by deed of separation covenanted with the trustee of the deed to pay him an annual sum of £52 during the life of A.'s wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. A., by will, subsequently gave certain specific property to trustees to pay out of the rents an annuity of £52 to his wife generally, on the same special quarterly days:—*Held:* there being no direction in the will to pay debts & legacies, & no expressions of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the annuity covenanted to be paid by the deed of separation; & the widow was put to her election.—ATKINSON *v.* LITTLEWOOD (1874), L. R. 18 Eq. 595; 31 L. T. 225.

Annotations:—**Mentd.** *Re* Horlock, Calham *v.* Smith, [1895] 1 Ch. 516; *Re* Rattenberry, Ray *v.* Grant, [1906] 1 Ch. 667.

2068. Debt to wife—Contemporaneous bequest of similar sum.]—By a separation deed, dated Sept. 7, 1844, the husband covenanted that his exors. or administrators should on his decease pay to his wife, if she survived him, £100; with a proviso that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period. By his will, dated Sept. 5, 1844, but alleged to have been signed on Sept. 9, "after all my just debts, funeral & testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation":—*Held:* the legacy was not in satisfaction of the sum covenanted by the deed to be paid, but the widow was entitled to both sums.

The circumstance that two documents are contemporaneous so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum.—HORLOCK *v.* WIGGINS, WIGGINS *v.* HORLOCK (1888), 39 Ch. D. 142; 58 L. J. Ch. 46; 59 L. T. 710, C. A.

Satisfaction generally, *see* EQUITY, Vol. XX., pp. 449 *et seq.*

SUB-SECT. 11.—EFFECT OF SUBSEQUENT ADULTERY OF WIFE.

Whether molestation.]—*See* Nos. 2018, 2019, *ante.*

2069. As defence to claim for arrears of annuity—Whether adultery a defence.]—In an action of debt on a bond by the trustee of deft.'s wife, to enforce payment of an annuity secured to her, the ct. refused to allow deft. to withdraw the general issue, & plead (1) deft.'s wife had committed adultery, & was living in that state; (2) she had committed adultery at the time when the bond was executed in her favour, though deft. was ignorant thereof; being of opinion that such pleas, if pleaded, would not have been a good defence to the action.—FIELD *v.* SERRES (1804), 1 Bos. & P. N. R. 121; 127 E. R. 405.

Annotations:—**Refd.** Scholey *v.* Goodman (1823), 1 Bing. 349; Evans *v.* Carrington (1860), 2 De G. F. & J. 481.

2070. —— ——.]—JEE *v.* THURLOW, No. 1961, *ante.*

2071. —— ——.]—Adultery of the wife after separation, no plea to a covenant to pay a trustee a separate maintenance for the wife.—BAYNON *v.* BATLEY (1832), 8 Bing. 256; 1 Moo. & S. 339; 1 L. J. C. P. 75; 131 E. R. 400.

Annotation:—**Refd.** Fearon *v.* Aylesford (1881), 14 Q. B. D. 792.

2072. —— ——.]—CHARLESWORTH *v.* HOLT, No. 2039, *ante.*

2073. —— —— **No dum casta clause in deed.**]—FEARON *v.* AYLESFORD (EARL), No. 2019, *ante*

2074. —— —— ——.]—SWEET *v.* SWEET, No. 2018, *ante.*

2075. —— —— ——.]—WASTENEYS *v.* WASTENEYS, No. 1989, *ante.*

2076. —— —— **Deed containing dum casta clause.**]—By a deed of separation, after reciting an agreement by the husband to make a payment of 5*s.* a week to the wife during her life so long as

PART XI. SECT. 6, SUB-SECT. 10.

k. *Annuity—Bequest of smaller annuity—Bequest not of same nature as debt.*]—By a separation deed S. covenanted that he, his exors. & administrators, would pay to his wife an annuity during the term of her natural life of the weekly sum of 15*s.* By his will S. bequeathed to his wife a weekly sum of 12*s.* & the life use of a house & furniture:—*Held:* (1) the annuity under the deed was payable to the wife for her life, & not merely during the joint lives of the husband & wife; (2) the legacy of 12*s.* could not operate as a satisfaction of the testator's liability under the separation deed of greater amount, & that the bequest of the life use of house & furniture could not be treated as a satisfaction, not being a gift of the same nature as the debt.—COATES *v.* COATES, [1898] 1 I. R. 258; 32 I. L. T. 7.—**IR.**

l. *Covenant in separation deed to bequeath.*]—By a separation deed made subsequent to the husband's will he covenanted that by his last will he would specifically bequeath to his wife & charge upon his land $30,000, & this same sum was bequeathed to her & charged upon his lands by the then existing will which remained unrevoked at the time of his death:—*Held:* the covenant in the separation deed had been performed or satisfied by the will & the widow was entitled only to the one sum of $30,000, & to that sum only as a creditor under the deed.—RISSMULLER *v.* BALCOM, [1917] 3 W. W. R. 535.—**CAN.**

PART XI. SECT. 6, SUB-SECT. 11.

2069 i. *As defence to claim for arrears of annuity—Whether adultery a defence.*—By a separation deed the husband covenanted to make certain payments to the wife, & it was agreed that in case the said marriage should at any time be dissolved upon the petition of the husband, "or in case the wife should be guilty of any act which would entitle the husband to obtain a dissolution of the said marriage—the said

2073 i. —— *No dum casta clause in deed.*]—An allegation of adultery by a husband against his wife living apart from him under a separation deed containing no *dum sola et casta* clause, is no defence to an action for money due under the deed.—BRIDGETT *v.* BRIDGETT (1910), 44 I. L. T. 229.—**IR.**

she should remain chaste, the husband covenanted generally to pay the said sum to the wife: —*Held:* the covenant, being ambiguous, was controlled by the recital, & the husband's liability ceased on the wife's failure to remain chaste.—CROUCH *v.* CROUCH, [1912] 1 K. B. 378; 81 L. J. K. B. 275; 106 L. T. 77; 28 T. L. R. 155; 56 Sol. Jo. 188, D. C.

See, also, Nos. 2038, 2039, *ante*.

2077. —— Necessity for pleading adultery.]—Husband not permitted to read evidence of his wife's adultery, upon allegations that her behaviour, in point of duty & virtue, was such as not to entitle her to any relief in a ct. of equity.—DONERAILE (LADY) *v.* DONERAILE (LORD) (1731), 1 Coop. *temp.* Cott. 531; 47 E. R. 987, H. L.

Annotation:—**Consd.** Clarke *v.* Periam (1742), 2 Atk. 337.

2078. —— ——.]—Where adultery is the ground upon which the ct. is called upon to restrain the wife's trustees from proceeding at law, the adultery must be plainly put in issue by the bill (LORD HARDWICKE, C.).—MOORE *v.* SCARBOROUGH (1737), Coop. *temp.* Cott. 538; 47 E. R. 989; *sub nom.* MOORE *v.* MOORE, 1 Atk. 272; West *temp.* Hard. 35; *sub nom.* MORE *v.* SCARBOROUGH (EARL), 2 Eq. Cas. Abr. 156, L. C.

Annotation:—**Refd.** Lee *v.* Lee (1758), 1 Dick. 321.

2709. —— — — Effect on proof of adultery.]—SCHOLEY *v.* GOODMAN, No. 1912, *ante*.

2080. —— —— Particulars.]—In an action by a wife for arrears of an annuity the husband claimed that the deed of separation under which the annuity was payable should be cancelled having, as he alleged, been obtained by fraudulent concealment of the previous adultery of the wife with F. No particulars of acts of adultery were pleaded. The judge found that the adultery was not proved. In a subsequent action for further arrears the husband raised the same plea, again giving no particulars of acts of adultery. It was stated by counsel & on affidavit that fresh alleged acts of adultery with F., also committed before the execution of the deed, but discovered since the first action, would be relied on. The county ct. judge, without hearing evidence, held that the issue of adultery was *res judicata*, & refused to try it:—*Held:* inasmuch as the issue in the first action was, in the absence of particulars of adultery, such acts of adultery as should appear in evidence, & in the second action, again in the absence of particulars, such acts as should similarly appear, the matter was not necessarily *res judicata*, & the case must go back for a new trial to ascertain the nature of the present allegations of adultery.—ORD *v.* ORD, [1923] 2 K. B. 432; 92 L. J. K. B. 859; 129 L. T. 605; 39 T. L. R. 437, D. C.

2081. Deed of separation not invalidated.]—EVANS *v.* CARRINGTON, No. 1982, *ante*.

2082. Agreement in deed to exclude evidence—In subsequent matrimonial proceedings—Extent of exclusion—Evidence of impropriety.]—Petitioner & resp. executed a deed of separation, which provided, that "in case either party shall hereafter commence or prosecute any proceeding against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, & no act, deed, neglect, or default of either in relation to any such offence or misconduct, shall be pleaded or alleged by either party, or be admissible in evidence." Resp. was subsequently guilty of adultery with the co-resp., & petitioner instituted a suit for dissolution of marriage by reason of such adultery:—*Held:* evidence of familiarities between resp. & co-resp. prior to the separation was admissible within the terms of the deed.—HARRIS *v.* HARRIS & WOODDEN (1872), 41 L. J. P. & M. 61; 27 L. T. 428; 21 W. R. 80.

SUB-SECT. 12.—EFFECT OF SUBSEQUENT MISCONDUCT OF HUSBAND.

2083. Covenant by wife not to claim further maintenance—Whether valid.]—Notwithstanding that by an agreement for separation, made between a husband & wife on withdrawal of the wife's petition for divorce, the wife has agreed to accept from the husband a specified sum for maintenance, to be paid in any event whether the marriage should thereafter be dissolved or not, the ct. has power under Divorce Acts, after a decree for dissolution on a fresh petition by the wife based on misconduct of the husband since the agreement, to disregard the agreement & order permanent alimony to be paid to her at a rate exceeding the amount specified in the agreement, if the husband's means on inquiry permit: at all events, if the agreement does not contain an express covenant by the wife not to sue for increased alimony in the event of a divorce grounded on future misconduct of the husband. *Qu.:* whether such a covenant is valid.

Again, when by a separation deed the wife has agreed to accept a specified sum for maintenance, the deed to become void if the marriage is afterwards "dissolved" for any future misconduct by either party, the ct. has a similar power to order the payment of permanent alimony to the wife after a decree for judicial separation by reason of the husband's misconduct since the execution of the deed, if there has been such an alteration of circumstances as renders it unjust that the wife should be bound by the deed.—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, [1897] P. 138; 66 L. J. P. 69, 76; 76 L. T. 409; 45 W. R. 567; 13 T. L. R. 366; 41 Sol. Jo. 559, C. A.

2084. —— Subsequent divorce — incestuous adultery of husband.]—A wife, by a deed of separation, agreed to accept certain sums as a provision for her support, & not to sue her husband for any further maintenance. Subsequently having discovered that he had been guilty of incestuous adultery, she obtained a decree for dissolution of the marriage:—*Held:* notwithstanding the deed, she was entitled to the usual order for permanent maintenance.—MORRALL *v.* MORRALL (1881), 6 P. D. 98; 50 L. J. P. 62; 47 L. T. 50; 29 W. R. 897.

Annotations:—**Distd.** Gandy *v.* Gandy (1882), 7 P. D. 168. **Apld.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Refd.** Williams *v.* Williams, [1921] P. 131.

2085. —.]—A husband having committed adultery, disputes arose between him & his wife which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her £250 a year, & to maintain the two youngest children, who were not to be in her custody; & she covenanted not to take any proceedings to compel the husband to allow her a larger amount of alimony. Subsequently the husband committed adultery, & the wife obtained a decree for judicial separation &

m. *Whether deed invalidated.*]—Deed of separation avoided by the breach on the part of the wife of the provisions of the *dum casta* clause therein contained.—SALAMAN *v.* SALAMAN, [1923] N. Z. L. R. 454.—**N.Z.**

Sect. 6.—*Construction and operation: Sub-sects.* 12 & 13. *Sect.* 7: *Sub-sects.* 1 & 2, *A.* & *B.*]

an order that she should have the custody of the two youngest children. The husband had since the date of the separation deed become wealthy, & the wife applied for an inquiry as to his means with a view to obtaining increased alimony:—*Held:* increased alimony could not be ordered, for that as the ct. had not, as it would have had in the case of a decree for dissolution, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, & must have effect given to it, the husband not having, in the opinion of the ct., been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed.

In my opinion, the conduct of the husband since the deed is not such as, having regard to what was known to the wife at the time she entered into the deed, can disentitle him from relying on the deed. I put it that way, because I quite agree with the Master of the Rolls, that we ought not to say, & I do not entertain the opinion, that there can be no misconduct on the part of a husband such as would disentitle him to set up a deed of separation of this kind when the wife is making an application for an increased allowance. The case of *Morrall* v. *Morrall*, No. 2081, *ante*, one of the cases referred to by the judge, as leading to the conclusion at which he arrived, is an instance. There, there was a deed of separation with a provision as to what maintenance the wife was to have. She subsequently ascertained that the husband was living in incestuous adultery. It may well be that such gross misconduct, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent the husband from in any way relying on that deed, & might render it just that the bargain made by the wife for maintenance should be disregarded on an application to the Ct. for alimony. Here, in my opinion, the circumstances are not such as to entitle the wife to disregard her bargain (COTTON, L.J.).—GANDY *v.* GANDY (1882), 7 P. D. 168; 51 L. J. P. 41; 46 L. T. 607; 30 W. R. 673, C. A.

Annotations:—**Apld.** Rose v. Rose (1883), 8 P. D. 98. **Distd.** Wood *v.* Wood (1887), 57 L. J. Ch. 1; Wilkinson *v.* Wilkinson (1893), 69 L. T. 459. **Consd. & Expld.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Refd.** Fearon *v.* Aylesford (1884), 14 Q. B. D. 792; Tress *v.* Tress (1887), 12 P. D. 128; Kunski *v.* Kunski & Josephs (1907), 23 T. L. R. 615; Thompson *v.* Thompson, [1916] P. 165; Williams *v.* Williams [1921] P. 131.

2086. —— Subsequent judicial separation.]—GANDY *v.* GANDY, No. 2085, *ante*.

2087. —— ——.]—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, No. 2083, *ante*.

2088. Acceptance of specified sum for maintenance—Subsequent divorce.]—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, No. 2083, *ante*.

2089. —— Subsequent judicial separation—Proviso avoiding deed if marriage "dissolved."]—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, No. 2083, *ante*.

SUB-SECT. 13.—EFFECT OF COVENANT NOT TO SUE.

See Part XIII., Sect. 5, sub-sect. 1, F. (*d*); Sect. 7, sub-sect. 3, A., *post*.

SECT. 7.—BREACH OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

2090. Breach must be substantial—To bar enforcement of deed.]—(1) Where a deed of separation had been executed between a husband & wife who had continued to live apart, & the wife more than five years afterwards, by counterclaim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—*Held:* her right to judicial separation was barred by lapse of time & by the execution of the deed of separation.

(2) A married woman can contract to live apart from her husband & the husband is entitled to come to the ct. to enforce specific performance of such a contract.

(3) A husband is not debarred from enforcing a deed of separation & from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part.

(4) Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, & had subsequently concurred as next friend of the infant in a petition under Infants' Custody Act, 1873 (c. 12), for the removal of the infant from the wife's custody which had been ordered by the ct.:—*Held:* this was not a breach of the husband's covenant.

(5) Injunction granted to restrain the wife from suing for restitution of conjugal rights.—BESANT *v.* WOOD (1879), 12 Ch. D. 605; 40 L. T. 445; 23 Sol. Jo. 443.

Annotations:—*As to* (1) **Folld.** Rose *v.* Rose (1883), 8 P. D. 98. *As to* (2) **Folld.** Hart *v.* Hart (1881), 18 Ch. D. 670. **Consd.** Cahill *v.* Cahill (1883), 8 App. Cas. 420; Wennhak *v.* Morgan (1888), 57 L. J. Q. B. 241. **Folld.** Aldridge *v.* Aldridge (1888), 13 P. D. 210; McGregor *v.* McGregor (1888), 21 Q. B. D. 424; Sweet *v* Sweet, [1895] 1 Q. B. 12. **Consd.** Russell *v.* Russell, [1895] P. 315. **Refd.** Gandy *v.* Gandy (1882), 7 P. D. 168; Gooch *v.* Gooch, [1893] P. 99; Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138; *Re* Western, Davies *v.* Tagart, [1900] 2 Ch. 164. *As to* (3) **Consd.** Kunski *v.* Kunski (1898), 68 L. J. P. 18. **Refd.** Kennedy *v.* Kennedy, [1907] P. 49. *As to* (5) **Apld.** Clark *v.* Clark (1885), 10 P. D. 188. *Generally*, **Mentd.** Horwood *v.* Millar's Timber & Trading Co., [1916] 2 K. B. 44; Eccl. Comrs. for England *v.* Inland Revenue, [1918] 2 K. B. 602.

2091. —— Suit for restitution of conjugal rights—Deed pleaded in bar.]—It is not every breach of covenant in a deed of separation which will prevent the party committing it from setting up the deed in answer to a suit for restitution of conjugal rights. To have this effect a breach must be substantial, serious, & deliberate.

In a case where the only breach consisted in the fact that the husband was four days late in paying a weekly allowance payable to his wife under a deed of separation:—*Held:* the deed was a complete answer to the wife's petition for conjugal rights, & the ct. refused to make the usual order for the wife's costs.—KUNSKI *v.* KUNSKI (1898), 68 L. J. P. 18.

PART XI. SECT. 6, SUB-SECT. 12.

2088 i. *Acceptance of specified sum for maintenance—Subsequent divorce.*]—A deed of separation was executed between a husband & wife, by which it was provided that the wife should accept certain chattels & the sum of £100, & in which there was a covenant that she would not thereafter institute any proceedings to enforce any claim for any further alimony or support or maintenance. The husband subsequently committed adultery, & the wife obtained a decree for divorce *a mensâ et thoro*:—*Held:* the subsequent adultery did not deprive him of the right to have the restraining provisions of the deed enforced.—ROSS *v.* ROSS, [1908] 2 I. R. 339; 42 I. L. T. 83.—IR.

PART XI. SECT. 7, SUB-SECT. 1.

n. *Covenants construed as independent.*]—The covenants in a separation agreement are independent of each other, & a breach of a covenant on the one side will not exonerate the covenantor on the other side from the due performance of his covenant.—MARSHALL *v.* MARSHALL, [1923] 2

2092. Deed not pleaded in bar—Duty of court to investigate breaches.]—When there is in existence a deed of separation drawn up between the parties to a matrimonial cause & containing a covenant not to sue for restitution of conjugal rights it does not follow that the ct. will disregard the deed because a suit for the restitution of conjugal rights is undefended & that one of the parties does not appear & set it up as a bar to a decree. It is rather the duty of the ct. to inquire into the question of the breaches of the covenants of the deed, if there have been any, & should it appear that these breaches have been substantial, it will not allow itself to be bound by a deed which has been unfair in its provisions & useless to petitioner. The proper time for considering the effect of the deed is at the hearing of the suit for restitution, & not at the hearing of a subsequent suit arising out of resp.'s disobedience in refusing to comply with an order for restitution.

A husband & wife agreed to live apart, & a deed of separation was executed between them. The husband covenanted to pay his wife an allowance, & the wife on her part covenanted not to sue for restitution of conjugal rights. The payments were not kept up by the husband, & eventually he expressed his intention of not providing his wife with any means whatever. The wife thereupon brought a suit for restitution of conjugal rights. The suit was undefended:—*Held:* the ct. could & ought to take notice of the separation deed, even although it was not set up by the husband as a bar to granting a decree; but as the husband had by his conduct & his declared intention rendered the deed absolutely valueless to his wife, the ct. would not refuse to make an order in her favour.—KENNEDY *v.* KENNEDY, [1907] P. 49; 76 L. J. P. 34; 96 L. T. 476; 23 T. L. R. 139.

Annotations:—**Apld.** Balcombe *v.* Balcombe, [1908] P. 176. **Folld.** Waller *v.* Waller (1910), 26 T. L. R. 223; Lipman *v.* Lipman, [1916] P. 25; Roe *v.* Roe, [1916] P. 163. **Consd.** Thompson *v.* Thompson (1916), 85 L. J. P. 159. **N.F.** Phillips *v.* Phillips, [1917] P. 90; Pugh *v* Pugh (1920), 37 T. L. R. 105; Williams *v.* Williams, [1921] P. 131. **Refd.** Welch *v.* Welch (1916), 85 L. J. P. 188.

2093. What amounts to substantial breach—Concurrence in petition to remove child from custody of wife—Covenant to permit child to reside with wife.]—BESANT *v.* WOOD, No. 2090, *ante*.

2094. —— Slight delay in weekly payments.]—KUNSKI *v.* KUNSKI, No. 2091, *ante*.

2095. —— Allowance not paid—Expressed intention of not providing for wife.]—KENNEDY *v.* KENNEDY, No. 2092, *ante*.

2096. —— Conduct amounting to repudiation.]—Where a deed of separation in an undefended case contained a covenant not to sue for a previous matrimonial offence, & the party whose offence had been thus condoned was shown to have committed serious breaches of his obligations under the deed, & had in effect repudiated it:—*Held:* the deed was not a bar to the right of the other party to have the marriage dissolved on grounds partly founded on the matrimonial offence committed before the date of the deed.—BALCOMBE *v.* BALCOMBE, [1908] P. 176; 77 L. J. P. 81; 99 L. T. 308.

2097. Covenants construed as independent—Unless expressed to be dependent.]—FEARON *v.* AYLESFORD (EARL), No. 2019, *ante*.

SUB-SECT. 2.—REMEDIES FOR BREACH.

A. Habeas Corpus.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 248 *et seq.*

2098. Detention of wife during continuance of agreement.]—If a husband & wife agree to live separate, & during this agreement the husband take her violently into his custody, the ct., on *habeas corpus*, will set her free.—LISTER'S CASE (1721), 8 Mod. Rep. 22; 88 E. R. 17; *sub nom.* R. *v.* LISTER, 1 Stra. 478.

Annotations:—**Consd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; *Re* Cochrane (1840), 8 Dowl. 630; *R. v.* Jackson, [1891] 1 Q. B. 671. **Refd.** R. *v.* Vane (1747), 1 Wm. Bl. 18; Jee *v.* Thurlow (1824), 4 Dow. & Ry. K. B. 11; Jones *v.* Waite (1839), 5 Bing. N. C. 341.

2099. ——.]—Where there are articles of separation between the husband & wife, if the husband afterwards confine her, she may have a *habeas corpus* & be set at liberty.—VANE'S (LORD) CASE (1744), 13 East. 171, n.; 2 Stra. 1202; 104 E. R. 334.

Annotations:—**Refd.** *Re* Dunn (1840), 10 L. J. M. C. 29. **Mentd.** R. *v.* Stanhope (1826), 12 Ad. & El. 620, n.

2100. ——.]—R. *v.* EDGAR (1789), Ridg. *temp.* H. 152, n.; 27 E. R. 787.

B. Action.

2101. Defence to action—Subsequent divorce decree—In favour of husband.]—JEE *v.* THURLOW, No. 1961, *ante*.

2102. —— Molestation by wife.]—FEARON *v.* AYLESFORD (EARL), No. 2019, *ante*.

—— Adultery of wife.]—*See* Nos. 1961, 1989, 2018, 2019, 2039, 2069, 2071, 2076, *ante*.

2103. For arrears of annuity—Action in name of but without authority of trustee—Trustee consenting to act—Death before execution of deed.]—By a deed of separation, A. & B. were named trustees for the wife. B. never executed the deed, but promised to do so, & on two occasions instructed an attorney to enforce the deed against the husband. B. (who survived A.) having died, the wife brought an action upon the deed in the name of the exors. of B. against her husband, the proceedings in which action were stayed by a judge's order; the ct., on the application of the wife, set aside the order upon payment of the costs of the application, & giving security to the exors. against the costs of the action, to the satisfaction of the master.—ARCHARD *v.* COULSTING (1843), 6 Man. & G. 75; 134 E. R. 815; *sub nom.* ORCHARD *v.* COULSTING, 6 Scott, N. R. 843; 1 L. T. O. S. 230.

2104. —— —— Trustee refusing to sue.]—A rule to set aside a writ of summons & subsequent proceedings had been obtained, on behalf of deft., on an affidavit that the action was commenced without the authority of pltf. It appeared, in answer, that the action was brought to recover from deft. arrears of maintenance money due to his wife under a deed of separation, of which pltf. was a trustee, but that she had refused to carry out the trusts of the deed, in collusion with deft., for the purpose of preventing the wife from obtaining payment of the arrears, &, having been informed that the action was brought in her name, had refused to sanction it, but without stating any reason for so doing. The ct. discharged the rule with costs.—AUSTER *v.* HOLLAND (1846), 1 New Pract. Cas. 464; 3 Dow. & L. 740; 1

W. W. R. 820 D. L. R. 175. **CAN.**

PART XI. SECT. 7, SUB-SECT. 2.—B.

2102 i. *Defence to action—Molestation by wife.*]—The covenant "not to molest" in a separation agreement does not go to the whole consideration, but only to a part, & breach thereof may be compensated by damages. The breach by the wife is no defence to an action by her for arrears of allowance. In such an action the husband should counterclaim for damages.—MARSHALL *v.* MARSHALL, [1923] 2 W. W. R. 820; 4 D. L. R. 175.—**CAN.**

Sect. 7.—Breach of contract: Sub-sect. 2, B. & C.]

Saund. & C. 15 L. J. Q. B.
O. S. 118.

2105. —— Action by wife—Trustees refusing to sue.]—WALROND *v.* WALROND, No. 1954, *ante*.

2106. —— —— ——.]—(1) To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, the third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract. By a deed of separation between husband & wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife & two eldest daughters, & also to pay to the trustees all the expenses of the maintenance & education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, & provided also that the covenants by the trustees were duly observed & performed: provided, also, that the two youngest daughters should live at such place (being reasonable & proper for the purpose) as the husband should direct, & should be maintained & educated at his expense, the husband & wife to have all reasonable access to them. The trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife & the two eldest daughters, & against all molestation by them, & that the wife would not take any proceedings against the husband for alimony, except as aforesaid; & that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, & the place at which they should live, & would permit them, if they so desired, & without any interference on the part of the wife, to accept any invitation of the husband to reside with him. On one of the two youngest daughters subsequently attaining sixteen, the husband refused any longer to maintain her, whereupon she brought an action, by her next friend, against the husband & the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as pltf., & judgment was given for enforcing the covenant. On appeal: —*Held:* upon the construction of the deed, pltf. was not in the position of *cestui que trust* under the covenant so as to entitle her to maintain the action, but liberty was given to her under R. S. C., 1883, Order 16, r. 2, to amend the writ, by adding the trustees, the wife, & the other daughters, or any of them, as pltfs.

(2) The trustees refusing to be joined as co-pltfs., the statement of claim was amended by making the wife a co-pltf.:—*Held:* she had such an interest as entitled her to sue, the deed being an arrangement between the husband & wife, & the trustees being introduced on her behalf in order to get over the difficulty that the husband & wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, & if they refused to sue she could sue in equity.

(3) After the separation deed the husband committed adultery, & a decree was made for judicial separation, giving the custody of the two youngest daughters to the wife. After this the wife applied for an increased alimony, which was granted by the President, but his decision was reversed on appeal, both the arguments & the judgment of the Ct. of Appeal proceeding on the footing (though the ct. did not expressly decide the point) that the husband remained liable under the deed to pay for the maintenance & education of the two youngest daughters. He now contended that his covenant was put an end to by the custody of the youngest daughters being given to his wife:—*Held:* he was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued, & at the same time to insist that his liability under it had determined, & the appeal was ordered to stand over, with liberty to the wife to apply to the Divorce Ct. for increased alimony, if she should be so advised.—GANDY *v.* GANDY (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803; 1 T. L. R. 520, C. A.

Annotations:—As to (2) **Consd. & Expld.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. *Generally*, **Mentd.** Clarke *v.* Birley (1889), 41 Ch. D. 422; Davis *v.* Marrable, [1913] 2 Ch. 421; R. *v.* Taylor, R. *v.* Amondt, [1915] 2 K. B. 593.

2107. Action by infants—Beneficiaries under deed.]—GANDY *v.* GANDY, No. 2106, *ante*.

2108. —— Security for costs—Action in name of trustee.]—ARCHARD *v.* COULSTING, No. 2103, *ante*.

2109. —— —— Action by trustee.]—Where trustees, to whom by a covenant in a separation deed a husband had covenanted to pay an annuity in trust for his wife sued for arrears under that covenant:—*Held:* pltfs. were not mere "nominal pltfs." within the rule as to giving security for costs & therefore an order for security for costs could not be made against them on the ground that they were if unsuccessful without means of paying costs.—WHITE *v.* BUTT, [1909] 1 K. B. 50; 78 L. J. K. B. 65; 99 L. T. 823; 25 T. L. R. 25; 53 Sol. Jo. 12, C. A.

Annotation:—**Refd.** Rainbow *v.* Kittoe, [1916] 1 Ch. 313.

2110. —— Jurisdiction of county court.]—McGREGOR *v.* McGREGOR, No. 2004, *ante*.

2111. Husband domiciled abroad—At time of writ—Previous domicil in England.]—D. & his wife, Americans by origin, in 1897 came with their family to England, made it their permanent home, & acquired an English domicil. D. was connected with a banking business in America & in Paris. In Jan. 1913, they entered into a deed of separation, prepared in America by American lawyers & executed by D. in America & by his wife in England, by which they agreed to live apart, & D. covenanted, amongst other things, to pay his wife an allowance of $50,000 *per annum*, but no place for payment was stated. They continued to reside in England, each having a separate establishment, but in June, 1915, D. closed his establishment in England & went to Paris intending to acquire a French domicil & to institute divorce proceedings in the French Cts. so as to get rid of the separation deed. In July, 1915, the wife issued a writ against D. to enforce the provisions of the separation deed, & obtained leave under R. S. C., Ord. 11, r. 1 (e), to serve the writ on him in Paris on the ground that he was ordinarily resident in England. He entered a conditional appearance & moved to discharge the service of the writ upon him, alleging that he was not domiciled or ordinarily resident in England at the date of the issue of the writ, & that there had been no breach by him of any contract in the separation deed that came within rule 1 (e) of the Ord.:—*Held:* D. was not domiciled or ordinarily resident in England at the date of the issue of the writ; but his covenant to pay the allowance was a contract which came within rule 1 (e) for the breach of which the wife was entitled to sue in England, & his application

failed.—DREXEL *v.* DREXEL, [1916] 1 Ch. 251; 85 L. J. Ch. 235; 114 L. T. 350; 32 T. L. R. 208.

C. Specific Performance.

See, generally, SPECIFIC PERFORMANCE.

2112. Jurisdiction of Court of Chancery.]—ANGIER *v.* ANGIER, No. 2150, *post.*

2113. ——.]—A wife living apart from her husband, according to the terms of a deed of separation, is no longer subject to his authority.

The husband has a right to the custody of his wife, but he may waive this right by articles of separation. Cts. of equity always decree a specific performance of such articles of separation as these, & a bill always lies for that purpose (LORD MANSFIELD, C.J.).—R. *v.* MEAD (1758), 2 Keny. 279; 1 Burr. 541; 96 E. R. 1182.

Annotations:—**Consd.** Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339; *Re* Cochrane (1840), 8 Dowl. 630. **Expld.** R. *v.* Jackson (1891), 64 L. T. 679. **Refd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; Beard *v.* Webb (1800), 2 Bos. & P. 93; St. John *v.* St. John (1805), 11 Ves. 526; Westmeath *v.* Westmeath (1821), Jac. 126; Jones *v.* Waite (1839), 5 Bing. N. C. 341; *Ex p.* Sandilands (1852), 17 Jur. 317; *Ex p.* Jackson (1891), 7 T. L. R. 382. **Mentd.** Canadian Prisoners' Case (1839), 3 State Tr. N. S. 963.

2114. ——.]—There is no doubt of the general jurisdiction of a ct. of equity to decree the specific performance of articles between husband & wife for a separation & a separate maintenance. But the ct. exercises its discretion in this case very cautiously, & will not give its assistance until it has seen whether from the circumstances of the case, there is or is not a probability of the parties being reconciled. A sentence in the Ecclesiastical Ct. for the restitution of conjugal rights, is a reason for this ct refusing to give its assistance in such a case; & in general if such an agreement is not fit to be enforced, the ct. will, on a cross bill, order it to be delivered up, though there may be cases in which no relief will be given to either party.—FLETCHER *v.* FLETCHER (1788), 2 Cox, Eq. Cas. 99; 3 Bro. C. C. 619, n.; 30 E. R. 46, L. C.

Annotations:—**Consd.** Wilson *v.* Wilson (1845), 14 Sim. 405. **Refd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; St. John *v.* St. John (1805), 11 Ves. 526; Westmeath *v.* Salisbury (1831), 5 Bli. N. S. 339; Hunt *v.* Hunt (1861), 31 Beav. 89.

2115. ——.]—SANDERS *v.* RODWAY, No. 2138, *post.*

2116. Executory contract.]—WILSON *v.* WILSON, No. 2139, *post.*

2117. ——.]—BESANT *v.* WOOD, No. 2090, *ante.*

2118. Agreement in compromise of divorce proceedings.]—Pltf., Mrs. H., who was the wife of deft., claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Ct. which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband & wife, after the husband's evidence in support of his case had been heard & before the wife's defence had been commenced, & was in these terms: "Petition & answer dismissed. Deed of separation with usual covenants; costs of preparing deed to be borne by Mr. H. Mr. H. to pay Mrs. H. for herself & child or children £150 a year quarterly. Mrs. H. to maintain the child or children. Mr. H. to pay wife's costs. In case of difference in working out these terms, matter to be referred to W. & D." (the leading counsel on each side):—*Held:* (1) this ct. had power to enforce specific performance of an agreement for a separation deed & for the compromise of a suit in the Divorce Ct. without infringing Jud. Act prohibiting interference with proceedings pending in another branch of the ct.; (2) the ct. would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children; (3) husband & wife were competent to make a binding agreement for compromise of a divorce suit, & this agreement was not too vague to be enforced by the ct.; (4) a *dum casta* clause did not come within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit; (5) the ct. would construe the term "usual covenants" in reference to surrounding circumstances, but the adultery of the wife not having been proved could not form an element for the consideration of the ct.; (6) the agreement on the face of it being complete, the arbitration clause could only come into force in case of difference between the parties, & did not oust the jurisdiction of the ct. to settle the deed itself. Decree for specific performance; the deed of separation to be settled in Chambers if the parties differed, & no *dum casta* clause to be inserted.

(7) It is no answer to a suit for specific performance for deft. to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.

(8) Sect. 2 of Infants' Custody Act, 1873 (c. 12), provides: "No agreement contained in any separation deed made between the father & mother of an infant or infants shall be held to be valid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that no ct. shall enforce any such agreement if the ct. shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." Surely the plain ordinary meaning of that clause is unmistakable. The deed is not to be invalid, nor is the particular clause in the deed giving up the custody of the children by the father to be invalid; but it is to be read as if there were inserted in it that this convention as to the custody of the children is subject to the power of the ct., as guardian of the infant children, to enforce or refuse to enforce that, according as the ct. may think the interests of the infant children require the enforcement or non-enforcement of that clause. Then, if in a deed of separation a covenant by the father to give the custody of the infant children to the mother is not of itself invalid, how can an agreement for a deed which is to contain such a covenant be invalid either? (KAY, J.).—HART *v.* HART (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.

Annotations:—*As to* (4) **Expld.** Wood *v.* Wood (1891), 64 L. T. 586. **Refd.** Bradley *v.* Bradley (1882), 51 L. J. P. 87; Harrison *v.* Harrison (1887), 12 P. D. 130.

2119. When granted—Discretion of court.]—FLETCHER *v.* FLETCHER, No. 2114, *ante.*

2120. Offer by husband to resume cohabitation.]—An agreement for the husband & wife's parting, & for the husband's returning his wife's portion to her father, & for the father's indemnifying the husband from the maintenance & debts of his wife, established by a decree, though the husband offered to receive & maintain his wife.—SEELING *v.* CRAWLEY (1700), 2 Vern. 386; cited in 3 Bro. C. C. at p. 618; 1 Eq. Cas. Abr. 67; 23 E. R. 847.

Annotations:—**Expld.** Guth *v.* Guth (1792), 3 Bro. C. C. 614. **Consd.** Legard *v.* Johnson (1797), 3 Ves. 352; Wilson *v.* Wilson (1845), 14 Sim. 405. **Refd.** Jones *v.* Waite (1839), 7 Scott, 317.

2121. ——.]—Specific performance decreed of articles of separation at the suit of the wife to allow her the separate maintenance agreed upon,

Sect. 7.—Breach of contract: Sub-sect. 2, C. & D.]

though the husband offered, by his answer, to receive her again.—GUTH *v.* GUTH (1792), 3 Bro. C. C. 614; 29 E. R. 729.

Annotations:—**Consd.** Legard *v.* Johnson (1797), 3 Ves. 352; St. John *v.* St. John (1805), 11 Ves. 526; Wilson *v.* Wilson (1845), 14 Sim. 405. **Refd.** Frampton *v.* Frampton (1841), 4 Beav. 287.

2122. —— Decree for restitution of conjugal rights.]—FLETCHER *v.* FLETCHER, No. 2114, *ante*.

2123. —— Mistake in drafting—Intention of parties.]—WILSON *v.* WILSON, No. 2139, *post*.

2124. —— Agreement to continue annuity after reconciliation.]—WEBSTER *v.* WEBSTER, No. 2155, *post*.

2125. —— Absence of consideration.]—WALROND *v.* WALROND, No. 1954, *ante*.

2126. —— ——.]—(1) An agreement between a husband & the father of the wife, that the husband & wife should live apart, & that the husband should execute a deed of separation containing all usual & proper clauses, & securing an annuity for the maintenance of his wife & child, & that the expense of the agreement & deed should be borne equally by the husband & the father, decreed to be specifically performed.

(2) The ct. would not execute an agreement without consideration. . . . The deed prepared contains a covenant to indemnify the husband against the debts of the wife, which in all these cases is the consideration given to the husband (LORD HATHERLEY, C.).

(3) A covenant to indemnify against the wife's debts is a usual & proper clause (LORD HATHERLEY, C.).—GIBBS *v.* HARDING (1870), 5 Ch. App. 336; 39 L. J. Ch. 374; 18 W. R. 361, L. C. & L. J.

Annotation:—*As to* (1) **Refd.** Aldridge *v.* Aldridge (otherwise Morton) (1888), 59 L. T. 896.

2127. Executory contract—Must be enforced if at all in entirety.]—VANSITTART *v.* VANSITTART, No. 1903, *ante*.

2128. —— Covenants contrary to public policy.]—VANSITTART *v.* VANSITTART, No. 1903, *ante*.

2129. —— Executed contract—Partly valid & partly invalid.]—VANSITTART *v.* VANSITTART, No. 1903, *ante*.

2130. —— —— ——.]—The ct. will enforce a legal & proper covenant in a separation deed, although other covenants in the same deed may be illegal. By a separation deed, made after the wife had instituted proceedings in the Divorce Ct. for divorce & the custody of her children, the husband covenanted to deliver up forthwith to his wife all her journals, diaries, & private correspondence & memoranda; that the elder two children of the marriage should remain at such schools in England as the husband, or such schools elsewhere as the husband, with the consent of the wife, should direct; that the husband & wife should each have access to them at all reasonable & convenient times, subject to the regulations of the schools; & that their holidays should be passed by them at such places & in such manner as the trustees of the deed should direct; & that the younger two children (who were respectively under the age of seven years) should remain in the custody of the wife:—*Held:* having regard to the evidence with respect to the husband's misconduct, the covenants with respect to the holidays of the elder two children were reasonable & proper, & would be enforced by the ct., even if the covenant as to the custody of the younger children were not legal, as to which, however, the ct. expressed no opinion.—HAMILTON *v.* HECTOR (1872), L. R. 13 Eq. 511; 36 J. P. 676; *previous proceedings* (1871), 6 Ch. App. 701, L. C.

2131. —— Trustees not parties.]—An agreement was entered into between husband & wife, that proceedings on a petition by the wife for a divorce should be stayed, the parties having agreed to execute a separation deed, & petitioner being allowed to receive the whole of her income. The costs of the proceedings were agreed to be paid by petitioner, resp.'s attorney thereby agreeing to receive £150 in satisfaction of his costs, including the costs of the deed of separation. The income to which petitioner was entitled consisted of the rents of certain leasehold houses which had been bequeathed by will to two trustees upon trust to pay the income to petitioner for life, but not to her separate use. The agreement was signed by the husband & wife, but not by the trustees or by any other person. A separation deed was prepared, but the wife refused to execute it, whereupon a bill was filed by the husband against the wife & the trustees for specific performance of the agreement:—*Held:* the ct. could not deal with the question of costs except by consent, having regard to the subsequent dealings of the parties, & could not decree specific performance; bill dismissed, but without costs.

This bill has incurable defects. It prays for the specific performance of an agreement against all defts. Two of defts. have never signed the agreement & they both decline to be bound by it. That alone would be enough. The difficulty is upon the subsequent part of the agreement, which relates to costs of various kinds. As to this part of the agreement it is impossible for the ct. to decree specific performance, if the agreement were more intelligible than it is—for this reason, that subsequent to the agreement that all costs should be disposed of in a way which should be binding & irrevocable, things have been done by the parties which were not included in it (STUART, V.-C.).—BARNETT *v.* BARNETT (1861), 3 L. T. 725.

2132. —— Provisions of agreement incomplete.]—BARNETT *v.* BARNETT, No. 2131, *ante*.

—— Trifling breaches of covenant.]—*See* Nos. 2090–2092, *ante*.

—— Agreement depriving father of custody of children.]—*See* Sect. 6, sub-sect. 7, *ante*.

—— Enforcement of negative covenants—By injunction.]—*See* Sub-sect. 2, D., *post*.

2133. Defence to action—Mistake as to legal effect.]—HART *v.* HART, No. 2118, *ante*.

2134. Matters for consideration of court—Provisions for children—Evidence as to beneficial nature.]—(1) Cross-petitions for divorce by husband & wife were withdrawn at the hearing, upon terms which included the execution of a separation deed to be settled by a counsel agreed upon in case of difference, & to contain "all usual terms as to access to children, etc." The parties could not agree, & the counsel settled a deed, providing that the wife should have the sole custody of the children, two boys of thirteen & fourteen, for half their vacations. In an action by the wife for specific performance of the agreement:—*Held:* these provisions related to custody & not access, & it was beyond the powers of the counsel to insert them; & the ct. had power to settle the proper form of deed instead of referring it back.

(2) *Semble:* in an action for specific performance of an agreement to execute a separation deed, the ct. will not go into evidence whether the provisions agreed upon are for the benefit of the children.—EVERSHED *v.* EVERSHED (1882), 46 L. T. 690; 30 W. R. 732.

D. Injunction.

See, generally, INJUNCTION.

2135. Consideration of surrounding circumstances.]—DE BENSAUDE *v.* DE BENSAUDE (1887), 4 T. L. R. 69, C. A.

2136. What may be restrained—Suit to recover alimony.]—Let an injunction be awarded to stay deft. from suing or proceeding in the Ecclesiastical Ct. for recovering of any alimony against pltf., her husband, till answer & further order to the contrary (*per* CUR.).—BOONE *v.* BOONE (1756), 31 Beav. 122, n.; 54 E. R. 1084, L. C.

Annotation :—**Refd.** Hunt *v.* Hunt (1862), 31 L. J. Ch. 161.

2137. —— ——.]—A separation deed was executed by a husband & wife whereby the husband covenanted to make an allowance to his wife, & a trustee, on behalf of the wife, covenanted that she would not sue for restitution of conjugal rights nor for alimony, & that she would not "molest, trouble, or disturb" her husband. The allowance was duly paid & received. The trustee became bkpt. Shortly after this, the wife presented petitions for restitution of conjugal rights & for alimony. A bill to restrain the wife from prosecuting these proceedings or doing any act to "molest, etc.," her husband, was then filed by him & on motion for injunction, an order was made restraining the wife from prosecuting her petition for alimony & from doing any act to "molest, etc.," her husband, but on the case coming on, upon motion for decree the ct. declined to grant a perpetual injunction, except so far as to restrain any application for alimony.—FLOWER *v.* FLOWER (1871), 25 L. T. 902; 20 W. R. 231.

Annotation :—**Refd.** Besant *v.* Wood (1879), 12 Ch. D. 605.

2138. —— **Breach of covenant not to molest.**]—Cts. of equity, recognising the validity of separation deeds, will enforce them.

By a separation deed, a husband covenanted with his wife's father, that his wife during her life, might live separate from him, that he would not sue her in the Ecclesiastical Ct. for living separate; that he would not molest, etc., her, nor claim any of her property; & her father covenanted with the husband to maintain her & indemnify him. Upon an infraction of the covenant, by the husband molesting his wife, he was restrained by injunction.—SANDERS *v.* RODWAY (1852), 16 Beav. 207; 22 L. J. Ch. 230; 20 L. T. O. S. 122; 16 Jur. 1005; 1 W. R. 11; 51 E. R. 757.

Annotations :—**Expld.** Hunt *v.* Hunt (1862), 31 L. J. Ch. 161. **Mentd.** Fearon *v.* Aylesford (1884), 32 W. R. 718.

2139. —— ——.]—A suit for nullity of marriage had been instituted by the wife against her husband; an arrangement for a deed of separation was proposed, in order to stop it. An agreement was entered into by which the property of the parties was regulated, & by which their conduct in relation to each other was to be guided. One of the articles of this agreement stipulated that the husband should "permit the wife to live separate & apart from him, as if she were unmarried, without any molestation, interference, or annoyance whatsoever, by, or on the part of," the husband. By another article, it was declared that if he performed the covenants, etc., "he, his heirs, exors., etc., & their estates & effects, shall be indemnified from all the present debts & liabilities of" the husband, "by the joint & several covenant of" the trustees for the wife. A deed was to be drawn up in conformity with these articles, & on mutual execution of the deed the suit for nullity was to be withdrawn. On a bill by the wife to compel the husband specifically to perform this agreement, the judge made an order referring it to the master to approve of a proper deed to carry its provisions into effect. This order was confirmed on appeal to this House. Pending the appeal, the master approved of a deed containing a covenant by the husband not to institute any suit in the Ecclesiastical Ct. for restitution of conjugal rights, & another in which the trustees of the wife agreed to indemnify the husband "against the present & future debts of" the wife. Exceptions to this deed taken by the husband were overruled :—*Held :* (1) the subsequent order approving of the deed as drawn by the master must be supported; (2) the ct. was fully at liberty to examine the articles of agreement, & on finding in them a stipulation as to payment of debts, inconsistent with the rest of the articles, & insensible or absurd, to authorise the introduction into the deed of a covenant which would carry into effect the real intentions of the parties.

(3) *Qu. :* whether as a rule of equity the ct. could enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights, though undoubtedly it could enforce stipulations as to an arrangement of property, & as to forbearance from personal molestation.

(4) One part of a decree was held to be sufficiently doubtful to justify an appeal against it; but as to another part of the same decree, applt. having sought to obtain a construction of articles of agreement, which he knew not to be justified by circumstances, the appeal, being dismissed, was dismissed with costs.

(5) It is a settled point of law that a contract for separation is a valid contract, & the agreement to enter into a covenant not to molest the wife, & to allow her to live as a *feme sole* is a perfectly legal covenant, & would be, & ought to be, as it has been, enforced by the ct. (LORD ST. LEONARDS).

(6) Applt. cannot imagine that if he had entered into a covenant in precisely the terms of the contract, he could have gone into the Ecclesiastical Ct. for a restitution of conjugal rights, without breaking that covenant (LORD ST. LEONARDS).—WILSON *v.* WILSON (1854), 5 H. L. Cas. 40; 23 L. J. Ch. 697; 23 L. T. O. S. 134; 10 E. R. 811, H. L.; *previous proceedings* (1848), 1 H. L. Cas. 538, H. L.

Annotations :—*As to* (1) & (2) **Consd.** Hunt *v.* Hunt (1862), 4 De G. F. & J. 221; Gibbs *v.* Harding (1870), 5 Ch. App. 336; Burchell *v.* Clark (1876), 2 C. P. D. 88. **Refd.** Brailey *v.* Brailey, [1922] P. 15. *As to* (3) & (6) **Refd.** Hunt *v.* Hunt (1861), 31 Beav. 89. *Generally,* **Mentd.** Hope *v.* Hope (1857), 8 De G. M. & G. 731; London Tram Co. *v.* L. C. C. (1898), 78 L. T. 361.

2140. ——.]—FLOWER *v.* FLOWER, No. 2137, *ante.*

2141. —— ——.]—DE BENSAUDE *v.* DE BENSAUDE (1887), 4 T. L. R. 69, C. A.

2142. —— ——.]—W. *v.* W. (1901), 45 Sol. Jo. 205.

2143. —— **Suit for restitution of conjugal rights.**]—WILSON *v.* WILSON, No. 2139, *ante.*

2144. —— ——.]—A husband, in a separation deed, covenanted with his wife's trustees, who

PART XI. SECT. 7, SUB-SECT. 2.—D.

2136 i. *What may be restrained—Suit to recover alimony.*]—The ct. will not issue an injunction to restrain a wife from continuing a suit for judicial separation, for custody of children & for increased alimony on the ground that she was a party to a deed of separation which provided for the custody of the children & for alimony, where she alleges adultery subsequent to the execution of the deed, & also ignorance of the fact that at the time she executed the deed her husband had been living in adultery for a long time past.—ATKINSON *v.* ATKINSON (NO. 1) (1890), 10 Z. L. R. 371.—**N.Z.**

Sect. 7.—Breach of contract: Sub-sect. 2, D. & E. Sect. 8.]

indemnified him against her debts, that he would not compel or endeavour to compel her to cohabit or live with him by any legal proceedings, or otherwise howsoever:—*Held:* by the master of the Rolls, upon a bill filed by the wife & her trustees, she was not entitled to an injunction to restrain the husband from proceeding in a suit he had commenced in the Divorce & Matrimonial Ct. to obtain a restitution of conjugal rights, etc.; but this decision was reversed, upon appeal, & the injunction was granted.

It seems to me therefore impossible to say after the Reformation, as a general proposition, that voluntary separations were contrary to the policy of the law. It certainly was perfectly true that inasmuch as the whole jurisdiction on the subject of marriage remained vested in the Cts. Christian . . . deeds of separation remained forbidden, that is, were treated as of no avail by the Ecclesiastical Law; & in that sense alone could it continue to be rightly said that separation was contrary to the policy of the law (LORD WESTBURY, C.).—HUNT *v.* HUNT (1862), 4 De G. F. & J. 221; 31 L. J. Ch. 161; 5 L. T. 778; 26 J. P. 243; 8 Jur. N. S. 85; 10 W. R. 215 45 E. R. 1168, L. C.

Annotations:—**Consd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185; Besant *v.* Wood (1879), 12 Ch. D. 605; Marshall *v.* Marshall (1879), 5 P. D. 19. **Expld.** Cahill *v.* Cahill (1883), 8 App. Cas. 420. **Consd.** Clark *v.* Clark (1885), 10 P. D. 188. **Expld.** *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470. **Refd.** Kitchin *v.* Kitchin (1869), 19 L. T. 674; Symonds *v.* Hallett (1883), 53 L. J. Ch. 60; Fearon *v.* Aylesford (1884), 32 W. R. 718; McGregor *v.* McGregor (1888), 20 Q. B. D. 529; Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138; Wilson *v.* Carnley (1908), 98 L. T. 265; Williams *v.* Williams, [1921] P. 131.

2145. By a deed of separation dated in Dec. 1862, a husband & wife agreed to live separate & apart, the husband to allow the wife an annuity of £200 for their joint lives & twelve months after the husband's death if the wife survived him. The trustee of the deed covenanted with the husband that the wife should not molest him, etc., & that she should not seek to compel him to live with her again, or "bring any citation in the Divorce Ct. for the restitution of conjugal rights." The annuity had been duly paid. The wife had commenced proceedings in the Divorce Ct. for a restitution of conjugal rights. Thereupon the husband filed his bill for an injunction to restrain the wife from further proceedings in the Divorce Ct. On motion for the injunction:—*Held:* the wife ought to be restrained from further proceedings until the hearing, the deed not having been impeached, & injunction granted, with liberty for her to file a cross-bill to impeach the deed, or as she should be advised, without filing it in the name of a next friend.—KITCHIN *v.* KITCHIN (1869), 19 L. T. 674.

2146. ——.]—FLOWER *v.* FLOWER, No. 2137, *ante.*

2147. —— ——.]—BESANT *v.* WOOD, No. 2090, *ante.*

2148. What will be enforced—Agreement to live separate.]—WILSON *v.* WILSON, No. 2139, *ante.*

2149. —— **Agreements as to property.]**—WILSON *v.* WILSON, No. 2139, *ante.*

Separation deed as a bar to proceedings.]—*See* Part XIII., Sect. 7, sub-sect. 3, A. (*d*), *post.*

E. Proof for Annuity in Bankruptcy.

Whether provable.]—*See* BANKRUPTCY, Vol. IV., pp. 295, 296, Nos. 2770–2772.

Valuation of annuity.]—*See* BANKRUPTCY, Vol. IV., pp. 296, 297, 299, Nos. 2776–2778, 2806.

SECT. 8.—RECONCILIATION.

2150. Effect of—Separation agreement avoided.]—The Ct. of Ch. had jurisdiction to enforce payment of maintenance due to a wife under a separation agreement. This was not equivalent to a decree for alimony or a separation, so as to be an invasion of the jurisdiction of the Spiritual Ct. The parties might, whenever they thought fit, come together again, & then the agreement would be no longer binding.—ANGIER *v.* ANGIER (1718), Gilb. Ch. 152; Prec. Ch. 496; 2 Eq. Cas. Abr. 150; 25 E. R. 107, L. C.

Annotations:—**Mentd.** Guth *v.* Guth (1792), 3 Bro. C. C. 614; Legard *v.* Johnson (1797), 3 Ves. 352; Nurse *v.* Craig (1806), 2 Bos. & P. N. R. 148; Wilson *v.* Wilson (1845), 14 Sim. 405.

2151. —— ——.]—O. leaves her husband's (B.'s) house, commences a suit in Ecclesiastical Ct. for divorce, & files a bill in Chancery for payment of her separate annuity. All matters in difference referred to arbn.; & the award made a rule of ct. by consent. B., the husband, obtains an order of ct., which, without setting aside the award, partly does away the effect of it, by which means the records of ct. are made contradictory. B., upon this, takes possession of a house which the award had given to his wife, & she goes there to protect her property. B. then pretends a reconciliation, & takes an exception to suit in Ecclesiastical Ct. on that ground, but exception disallowed. O. files another bill, praying benefit of award: sentence of Ecclesiastical Ct. received as admissible, but not conclusive, evidence of non-reconciliation, & decree according to prayer of bill. Chancellor states general doctrine to be clear, that reconciliation after separation entirely does away the effects of it; but here no reconciliation. Decree affirmed.—BATEMAN *v.* ROSS (COUNTESS) (1813), 1 Dow, 235; 3 E. R. 684, H. L.

Annotations:—**Distd.** Negus *v.* Forster (1882), 46 L. T. 675. **Apld.** Nicol *v.* Nicol (1886), 31 Ch. D. 524. **Refd.** Joe *v.* Thurlow (1824), 2 B. & C. 547; Haddon *v.* Haddon (1887), 18 Q. B. D. 778; Williams *v.* Williams, [1904] P. 145. **Mentd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538; Cartwright *v.* Cartwright (1853), 3 De G. M. & G. 982; Barrow *v.* Barrow (1858), 4 K. & J. 409; Vansittart *v.* Vansittart (1858), 4 K. & J. 62; Nicholl *v.* Jones (1866), L. R. 3 Eq. 696; Williams *v.* Baily (1866), L. R. 2 Eq. 731; Gibbs *v.* Harding (1870), 5 Ch. App. 336; Cahill *v.* Cahill (1883), 8 App. Cas. 420; Aldridge *v.* Aldridge (otherwise Morton) (1888), 59 L. T. 896; *Re* Lovell, Sparks *v.* Southall, [1920] 1 Ch. 122.

2152. —— ——.]—SCHOLEY *v.* GOODMAN, No. 1912, *ante.*

2153. —— ——.]—WESTMEATH (MARQUIS) *v.* SALISBURY (MARQUIS), No. 1934, *ante.*

2154. —— ——.]—FRAMPTON *v.* FRAMPTON, No. 1953, *ante.*

2155. —— ——.]—(1) A separation deed in which the husband covenants with a surety that he will not visit the wife without the surety's consent, does not contemplate reconciliation & subsequent separation, so as to be void as being contrary to public policy.

(2) Where a husband in a separation deed covenanted with a surety (who covenanted to indemnify the husband against the wife's debts)

PART XI. SECT. 8.

2150 i. *Effect of—Separation agreement avoided.]*—BREWSTER *v.* BREWSTER, 20 C. L. T. 182.—**CAN.**

2150 ii. —— ——.]—An agreement for immediate separation is terminated by cohabitation & reconciliation.—CHRISTOFFERSON *v.* CHRISTOFFERSON, [1924] 3 W. W. R. 545; 4 D. L. R. 967.—**CAN.**

to pay the wife an annuity for life:—*Held:* a subsequent agreement between the husband & surety, that if the wife returned to live with the husband the annuity should continue, was valid & enforceable in equity.

(3) Although generally the provisions of a separation deed are annulled by reconciliation & recohabitation, yet a husband may so conduct himself subsequently as to create new obligations on the footing of the old obligations contained in the deed of separation.—WEBSTER *v.* WEBSTER (1853), 4 De G. M. & G. 437; 22 L. J. Ch. 837; 1 W. R. 509; 43 E. R. 577, L. JJ.

Annotations:—*As to* (1) **Consd.** Nicol *v.* Nicol (1885), 30 Ch. D. 143. **Refd.** Randle *v.* Gould (1857), 8 E. & B. 457; Ruffles *v.* Alston (1875), 44 L. J. Ch. 308; Rowell *v.* Rowell (1899), 69 L. J. Q. B. 55.

2156. —— ——.]—By a marriage settlement certain stock belonging to the wife was assigned to trustees upon trust to pay out of the income thereof £50 a year to the husband for his life, & the residue of the income to the wife for her separate use; there were certain trusts to the issue of the marriage, & in default of issue all the property was to be reassigned to the wife in the event of her predeceasing her husband, but if the husband survived the wife he was to have one-half of the income for life, & the wife was to have power to appoint the whole of the capital by will, &, in default of appointment, one-half of the whole property was to go to the husband & the other half to the wife's next of kin. Certain shares, also belonging to the wife, were not included in the settlement, but were placed in the name of the husband. Shortly after the marriage the husband & wife separated, & a deed of separation was then executed, whereby the husband transferred the shares to a trustee for the wife for her separate use & covenanted not to molest her, the trustee covenanting to indemnify the husband against the wife's debts during the separation. It was also provided that the trusts of the settlement should still subsist, notwithstanding the deed of separation. Subsequently the husband & wife renewed their cohabitation & afterwards discontinued it, & again renewed it at various times. Ultimately, the trustee refused to continue the payments, under the separation deed, without the direction of the ct., & thereupon the wife instituted a suit to enforce the trusts of the deed, &, so far as might be necessary, those of the settlement:—*Held:* inasmuch as the effect of the recohabitation was to render the husband liable for the wife's debts, the chief consideration for the deed had failed, & the husband was entitled to the shares assigned under it; but with respect to the stock it was still subject to the trusts of the marriage settlement.—O'MALLEY *v.* BLEASE (1869), 20 L. T. 899; 17 W. R. 952.

2157. —— ——.]—NEGUS *v.* FORSTER, No. 1664, *ante*.

2158. —— ——.]—Husband & wife agreed that in the event of a decree for judicial separation in a suit then pending being made, the wife should enjoy the furniture in a particular house during her life, with power to remove the same elsewhere; the furniture to revert to the husband after her death, & the right to enjoyment to cease if the wife interfered with or annoyed her husband. A decree for judicial separation was made, & the wife took possession of the furniture. The husband & wife were subsequently reconciled, & they recohabited:—*Held:* notwithstanding the express provision that the wife should enjoy the use of the furniture during her life, her right to it was determined upon the reconciliation taking place.—NICOL *v.* NICOL (1886), 31 Ch. D. 524; 55 L. J. Ch. 437; 54 L. T. 470; 50 J. P. 468; 34 W. R. 283; 2 T. L. R. 280, C. A.

Annotation:—**Refd.** Haddon *v.* Haddon (1887), 18 Q. B. D. 778.

2159. —— ——.]—A quasi-separation deed was executed between a man & a woman, who had been living in concubinage, by which they mutually covenanted that they would in future live separately & he covenanted to pay her an annuity during her life:—*Held:* the obligation to pay the annuity did not cease by implication upon the parties subsequently resuming cohabitation.—*Re* ABDY, RABBETH *v.* DONALDSON, [1895] 1 Ch. 455; 64 L. J. Ch. 465; 72 L. T. 178; 43 W. R. 323; 11 T. L. R. 245; 39 Sol. Jo. 283; 12 R. 163, C. A.

2160. —— **Reconciliation not genuine.**]—BATEMAN *v.* ROSS (COUNTESS), No. 2151, *ante*.

2161. —— **Separation deed kept alive—By express provision—Reconciliation temporary.**]—A deed of separation, by which the husband engages to pay an annual sum to his wife upon certain conditions, & which provides, that its trusts shall continue, although the parties should live together again, does not become void at law by the circumstance of the parties afterwards living together for some time, & then again separating.

Qu.: whether a ct. of equity would allow the deed, under such circumstances, to be enforced.—WILSON *v.* MUSHETT (1832), 3 B. & Ad. 743; 1 L. J. K. B. 250; 110 E. R. 271.

Annotations:—**Consd.** Webster *v.* Webster (1853), 1 Sm. & G. 489. **Apld.** Randle *v.* Gould (1857), 8 E. & B. 457; Negus *v.* Forster (1882), 30 W. R. 671. **Distd.** Nicol *v.* Nicol (1885), 30 Ch. D. 143. **Mentd.** Wilson *v.* Wilson (1848), 1 H. L. Cas. 538; Cooper *v.* Lloyd (1859), 6 Jur. N. S. 125.

2162. —— —— ——.]—WEBSTER *v.* WEBSTER, No. 2155, *ante*.

2163. —— **Conduct of parties.**]—WEBSTER *v.* WEBSTER, No. 2155, *ante*.

2164. —— **Proviso for written agreement to recohabit—Reconciliation without such agreement.**]—By deed between deft. of the first part, his wife of the second, & pltf. of the third, it was recited that differences had arisen, & were likely to continue, between deft. & his wife, & they had agreed to live apart during the remainder of their lives, subject to the proviso after mentioned; & deft. covenanted with pltf. to allow the wife to live separate, & go where she thought fit, etc., free from his restraint, & that he would not disturb her, or sue her in the Ecclesiastical Ct. or otherwise, or claim the goods which she then had or might purchase; & that, as & by way of a provision for her, he would pay to pltf. or to her, during her life, 10*s.* weekly: & pltf., in consideration of the provision so made & the other promises, covenanted that the wife, during the separation, would not molest deft., nor sue for conjugal rights to compel him to cohabit, or for further allowance by way of alimony; & that pltf. would keep deft. indemnified for debts contracted by the wife during the separation: provided that, in case deft. & his wife should by writing under their hands agree to cohabit, & should cohabit for one month next thereafter, the indenture should be void. Pltf. declared against deft. on this deed, averring that deft. & his wife did not by such writing, or otherwise, agree to cohabit, nor cohabit for one month after, or at all; that the wife was alive; that deft. made default in the weekly payments. Plea, upon equitable grounds, that, before the accruing of the causes of action, deft. & his wife were reconciled & cohabited together, & continued to do so, to wit for six months thereafter. Issue having been taken on this plea, & a verdict found for deft., judgment was arrested, because the reconciliation without agreement in writing did not impliedly

Sect. 8.—*Reconciliation. Sect.* 9.]

avoid a deed framed with such an express proviso, because, without the proviso, the reconciliation would not have avoided the deed, which would have been in the nature of an absolute post-nuptial settlement for the wife's life, holding out no inducement to live separate.—RANDLE *v.* GOULD (1857), 8 E. & B. 457; 27 L. J. Q. B. 57; 30 L. T. O. S. 198; 4 Jur. N. S. 304; 6 W. R. 108; 120 E. R. 170.

Annotations:—**Consd.** Crouch *v.* Waller (1859), 4 De G. & J. 302; Negus *v.* Forster (1882), 46 L. T. 675. **Distd.** Nicol *v.* Nicol (1886), 31 Ch. D. 524; Haddon *v.* Haddon (1887), 18 Q. B. D. 778.

2165. —— Deed more than mere separation deed—In nature of post-nuptial settlement.]—RANDLE *v.* GOULD, No. 2164, *ante*.

2166. —— —— ——.]—By a deed executed on the separation of a husband & wife, after containing the usual provision for separation, a debt due to the wife before marriage on a promissory note was declared to be held by the debtor (who joined in executing the deed) upon trust for the wife & husband successively for life, & after the death of the survivor, for the then only child of the marriage absolutely. Subsequently the husband & wife resumed cohabitation, & the husband became a bkpt. The wife then filed a bill praying the execution of the trusts of the deed, or, in the alternative, for her equity to a settlement out of the debt. A demurrer, for want of equity, by the husband's trustee in bkpcy. on the ground, first, that the deed was not a settlement but a mere separation deed annulled by the resumption of cohabitation; & secondly, that the debt, being a legal chose in action of the wife's before marriage, belonged to the husband, was overruled.—RUFFLES *v.* ALSTON (1875), L. R. 19 Eq. 539; 44 L. J. Ch. 308; 32 L. T. 236; 23 W. R. 465.

Annotation:—**Apld.** *Re* Spark's Trusts, Spark *v.* Massey, [1904] 1 Ch. 451.

2167. —— —— Settlement in favour of children.]—By a separation deed the husband assigned property belonging to him to a trustee upon trust for the wife for life, & after her death for the benefit of the existing children of the marriage. The husband & wife subsequently resumed cohabitation:—*Held:* the settlement in favour of the children was not affected by the resumption of cohabitation. Compromised on appeal.—*Re* SPARK'S TRUSTS, SPARK *v.* MASSEY, [1904] 1 Ch. 451; 73 L. J. Ch. 259; 90 L. T. 54; 52 W. R. 426; *on appeal*, [1904] 2 Ch. 121, C. A.

2168. —— ——.]—NEGUS *v.* FORSTER, No. 1664, *ante*.

2169. —— Separation deed between man & woman not married.]—*Re* ABDY, RABBETH *v.* DONALDSON, No. 2159, *ante*.

—— On trusts for children of marriage—Child born after reconciliation.]—*See* No. 2063, *ante*.

2170. What amounts to reconciliation—Parties living together without cohabitation.]—WESTMEATH (MARQUIS) *v.* SALISBURY (MARQUIS), No. 1934, *ante*.

2171. —— Friendly correspondence without cohabitation.]—FRAMPTON *v.* FRAMPTON, No. 1953, *ante*.

2172. —— Casual acts of intercourse.]—Husband & wife entered into a deed of separation under which the husband covenanted to pay a weekly sum to the wife during their joint lives if they should so long live separate from one another. While they were living apart, acts of connubial intercourse took place. In an action by the wife to recover arrears of payments due under the deed:—*Held:* the fact that intercourse had taken place was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect.—ROWELL *v.* ROWELL, [1900] 1 Q. B. 9; 69 L. J. Q. B. 55; 81 L. T. 429; 16 T. L. R. 10, C. A.; *subsequent proceedings* (1903), 89 L. T. 288, C. A.

Annotations:—**Distd.** Macan *v.* Macan (1900), 70 L. J. Q. B. 90. **Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158. **Mentd.** Russell *v.* Russell, [1924] A. C. 687.

2173. Whether accord & satisfaction of arrears of annuity.]—Where a husband & wife are living apart under a deed of separation & the husband has made default in payment of instalments due to the wife under the deed, a resumption of cohabitation subsequent to such default does not of itself amount to accord & satisfaction of the cause of action which has already accrued to the wife in respect of the arrears of the instalments.—MACAN *v.* MACAN (1900), 70 L. J. Q. B. 90; 17 T. L. R. 131; 45 Sol. Jo. 120.

T. 9.—**VARIATION OF SEPARATION DEED.**

2174. Power of court to vary deed—As post-nuptial settlement.]—Husband & wife having agreed to live separate & apart executed a deed of separation, by which the husband covenanted to pay to the wife an annuity of £200 a year during their joint lives, the annuity to be reduced to £150 a year on the decease of the husband, & to £50 a year if the wife remarried:—*Held:* it was a post-nuptial settlement Matrimonial Causes Act, 1859 (c. 61), s. 5, & an order was made for its revision after a decree for dissolution of the marriage by reason of the wife's adultery.—WORSLEY *v.* WORSLEY & WIGNALL (1869), L. R. 1 P. & D. 648; 38 L. J. P. & M. 43; 20 L. T. 546; 17 W. R. 743.

Annotations:—**Consd.** Dormer *v.* Ward, [1900] P. 130. **Refd.** Charlesworth *v.* Holt (1873), L. R. 9 Exch. 38; Bishop *v.* Bishop, Judkins *v.* Judkins (1897), 76 L. T. 409.

2175. Allowance to wife—Subsequent adultery of wife—Previous post-nuptial settlement of respondent's property to her separate use—Extinction of interest under deed.]—By a post-nuptial settlement certain property belonging to resp. was assigned to trustees in trust, amongst other things, to pay the interest & annual proceeds thereof to her for her separate use. Subsequently a deed of separation was entered into between the parties with the same trustees as those of the post-nuptial settlement. By this deed petitioner covenanted to pay resp. an annuity for her life. A decree for dissolution of marriage having been obtained on

2165 i. —— *Deed more than mere separation deed—In nature of post-nuptial settlement.*]—*Semble:* where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, & she does so, after reconciliation & separation, at his instance, the deed is thereby revived.—MCARTHUR *v.* WEBB (1871), 21 C. P. 358.—**CAN.**

2165 ii. .]—An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent reconciliation of the parties; or by the wife's leaving her husband afterwards without cause.—WALKER *v.* WALKER (1872), 19 Gr. 37.—**CAN.**

2167 i. —— —— *Settlement in favour of children.*]—A deed of separation between husband & wife, where the estate is conveyed to the wife for life with remainder to the children of the marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interest of the children intervene to preserve the deed.—MCARTHUR *v.* WEBB (1871), 21 C. P. 358.—**CAN.**

o. —— *Depends on intention of parties.*]—The conditions of a separation deed may or may not come to an end in the event of the reconciliation of the husband & wife—that depends upon their intention.—BOWERS *v.* BOWERS (1915), 9 O. W. N. 66; 34 O. L. R. 463.—**CAN.**

the ground of resp.'s adultery, application was made to the ct. to vary the deed of separation, so as to relieve petitioner from the payment of the above-mentioned annuity. The ct. ordered that whenever any money should be payable to resp. under the deed of separation the trustees should, out of the moneys in their hands payable to resp. under the post-nuptial settlement pay & apply a sum equal in amount upon such & the same trusts as would be applicable thereto in case respondent were dead & had died in the lifetime of petitioner.—BULLOCK *v.* BULLOCK & STRONG (1872), L. R. 2 P. & D. 389; 41 L. J. P. & M. 83; 27 L. T. 247.

2176. —— —— **Reduction.**]—The ct. has jurisdiction, after the dissolution of a marriage on the ground of the wife's adultery, to reduce the amount of a weekly allowance which the husband, under a deed of separation, has covenanted to pay to the wife.

By a deed of separation a husband & wife agreed to live separately for the rest of their lives, & the husband covenanted to pay to the wife a sum of 15*s.* per week, & to permit her to have the custody of the children of the marriage, wholly freed from his authority, as if she were a *feme sole*. The marriage was afterwards dissolved on the ground of the wife's adultery:—*Held:* the husband's agreement to permit his wife to have the custody of the children ought not to be enforced, & the terms of the deed of separation ought to be varied by reducing the amount of the weekly payment to the wife from 15*s.* to 10*s.*—JUMP *v.* JUMP (1883), 8 P. D. 159; 52 L. J. P. 71; 31 W. R. 956.

Annotations:—**Consd.** Saunders *v.* Saunders & Beck (1893), 69 L. T. 498; Ollier *v.* Ollier, [1914] P. 240.

2177. —— —— ——.]—In June, 1881, a deed of separation was executed by which the husband agreed to pay for the benefit of the wife £52 a year. Shortly after the separation she committed adultery, & in Nov. 1882, a decree for dissolution of the marriage was made absolute. In Apr. 1883, the husband obtained leave to present a petition to vary the deed, on payment of all arrears up to that time. There were three children of the marriage who were living with the husband. A petition having been presented, the matter was referred to the registrar, who reported that the wife had no means of support, & that the husband's income was about £270 a year:—*Held:* the case was not to be treated as one of alimony, but was one in which the ct. had a discretion as to the amount of allowance which ought to be made to the wife under all the circumstances; & having regard to the circumstances, & the conduct of the wife in the suit, the husband ought to be allowed to retain one-half of the allowance provided by the deed.—CLIFFORD *v.* CLIFFORD (1884), 9 P. D. 76; 53 L. J. P. 68; 50 L. T. 650; 32 W. R. 747, C. A.

Annotations:—**Consd.** Saunders *v.* Saunders & Beck (1893), 69 L. T. 498; Ollier *v.* Ollier, [1914] P. 240.

2178. —— —— —— **Payment dum sola et casta.**]—The husband & wife were married in 1884, & separated in 1889 under a deed, by which the husband paid his wife £200 a year, without any *dum casta* clause. He afterwards found that she was living with co-resp. under petitioner's name. He thereupon petitioned to have the marriage dissolved, & a decree *nisi* was pronounced, which was in due course made absolute. Upon petition to vary the post-nuptial deed:—*Held:* the allowance to resp. should be reduced to £100 *per annum*, & this should be payable to resp. only *dum sola et casta vixerit.*—SAUNDERS *v.* SAUNDERS & BECK (1893), 69 L. T. 498.

2179. Allowance to petitioning husband—Order for increase.]—The marriage of petitioner & resp. was solemnised in 1870, & in 1872 a deed of separation was entered into between them, in which, amongst other things, it was arranged that resp. (the wife) should pay petitioner during their joint lives an annuity of £100 a year out of the settled property. In 1874 the marriage was dissolved by reason of resp.'s adultery:—*Held:* on a revision of the settlements petitioner was not precluded by the deed of separation from asking for a larger allowance out of the wife's settled property than that which was secured to him by the deed.—BENYON *v.* BENYON & O'CALLAGHAN (1876), 1 P. D. 447; 45 L. J. P. 93; 24 W. R. 950.

Annotations:—**Consd.** Gandy *v.* Gandy (1882), 7 P. D. 77. **Apld.** Wilkinson *v.* Wilkinson (1893), 69 L. T. 459. **Consd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Refd.** Benyon *v.* Benyon & O'Callaghan (1890), 59 L. J. P. 39; Blandford *v.* Blandford (1892), 67 L. T. 392; Midwinter *v.* Midwinter (1893), 68 L. T. 262: Hanbury *v.* Hanbury (1894), 70 L. T. 569; Thomasset *v.* Thomasset, [1894] P. 295.

2180. Custody of children—Provision for rescinded.]—JUMP *v.* JUMP, No. 2176, *ante*.

PART XI. SECT. 9.

2176 i. *Allowance to wife—Subsequent adultery of wife—Reduction.*]—A husband obtained a divorce from his wife on the ground of her adultery. For some years previously the parties had been living apart under a deed of separation, by which the husband covenanted to pay the wife £65 a year for the support of herself & her children, of which it had been agreed that she should have the custody. The husband, on obtaining the divorce, applied to the ct. for the custody of the children, & for a cancellation of the deed of separation:—*Held:* the husband should have the custody of the children, but should continue to pay to his late wife for her own support the sum of £26 a year out of the amount covenanted to be paid to her in the deed of separation.—HALL *v.* HALL (1902), 22 N. Z. L. R. 226.—**N.Z.**

2180 i. *Custody of children—Provision for rescinded.*]—HALL *v.* HALL (1902), 22 N. Z. L. R. 226.—**N.Z.**

p. *Whether court will vary—When not for benefit of child—Meaning of "access."*]—By a separation agreement, charge & control of the child of the marriage, a girl under three years of age, were given to the wife. This agreement was not to be an admission on his part that his wife should always have the charge & control of the child, & was not to prejudice him should he desire to have its custody:—*Held:* there was nothing to justify the giving of the custody to the father & it was in the interest of the child that it should remain in the mother's custody.

Under the agreement, the father was entitled to access to the child only while it was in the mother's custody & control; & in the absence of any stipulation therefor in the agreement, the mother was not guilty of any breach of its provisions by remaining in the room in her house in which the father was permitted to see the child during the times of the father's visit.—*Re* M. (1915), 8 O. W. N. 265; 33 O. L. R. 515.—**CAN.**

Part XII.—Legal Proceedings.

SECT. 1.—CIVIL PROCEEDINGS.

SUB-SECT. 1.—BY AND AGAINST MARRIED WOMEN.

A. In General.

Protection order — Matrimonial Causes Act, 1857 (c. 85).]—*See* Part XIII., Sect. 27, sub-sect. 3, E., *post.*

Matrimonial causes generally.]—*See* Part XIII., *post.*

B. Under Married Women's Property Act, 1882.

(a) Capacity to Sue and be Sued.

See Married Women's Property Act, 1882 (c. 75), s. 1 (2).

2181. Right of married woman to sue alone—Cause of action arising before Act.]—SEVERANCE *v.* CIVIL SERVICE SUPPLY ASSOCN., LTD., No. 2191, *post.*

2182. —— ——.]—A married woman, married before Jan. 1, 1882, may bring & maintain an action in her own name alone after the commencement of the Married Women's Property Act, 1882 (c. 75), for torts committed against her property before that Act came into operation; & since its coming into operation the previous leave of the ct. is no longer necessary.—JAMES *v.* BARRAUD (1883), 49 L. T. 300; 31 W. R. 786, D. C.

Annotation:—**Apld.** Gloucestershire Banking Co. *v.* Phillipps (1884), 12 Q. B. D. 533.

2183. —— ——.]—The Married Women's Property Act, 1882 (c. 75), does not enable a married woman to bring an action for an assault committed upon her during coverture before the passing of the Act without joining her husband.—WELDON *v.* RIVIERE (1884), 53 L. J. Q. B. 448, D. C.

2184. —— ——.]—A married woman may, by virtue of the Married Women's Property Act, 1882 (c. 75), sue alone for a tort committed before that Act came into operation.—WELDON *v.* WINSLOW (1884), 13 Q. B. D. 784; 53 L. J. Q. B. 528; 51 L. T. 643; 33 W. R. 219, C. A.

Annotations:—**Folld.** Weldon *v.* De Bathe (1884), 14 Q. B. D. 339. **Consd.** Turnbull *v.* Forman (1885), 15 Q. B. D. 234. **Refd.** Earle *v.* Kingscote, [1900] 2 Ch. 585; Edwards *v.* Porter (1924), 41 T. L. R. 57. **Mentd.** R. *v.* Whitfield & Thorne (1885), 49 J. P. 230.

2185. —— ——.]—WELDON *v.* DE BATHE, No. 2284, *post.*

2186. Right of husband to sue—In respect of tort to wife's property.]—The articles are the separate property of pltf.'s wife & his creditors could not touch them. There is no ground for saying that the husband can still claim damages for a tort to his wife's property. It would be a strange result if the Act of 1882 had enabled each one of two persons to sue for damages in respect of the same wrong (COZENS-HARDY, J.).—RUSTON *v.* SHERRAS (1899), 44 Sol. Jo. 11.

2187. What amounts to "suing"—Petition for appointment of new trustees.]—The presentation by a married woman of a petition for the appointment of new trustees of a fund in which she is interested in reversion is a "suing" within the Married Women's Property Act, 1882 (c. 75), s. 112, & her husband need accordingly not be made a co-petitioner.—*Re* OUTWIN'S TRUSTS (1883), 48 L. T. 410; 31 W. R. 374.

2188. —— **Action must relate to woman personally.**]—The general rule that a married woman cannot act as a next friend or guardian *ad litem* has not been abrogated by the Married Women's Property Act, 1882 (c. 75), s. 1 (2), which, in providing that she shall be capable of suing & being sued . . . in all respects as if she were a *feme sole*, is limited to actions relating to herself personally.

PART XII. SECT. 1, SUB-SECT. 1.- A.

q. *Right of married woman to sue alone—Respecting separate property—By next friend.*]—In suits by a married woman respecting her separate property, she must sue separately from her husband, by her next friend, & must make her husband a deft., as otherwise the proceeding is looked upon as exclusively the suit of the husband, & would not be conclusive on the wife, or those claiming under her.—HOULDING *v.* POOLE (1850), 1 Gr. 206.— **CAN.**

r. —— —— ——.]—RANN *v.* LAWLESS (1866), 1 Ch. Ch. 333.—**CAN.**

s. —— —— ——.]—A husband & wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of the land of the wife; but the wife must sue by her next friend.—JESSOP *v.* MCLEAN (1868), 15 Gr. 489.— **CAN.**

t. —— —— ——.]—A married woman applying under M. W. Act, must proceed by next friend, notwithstanding the provision of 29 Vict. c. 2, s. 41.—*Re* HOWLAND (1872), 4 Ch. Ch. 74.— **CAN.**

a. —— —— ——.]—A married woman must sue by her next friend, where it does not appear on the face of a bill filed by her that the property in question is her separate property.—PRUYN *v.* SOBY (1876), 7 P. R. 44.— **CAN.**

b. —— —— ——.]—ARCHDEACON *v.* HOWE (1889), 28 N. B. R. 555.— **CAN.**

c. —— ——.]—WYLIE *v.* FRAMPTON (1889), 17 O. R. 515.—**CAN.**

d. —.]—L. retired from a firm after the registration of the same under Partnership Act, leaving R., a married woman, sole member:—*Held:* R. was entitled to sue.—PACIFIC LAND CO. *v.* JAMIESON (1910), 15 B. C. R. 219.— **CAN.**

e. —— *Personal services.*] A married woman has no right of action for nursing a person boarding with her & her husband, unless there has been a special agreement with her to pay her for such service; & in that case she should sue for it alone.—DOIDGE *v.* MIMMS (1900), 13 Man. L. R. 48.— **CAN**

f. —— *Husband insane.*]—A married woman, whose husband is insane & confined in a lunatic asylum, & who is compelled to support herself by keeping a boarding-house, may sue & recover in her own name the amount due from a boarder lodging in the house after her husband's insanity, under Rev. Stat. cap. 114, s. 3.—BELL *v.* LIGHT (1867), 1 Han. 97.—**CAN.**

g. —— *In action for wages.*]—Under 35 Vict. c. 16, s. 1 (O), a married woman can maintain an action for her wages, earned whilst living with her husband.—MCCANDY *v.* TUER (1874), 24 C. P. 101.—**CAN.**

h. —— *In respect of tort.*]—A married woman may bring an action of libel in her own name without joining her husband as pltf.— SPAHR *v.* BEAN (1889), 18 O. R. 70.—**CAN.**

k. —— ——.]—VARNER *v.* MORTON (1919), 46 D. L. R. 597.—**CAN.**

l. —— ——.]—An action may be maintained by a married woman against the parents of her husband for having slandered her to their son, & caused an estrangement, & induced him to abandon her, & to take proceedings to obtain a divorce.—SHEPPARD *v.* SHEPPARD (1922), 69 D. L. R. 570; 51 O. L. R. 520.— **CAN.**

m. —— ——.]—A medical man's unskilful treatment is breach of duty to his patient & a married woman has a title to sue such an action although the medical man has been employed by the husband & not by the wife.—EDGAR *v.* LAMONT, [1914] S. C. 277.— **SCOT.**

n. *Right of husband to sue — In respect of tort to wife's property.*]—Where, in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between pltf. & deft., for the sale by the latter to the former, but the land, on which the works & machinery were, was conveyed to pltf.'s wife, whose property was conveyed to deft. as part consideration:—*Held:* pltf., & not his wife, was the proper person to sue.—FILSCHIE *v.* HOGG (1874), 35 U. C. R. 94.—**CAN.**

permissible to join a husband with his wife as pltf. in an action of tort, for damage to her goods, notwithstanding M. W. P. Act.—PETTIT *v.* KERR (1889), 5 Man. L. R. 359.—**CAN.**

p. —— *Personal injuries.*]—Where a married woman sues in tort to recover damages for personal injuries, & not in respect of either her separate real or personal property, it is not only proper to join the husband as a

—*Re* SOMERSET (DUKE), THYNNE *v.* ST. MAUR (1887), 34 Ch. D. 465; 56 L. J. Ch. 733; 56 L. T. 145; 35 W. R. 273.

Annotations:—**Refd.** *Re* Smith, Clements *v.* Ward (1887), 56 L. T. 850; London & County Banking Co. *v.* Bray, [1893] W. N. 130.

2189. Cannot act as next friend—Or guardian ad litem.]—*Re* SOMERSET (DUKE), THYNNE *v.* ST. MAUR, No. 2188, *ante*.

2190. Effect of Married Women's Property Act, 1882 (c. 75)—Liability to be sued—Remedy confined to separate property.]—A residuary legatee assigned the residue to his wife, Mrs. K., for her separate use. The residue comprised some shares not fully paid up in a joint stock co. The exors. handed over to Mrs. K. the certificates of the shares, but did not transfer them, & they paid over to her the cash balance of the residue. After this a call was made on the shares which the exors. were compelled to pay. Mrs. K. refused to indemnify them, & they brought this action against her to enforce indemnity:—*Held:* (1) if Mrs. K. had been a *feme sole*, she would have been liable to refund at the suit of the exors., for that the liability on the shares did not constitute a debt at the time of paying away the residue, & though the exors. would have had no right to call on the residuary legatee to refund for payment of a debt of which they had notice when they paid away the residue, they did not lose the right to refunding by paying it away with notice of a liability which had not become a debt; (2) Mrs. K. who at the time of action brought had separate estate, though she was restrained from anticipation, was liable to be sued for refunding, for Married Women's Property Act, 1882 (c. 75), s. 1 (2), which makes a married woman having separate estate liable to be sued "in contract, or in tort, or otherwise," makes her liable to be sued on any ground on which a *feme sole* could be sued. (3) *Semble:* the right to compel refunding extended to the costs, charges, & expenses incurred by the exors. as to the shares after they had paid away the residue.—WHITTAKER *v.* KERSHAW (1890), 45 Ch. D. 320; *sub nom. Re* KERSHAW, WHITTAKER *v.* KERSHAW, 60 L. J. Ch. 9; 63 L. T. 203; 39 W. R. 22, C. A.

Annotations:—*As to* (2) **Consd.** Braumstein *v.* Lewis (1891), 7 T. L. R. 246; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559. **Refd.** Hoare *v.* Niblett, [1891] 1 Q. B. 781. *As to* (3) **Refd.** Hosegood *v.* Pedler (1896), 66 L. J. Q. B. 18.

Wife of alien enemy.]—*See* ALIENS, Vol. II., p. 156, No. 259.

(*b*) *Security for Costs.*

See R. S. C., Ord. 65, r. 6.

2191. Action by married woman—Security not ordered.]—The Married Women's Property Act, 1882 (c. 75), enables a married woman to bring an action in her own name without giving security for costs, & although the cause of action arose before the Act came into operation.—SEVERANCE *v.* CIVIL SERVICE SUPPLY ASSOCN., LTD. (1883), 48 L. T. 485, D. C.

Annotations:—**Apld.** James *v.* Barraud (1883), 49 L. T. 300. **Refd.** *Re* Isaac, Jacob *v.* Isaac (1885), 53 L. T. 478.

2192. —— ——.]—Married women suing as pltfs. without their husbands being joined:—*Held:* since Married Women's Property Act, 1882 (c. 75), not liable to give security for costs.—THRELFALL *v.* WILSON (1883), 8 P. D. 18; 47 FIELD *v.* MCARTHUR (1876), 27 C. P. 15.—**CAN.**

g. —— —— ——.]—In an action against a married woman on a note made by her to her husband, & indorsed to pltfs., it appeared that the only property she was possessed of was land derived under the will of her father, who died in 1849; that she married in 1858, while a minor; & that she & her husband had been in possession since she was twenty-one years old:—*Held:* such land was not her separate estate, & she was, therefore, not liable.—THOMSON *v.* DICKSON (1877), 28 C. P. 225.—**CAN.**

h. —— —— ——.]—A wife who joined in a note with her husband, was, under the facts stated in the report, not possessed of separate estate, & therefore not liable, notwithstanding her admission indorsed on the note that the payee had advanced the money on the faith of such separate estate.—BELL *v.* RIDDELL (1882), 2 O. R. 25.—**CAN.**

k. —— —— ——.]—Since M. W. P. Act, 1884, a married woman can be sued as if she were a *feme sole* in respect of property-tax imposed on property held by her to her separate use, whether such tax became due before or after the Act came into operation.—MCDONALD *v.* SPERRY (1885), 4 N. Z. L. R. 5 (S. C.)—**N.Z.**

l. —— —— —— *Onus of proof of separate property.*]—In an action against a married woman to recover a debt secured by a mtge. on her separate property:—*Held:* deft. would have been bound under the covenant implied by Property Law Consolidation Act, 1883, s. 49, if it had been shown that she had separate property at the time of entering into the contract; but the *onus* was on pltf. of proving that deft. at that time was possessed of separate property.—BELL *v.* PETRY (1897), 15 N. Z. L. R. 698.—**N.Z.**

m. *Security for costs.*]—HARVEY *v.* BOOMER (1870), 3 Ch. Ch. 11.—**CAN.**

party pltf., but, if he is not joined, deft. can insist upon the joinder, either by motion in Chambers or summarily at the trial of the action.—SWAN *v.* CANADIAN NORTHERN RY. CO. (1908), 1 Alta. L. R. 427; 9 W. L. R. 275.—**CAN.**

q. —— ——.]—There is no statute in Alberta giving a married woman a right to sue separately from her husband for a personal tort committed against her.—BENNETT *v.* EDMONTON, [1922] 1 W. W. R. 861; 63 D. L. R. 605.—**CAN.**

r. *Effect of Married Women's Property Acts—Liability to be sued.*]—To a bill against a married woman to set aside a mtge. made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party deft.:—*Held:* since the M. W. P. Act, 1872, the husband was not a necessary or proper party.—MCFARLANE *v.* MURPHY (1874), 21 Gr. 80.—**CAN.**

s. —— ——.]—Where a trader in contemplation of insolvency had purchased lands, the conveyance of which he took in his wife's name with the fraudulent design of withdrawing part of his estate from his creditors, & thereupon a bill was filed by the official assignee for the purpose of obtaining a conveyance or sale of the property, to which bill the husband was made a party deft., the ct. allowed a demurrer thereto by the husband, on the ground that he was not a necessary party.—BOUSTEAD *v.* WHITMORE (1875), 22 Gr. 222.—**CAN.**

t. —— ——.]—In proceeding to set aside a deed to a married woman on the ground that the same was made to her as the appointee of her husband, who was insolvent, & was so made in order to defeat his creditors, it is not proper to make the husband a party.—MURDOCH *v.* O'SULLIVAN (1878), 25 Gr. 392.—**CAN.**

u. —— ——.]—In an action on a promissory note against a married woman deft. pleaded coverture to which pltf. replied, setting out an order for protection in consequence of desertion by her husband, made under Revised Statutes, c. 86. Deft. rejoined that long before the making of the note she returned to her husband & the desertion had wholly ceased as pltf. well knew. The facts set out in the rejoinder were fully proved:—*Held:* pltf. could not recover.—SINCLAIR *v.* WAKEFIELD (1880), 1 R. & G. 465.—**CAN.**

y. —— ——.]—In a bill the style of cause named several female pltfs. as being severally wives of their respective husbands, but the stating part of the bill did not allege that they were married; a demurrer on the ground that their husbands were not named as parties was overruled with costs.—WEBSTER *v.* LEYS (1881), 28 Gr. 471.—**CAN.**

a. —— ——.]—Debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf, or separately from her husband, may be sued for as if she were an unmarried woman.—BERRY *v.* ZEISS (1882), 32 C. P. 231.—**CAN.**

b. —— ——.]—TEMPLETON *v.* STEWART (1893), 9 Man. L. R. 487.—**CAN.**

c. —— ——.]—The plea of coverture is no answer to an action of trespass.—EGERS *v.* MCNAMARA (1895), 33 N. B. R. 46.—**CAN.**

d. —— ——.]—LAWRENCE *v.* LANDSBERG (1910), 14 W. L. R. 477.—**CAN.**

e. —— ——.]—DICK *v.* LAMBERT (1916), 31 W. L. R. 1156.—**CAN.**

f. —— —— *Remedy confined to separate property.*]—To enable a married woman to be sued separately from her husband, under C. S. U. C., c. 73, & 35 Vict. c. 16, she must be proved to have separate property to her own use available by execution for pltf.'s demand, which demand, if in the nature of a contract, must arise by reason & upon the faith of her having such separate property.—

g. —— —— ——.]—In an action against a married woman on a note made by her to her husband, & indorsed to pltfs., it appeared that the only property she was possessed of was land derived under the will of her father, who died in 1849; that she married in 1858, while a minor; & that she & her husband had been in possession since she was twenty-one years old:—*Held:* such land was not her separate estate, & she was, therefore, not liable.—THOMSON *v.* DICKSON (1877), 28 C. P. 225.—**CAN.**

h. —— —— ——.]—A wife who joined in a note with her husband, was, under the facts stated in the report, not possessed of separate estate, & therefore not liable, notwithstanding her admission indorsed on the note that the payee had advanced the money on the faith of such separate estate.—BELL *v.* RIDDELL (1882), 2 O. R. 25.—**CAN.**

k. —— —— ——.]—Since M. W. P. Act, 1884, a married woman can be sued as if she were a *feme sole* in respect of property-tax imposed on property held by her to her separate use, whether such tax became due before or after the Act came into operation.—MCDONALD *v.* SPERRY (1885), 4 N. Z. L. R. 5 (S. C.)—**N.Z.**

l. —— —— —— *Onus of proof of separate property.*]—In an action against a married woman to recover a debt secured by a mtge. on her separate property:—*Held:* deft. would have been bound under the covenant implied by Property Law Consolidation Act, 1883, s. 49, if it had been shown that she had separate property at the time of entering into the contract; but the *onus* was on pltf. of proving that deft. at that time was possessed of separate property.—BELL *v.* PETRY (1897), 15 N. Z. L. R. 698.—**N.Z.**

m. *Security for costs.*]—HARVEY *v.* BOOMER (1870), 3 Ch. Ch. 11.—**CAN.**

Sect. 1.—*Civil proceedings: Sub-sect.* 1, *B.* (*b*), (*e*), (*f*), (*g*), (*h*) & (*i*), *C.* & *D.*]

J. P. 279; 31 W. R. 508; *sub nom. In the Goods of* WILSON, THRELFALL *v.* WILSON, 48 L. T. 238.

2193. —— —— No separate estate.]—A married woman being empowered by Married Women's Property Act, 1882 (c. 75), s. 1 (2), to sue as a *feme sole*, may sue without her husband or a next friend, & cannot be ordered to give security for the costs of the action, even although she have at the time of action no separate estate, & there be nothing upon which, if she fails, deft. can issue available execution.—*Re* ISAAC, JACOB *v.* ISAAC, (1885), 30 Ch. D. 418; 54 L. J. Ch. 1136; 53 L. T. 478; 33 W. R. 845; 1 T. L. R. 660, C. A.

Annotations:—**Distd.** *Re* Thompson, Stevens *v.* Thompson (1888), 57 L. J. Ch. 748. **Refd.** Critchley *v.* Brown (1886), 2 T. L. R. 238.

2194. —— —— ——.]—*Re* ROBINSON, PINDAR *v.* ROBINSON, [1885] W. N. 147.

2195. Costs of appeal—Security ordered.]—WELDHEN *v.* SCATTERGOOD, [1887] W. N. 69, C. A.

2196. —— —— Property restrained from anticipation.]—A married woman who has no separate property except property which she is restrained from anticipating, & who appeals without a next friend, must give security for the costs of the appeal.—WHITTAKER *v.* KERSHAW (1890), 44 Ch. D. 296; 62 L. T. 776; *sub nom. Re* KERSHAW, WHITTAKER *v.* KERSHAW, 38 W. R. 497, C. A.

Annotation:—**Consd.** Hood-Barrs *v.* Heriot (1896), 65 L. J. Q. B. 621.

2197. —— Discretion of court—Order for attachment.]—The question whether an order shall be made for security for the costs of an appeal to the Ct. of Appeal is in all cases a matter for the discretion of the ct. *Semble:* as a general rule such an order will not be made where the appeal is against an order for attachment.—HOOD BARRS *v.* HERIOT, [1896] 2 Q. B. 375; 65 L. J. Q. B. 621; 45 W. R. 17; 40 Sol. Jo. 714, C. A.

2198. Suing by next friend—Security ordered.]—A married woman by her next friend took out an originating summons for administration of a testator's estate, upon which an order was made without prejudice to any application by defts. as to security for costs. Defts. applied, & on the ground that the next friend was not a person of substance an order was made staying proceedings till pltf. had given security for costs. Pltf. appealed on the ground that a married woman could not be ordered to find security for costs: —*Held:* although a married woman suing alone cannot be ordered to find security for costs on the ground of poverty, security had rightly been ordered in the present case, since the next friend alone was liable for them, & pltf. after obtaining a judgment by her next friend was too late to claim to sue alone.—*Re* THOMPSON, STEVENS *v.* THOMPSON (1888), 38 Ch. D. 317; 57 L. J. Ch. 748; 59 L. T. 427, C. A.

(*c*) *Actions in formâ pauperis*

See R. S. C., Ord. 16, r. 22–31N.

2199. Affidavit as to means—Joinder of husband—Appeal.]—Where a party who has not sued or defended as a pauper in the ct. below, applies for leave to appeal *in formâ pauperis*, the ct. will follow by analogy R. S. C., Ord. 16, rr. 22, 23, & 24, & not the old practice as to such appeals. A married woman suing without a next friend, her husband not being a party, applied for leave to appeal *in formâ pauperis:*—*Held:* the husband as well as herself must make the affidavit required by r. 22.—*Re* ROBERTS, KIFF *v.* ROBERTS, (1886), 33 Ch. D. 265; 35 W. R. 176, C. A.

Annotations:—**Refd.** *Ex p.* Goldberg, [1893] 1 Q. B. 417; Biggs *v.* Dagnall, [1895] 1 Q. B. 207.

2200. —— ——.]—A married woman in receipt of yearly income of £52 without power of anticipation obtained an *ex p.* order for leave to prosecute *in formâ pauperis* an action in which she was sole pltf. Upon the application of defts. to dispauper her:—*Held:* that the married woman was not a a person "not worth £25" within R. S. C., Ord. 16, r. 22, & must be dispaupered.

Qu.: whether the joinder of her husband in the affidavit of want of means by a married woman seeking to be admitted to sue *in formâ pauperis* is in all cases absolutely necessary.—*Re* ATKIN'S TRUSTS, SMITH *v.* ATKIN, [1909] 1 Ch. 471; 78 L. J. Ch. 307; 99 L. T. 877; 53 Sol. Jo. 61.

2201. Not worth twenty-five pounds—Yearly income restrained from anticipation.]—*Re* ATKIN'S TRUSTS, SMITH *v.* ATKIN, No. 2200, *ante*.

(*d*) *Undertakings in Damages.*

See, generally, INJUNCTION.

2202. Given by married woman—In respect of separate estate.]—An undertaking as to damages required from a married woman in respect of her separate estate.—HOLDEN *v.* WATERLOW (1866), 15 W. R. 139, L. J.

2203. —— Enforcement—As if given by next friend.]—(1) Where an injunction is wrongly granted, an undertaking as to damages given by pltf. is equally enforceable whether the mistake was in point of law or in point of fact.

In such a case the ct. has no discretion to refuse an inquiry as to damages unless the damages alleged would be too remote if deft. were suing in respect of them upon a breach of contract.

In such a case a husband deft. is not prohibited from enforcing an undertaking given by a wife pltf. by reason of the Married Women's Property Act, 1882 (c. 75), s. 12, debarring him from suing his wife in tort.

(2) A married woman who has given an undertaking as to damages since Married Women's Property Act, 1882 (c. 75), will be dealt with on the same footing as that on which a married woman's next friend who had given such an undertaking would have been dealt with before the Act.—HUNT *v.* HUNT (1884), 54 L. J. Ch. 289; 1 T. L. R. 149.

2204. —— Must be accepted—No separate property.]—An application was made on behalf of a married woman for an injunction restraining the Bank of England, until further order, from permitting the transfer of a sum of New 3 per cent. Annuities, standing in the names of the exors. of testator, & to which the married woman claimed to be beneficially entitled. An injunction was granted for a fortnight on the usual undertaking of the married woman to be answerable in damages. The registrar refused to draw up the order on the sole undertaking of the married woman as to damages:—*Held:* the sole undertaking of the married woman must be accepted. —*Re* PRYNNE (1885), 53 L. T. 465.

Annotation:—**Folld.** Pike *v.* Cave (1893), 62 L. J. Ch. 937.

2205. — — — — — —.]—In an action where pltf. is a married woman, & an interlocutory injunction is asked for, the ct. will, if a proper case is made out, grant the injunction upon an undertaking in damages by the married woman, notwithstanding that she may not be entitled to separate property of any value.—PIKE *v.* CAVE (1893), 62 L. J. Ch. 937; 68 L. T. 650.

(e) Third Party Procedure.

See, generally, PRACTICE, R. S. C., Ord. 16, r. 52.

2206. Appearance to third party notice—Refusal to state defences—Order for judgment.]—Under R. S. C., Ord. 16, r. 52, judgment against a third party who has appeared pursuant to a third party notice, but, at that hearing of an application by deft. for directions, declines to state any defence, may be ordered, if the judge is not satisfied that there is any question proper to be tried as to the liability of the third party. The rule is consistent with Jud. Act, 1873 (c. 66), s. 24, (3), & Jud. Act, 1875 (c. 77), s. 24, & is not *ultra vires*. Such judgment under the rule may since the Married Women's Property Act, 1882 (c. 75), be ordered against a married woman, third party, as a *feme sole*, declaring her separate estate chargeable even in respect of a liability created before that Act.—GLOUCESTERSHIRE BANKING CO. *v.* PHILLIPPS (1884), 12 Q. B. D. 533; 53 L. J. Q. B. 493; 50 L. T. 360; 32 W. R. 522; D. C.

Annotation :— **Refd.** Bursill *v.* Tanner (1884), 50 L. T. 589.

2207. Wife without separate estate—Third party notice served by husband.]—JONES *v.* ELDERTON, [1884] W. N. 39; Bitt. Rep. in Ch. 235.

Actions between husband & wife.]—*See* Subsect. 2, *post.*

(f) Payment into Court.

See, generally, PRACTICE.

2208. Payment out to successful plaintiff—Without inquiry—R. S. C., Ord. 14.]—Deft., a married woman possessed of separate property not subject to any restraint on anticipation, entered into a covenant for payment of a sum of money. On an action on the covenant, deft., who had in the meantime become a widow obtained leave to defend on payment of £500 into ct. under above Ord. Judgment having been given for pltf.: —*Held:* he was entitled to have the £500 paid out to him forthwith.—BIRD *v.* BARSTOW, [1892] 1 Q. B. 91; 61 L. J. Q. B. 1; 65 L. T. 656; 56 J. P. 196; 40 W. R. 71; 8 T. L. R. 40; 36 Sol. Jo. 41, C. A.

Annotation :— **Refd.** *Re* Ford, *Ex p.* Trustee, [1900] 2 Q. B. 211.

(g) Damages recovered Separate Property.

See Married Women's Property Act, 1882 (c. 75), s. 1 (2).

2209. Action by husband & wife for injuries to wife—Damages awarded to wife—Execution by husband's creditor.]—BEASLEY *v.* RONEY, No. 2245, *post.*

2210. —— Payment into court—Apportionment.]—HELLINGS *v.* WEST END DRAPERY STORES, LTD. (1899), cited in 76 L. J. K. B. at p. 683.

Annotation :— **Expld. & Distd.** Benning *v.* Ilford Gas Co., [1907] 2 K. B. 290.

(h) Effect of Marriage during Proceedings.

See R. S. C., Ord. 17, rr. 1, 2, 3.

(i) Limitation of Actions.

See, generally, LIMITATION OF ACTIONS.

2211. Action by married woman—Cause of action arising before Married Women's Property Act, 1882 (c. 75)—From what time statute runs.]—The right of a married woman, whose husband is alive, to bring an action in her own name, dates from the commencement of the Married Women's Property Act, 1882 [Jan. 1, 1883]. For that purpose she is a *feme discovert* within the Stat. Limitations, & she may, within the statutable limits from that date, bring an action for a cause which accrued many years previously to that date while she was a married woman.—WELDON *v.* NEAL (1884), 51 L. T. 289; 32 W. R. 828, D. C.

2212. —— —— ——.]—A married woman can maintain in her own name an action for an assault & false imprisonment committed before the coming into operation of the Married Woman's Property Act, 1882 (c. 75), even although the cause of action accrued more than four years before suit, provided the action be brought within four years after the coming into operation of that statute, for she thereby has become *discovert* within Stat. Limitations, s. 7.—LOWE *v.* FOX (1885), 15 Q. B. D. 667; 54 L. J. Q. B. 561; 53 L. T. 886; 50 J. P. 244; 34 W. R. 144, C. A.; *on appeal* (1887), 12 App. Cas. 206, H. L.

Annotations :— **Consd.** *Re* Smith's Estate, Clements *v.* Ward (1887), 35 Ch. D. 589. **Refd.** Hulley *v.* Silversʼ Bleaching Co., [1922] 2 Ch. 268.

C. Joinder of Causes of Action.

See R. S. C., Ord. 18, r. 4.

2213. Action by husband & wife with separate cause of action—Payment into court of lump sum—Necessity for apportionment.]—HELLINGS *v.* WEST END DRAPERY STORES, LTD. (1899), cited in 76 L. J. K. B. at p. 683.

Annotation :— **Expld. & Distd.** Benning *v.* Ilford Gas Co., [1907] 2 K. B. 290

D. Discovery, Interrogatories, etc.

2214. Production & inspection of documents—Husband & wife employing same solicitor—Matters of separate interest.]—Wherever husband & wife have distinct interests & the wife is induced in dealing with those interests to act under the advice of an attorney employed & paid by the husband, the attorney must be deemed to act as the attorney of both husband & wife, & each of them has a right to call for the production & to have full inspection of all documents that may come into the possession of the attorney during such employment relating to the transaction & to the advice given to the wife.—WARDE *v.* WARDE (1851), 3 Mac. & G. 365; 21 L. J. Ch. 90; 18 L. T. O. S. 189; 15 Jur. 759; 42 E. R. 301, L. C.; *subsequent proceedings* (1852), 16 Beav. 103.

Annotations :— **Expld.** O'Shea *v.* Wood, [1891] P. 237. **Refd.** Manser *v.* Dix (1855), 1 K. & J. 451; Ford *v.* De Pontès (1859), 29 L. J. Ch. 883.

2215. —— Husband & wife employing different solicitors—Matters of common interest.]—A married woman living apart from her husband must,

PART XII. SECT. 1, SUB-SECT. 1.—C.

n. *Action of husband & wife with separate causes of action.*]—Counts in trespass to the goods of a husband cannot be joined with counts for unlawful distress of the goods of the wife.—VAUGHAN *v.* BUILDING & LOAN ASSOCN. (1889), 6 Man. L. R. 289.—**CAN.**

o. ——.]—Pltfs., husband & wife, brought action for the value of their services under contract made by deft. with the husband, to pay him £425 for the services for a year of both husband & wife:—*Held:* the husband & wife could not join in one action their separate claims for their work & labour done for deft.—CRUMBIE *v.* MCEWAN (1894), 9 Man. L. R. 419.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—D.

p. *Examination of married woman.*]—On the facts:—*Held:* a married woman cannot be compelled to disclose the nature of her separate estate upon her examination under R. S. O. 1877, c. 50, s. 156.—STANDARD BANK *v.* MCGUAIG (1878), 7 P. R. 356.—**CAN.**

q. —— .]—GOODEVE *v.* WHITE (1893), 15 P. R. 433.—**CAN.**

r. *Particulars of husband's residence.*]—Particulars of the residence, etc., of the husband of a pltf.

Sect. 1.—*Civil proceedings: Sub-sect.* 1, *D., E. & F.* (*a*), (*b*) & (*c*).]

as between herself & her husband or those claiming under him, disclose all correspondence with her solr. which relates to business in which she & her husband were mutually interested, & in which there was nothing adverse to him.

But where her interest is adverse to her husband, & where rightly or wrongly she acts as a *feme sole*, her communications & correspondence will be privileged.—FORD *v.* DE PONTÈS (1859), 29 L. J. Ch. 883; 32 L. T. O. S. 383; 5 Jur. N. S. 993; 7 W. R. 299; *subsequent proceedings, sub nom.* FORD *v.* DE PONTÈS, DE PONTÈS *v.* KENDALL (1861), 30 Beav. 572.

Annotation:—**Refd.** Mornington *v.* Mornington (1861), John. & H. 697.

——.]—*See* DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

2216. Interrogatories—Whether parties married.]—A. sued defts. as man & wife, & then asked them whether they were married. The interrogatory was ordered to be struck out. A. did not appeal, because he considered that a part of the remaining interrogatories would oblige an answer to the question disallowed. Defts. neglected to answer that part of the interrogatories:—*Held:* they were not bound to answer.—SMITH *v.* BERG (1877), 36 L. T. 471; 25 W. R. 606.

Annotation:—**Consd.** Church *v.* Perry (1877), 36 L. T. 513.

——.]—*See* DISCOVERY, Vol. XVIII., pp. 178 *et seq.*

2217. Affidavit of documents—Joint affidavit—Must answer as to documents in possession of either.]—A husband & wife sued as co-pltfs. in respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, & sued without a next friend. An order was made that pltfs. should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them" any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, & going on to say: "We have not now & never had, in our possession, custody or power, or in the possession custody or power of any other person or persons on our behalf, any deed, etc., other than & except the documents set forth in the said schedule":—*Held:* pltfs. must be ordered to file a further & better affidavit, for that an affidavit relating only to documents in the joint custody of the husband & wife did not comply with the order, & the order was right in requiring them to answer as to documents in the possession of either of them.—FENDALL *v.* O'CONNELL (1885), 29 Ch. D. 899; 54 L. J. Ch. 756; 52 L. T. 553; 33 W. R. 619, C. A.

Annotation:—**Mentd.** Scott *v.* Consolidated Bank, [1893] W. N. 56.

2218. —— —— Answer by wife only.]—In an action by a husband & wife, the wife alone made an affidavit of documents, although deft. had obtained an order for an affidavit by both husband & wife; the ct. in the circumstances declined to dismiss the action for want of prosecution, R. S. C., Ord. 31, r. 21 not being imperative.—HARTLEY *v.* OWEN (1876), 34 L. T. 752; 3 Char. Pr. Cas. 240.

Annotation:—**Refd.** Wilson *v.* Raffalovich (1881), 7 Q. B. D. 553.

——.]—*See* DISCOVERY, Vol. XVIII., pp. 74 *et seq.*

2219. Non-compliance with order—Discretion of court to dismiss action.]—HARTLEY *v.* OWEN, No. 2218, *ante.*

——.]—*See* DISCOVERY, Vol. XVIII., pp. 246 *et seq.*

E. Compromise of Actions.

2220. Jurisdiction of court to sanction compromise.]—The ct. has jurisdiction to sanction on behalf of a married woman a compromise of a suit to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest. Upon a petition to the ct. to sanction such a compromise, the married woman should appear separately from her husband.—WALL *v.* ROGERS, WALL *v.* OGLE (1869), L. R. 9 Eq. 58; 39 L. J. Ch. 204, 381; 21 L. T. 654; 18 W. R. 203.

Annotation:—**Consd.** Harle *v.* Jarman (1895), 43 W. R. 618.

F. Judgments against Married Women.

(*a*) *In Respect of Contracts during Coverture.*

See, now, Married Women's Property Act, 1882 (c. 75), s. 1 (2); R. S. C., Appendix F, No. 1, B.

Contracts of wife during coverture.]—*See* Part VIII., *ante.*

2221. Whether liability proprietary or personal.]—A married woman signed a cheque & passed it to her husband to raise money for himself. She was sued alone on the cheque & handed the writ to her husband who promised to attend to it. No appearance was entered & judgment was signed. Several summonses were taken out which were served on the husband's solrs. but not on deft. More than a year after judgment a summons to commit deft. having been taken out she applied to set aside the judgment:—*Held:* the application was not too late & judgment ought to be set aside.

A judgment is not maintainable at law against a married woman, nor in equity against her personally (COTTON, L.J.).—ATWOOD *v.* CHICHESTER (1878), 3 Q. B. D. 722; 47 L. J. Q. B. 300; 38 L. T. 48; 42 J. P. 341; 26 W. R. 320, C. A.

Annotations:—**Folld.** Davis *v.* Ballenden (1882), 46 L. T. 797. **Consd.** Haigh *v.* Haigh (1885), 31 Ch. D. 478. **Refd.** Meager *v.* Pellew (1885), 53 L. T. 67; Darracott *v.* Harrison (1886), 34 W. R. 546.

2222. ——.]—A husband & wife having signed a joint & several promissory note, a writ was issued against them both & judgment was signed against both for default of appearance in 1880. Certain summonses & orders were afterwards served on the wife. She always handed all documents so served on her to her husband until Nov. 1881, & her affidavit showed that until that date she was ignorant of the nature of the proceedings. In

married woman ordered to be delivered.—MCLELLAN *v.* MUNICIPALITY OF ASSINIBOIA (1888), 5 Man. L. R. 299.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—E.

s. *Right to compromise.*]—A married woman can compromise an action brought in her own name, or deal with it as she pleases, just as any other suitor can.—VARDON *v.* VARDON (1884), 6 O. R. 719.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—F. (a).

2221 i. *Whether liability proprietory or personal.*]—DARLING *v.* RICE (1876), 1 A. R. 43.—**CAN.**

t. —— *Form of judgment—Must be against separate estate.*]—CONSOLIDATED BANK OF CANADA *v.* HENDERSON (1879), 29 C. P. 549.—**CAN.**

a. —— —— ——.]—MOORE *v.* JACKSON (1889), 16 A. R. 431.—**CAN.**

b. ——————.]—CANADIAN BANK OF COMMERCE *v.* WOODCOCK (1889), 13 P. R. 242.—**CAN.**

c. *Judgment drawn up in personal form.*]—Application to set aside a judgment entered against deft. for $119.84 & interest & $23.13 costs. Deft. was the wife of S. & was not residing with her husband. The writ was issued against her & the statement of claim indorsed as if she were a *feme sole.* Pltfs. took judgment by default & on the papers brought to

Nov. 1881, the husband filed a liquidation petition. In Feb. 1882, a summons for committal was served on the wife. She instructed solrs. & opposed the summons, but an order was made. She then moved to set aside the original judgment :—*Held:* as the judgment, being a personal judgment against a married woman, was irregular & wrong, & as pltf. had not been prejudiced or misled, it ought to be set aside, notwithstanding the delay. —DAVIS *v.* BALLENDEN (1882), 46 L. T. 797, C. A.

2223. —— Form of judgment.]—SCOTT *v.* MORLEY, No. 1469, *ante*.

2224. ——.]—A judgment obtained against a married woman after the death of her husband in respect of a pecuniary liability incurred during coverture binds her personally, even though execution thereon is limited to her separate property not subject to any restriction against anticipation; & the costs incurred by the creditor in obtaining such judgment may, under the powers given by Ord. 65, r. 27, s. (21), be set off on taxation against the costs for which such creditor is liable to the married woman. — PELTON BROTHERS *v.* HARRISON (2), [1892] 1 Q. B. 118; 61 L. J. Q. B. 144; 65 L. T. 845, C. A.

Annotations :—**Refd.** *Re* Lynes, *Ex p.* Lester, [1893] 2 Q. B. 113; *Re* Bassett, *Ex p.* Lewis, [1896] 1 Q. B. 219; Softlaw *v.* Welch, [1899] 2 Q. B. 419. **Mentd.** *Re* Hewett, *Ex p.* Levene, [1895] 1 Q. B. 328.

2225. Judgment drawn up in personal form—No power to amend—R. S. C., 1883, Ord. 28, r. 11.]—Pltfs. signed judgment in default of appearance against deft. a married woman sued in respect of her separate estate. By mistake the judgment was drawn up in the ordinary form of a personal judgment against deft. instead of in the appropriate form laid down by the Ct. of Appeal in *Scott* v. *Morley*, No. 1469, *ante*. Pltfs. having taken out a summons for leave to amend the judgment so as to follow the form of judgment prescribed in the case of a judgment against a married woman upon a contract made during coverture, a master & a judge at chambers declined to make any order upon it :—*Held :* pltfs. were proposing not to make a correction in the judgment but to substitute one form of judgment for another, & above rule had no application to the case.

The form of order was settled in *Scott* v. *Morley*, No. 1469, *ante*. It proceeds upon the footing that there is no personal liability, but only what BOWEN, L.J. calls a proprietary liability in the case of a married woman (BUCKLEY, L.J.).—OXLEY *v.* LINK, [1914] 2 K. B. 734; 83 L. J. K. B. 602; 110 L. T. 248, C. A.

Annotations :— **Refd.** Sutherland *v.* Hannevig, [1921] 1 K. B. 336; Edwards *v.* Porter, [1925] A. C. 1.

Property subject to restraint on anticipation.]—*See* Part V., Sect. 1, sub-sect. 5, C., *ante*.

(*b*) *In Respect of Ante-Nuptial Obligations and Torts during Coverture.*

See R. S. C., Appendix F, No. 1, c.

Liability for ante-nuptial obligations of wife.]—*See* Part VII., Sect. 2, *ante*.

2226. Personal liability.]—On July 25, 1901, an action for libel was commenced against deft., who in the writ & the pleadings was described as "a married woman." At that time a decree *nisi* had been made for the dissolution of deft.'s marriage. On Nov. 25, 1901, the decree was made absolute. On Oct. 30, 1902, the libel action was tried, when a verdict was found for pltf. with £5,000 damages, & the judge directed judgment to be entered accordingly.

Deft. applied for a new trial, & in June, 1903, the Ct. of Appeal ordered a new trial, unless pltf. would consent to reduce the damages to £1,500. To this pltf. afterwards consented, & the judgment was on July 19 amended accordingly, but the date of Oct. 30 was not altered. The judgment as drawn up was in the ordinary form of a judgment against an unmarried woman, instead of in the form of judgment against a married woman in respect of her separate estate, as settled by the Ct. of Appeal in *Scott* v. *Morley*, No. 1469, *ante*.

The £1,500 not having been paid, pltf. on July 28 served a bkpcy. notice on deft. claiming payment of the £1,500, with interest thereon from Oct. 30, 1902. In the notice the creditor gave as her address an hotel in London where she was temporarily residing. She was in the habit of stopping at that hotel, but did not permanently retain a room there. On Aug. 4, the last of the seven days limited for compliance with the notice, the creditor at 10.15 a.m. went away from the hotel, leaving no address behind her. She went to Newhaven & thence to France, where she remained till the end of Sept. The debtor did not comply with the bkpcy. notice, & on Aug. 24 the creditor presented a bkpcy. petition against her founded on the judgment debt & the act of bkpcy. committed by non-compliance with the bkpcy. notice, & on this petition a receiving order was made.

It was objected by the debtor that the judgment was in a wrong form as a judgment against a deft. who was described in it as "a married woman" :—*Held :* inasmuch as at the date of the trial of the action deft. was unmarried, & a judgment could have been obtained against her creating a personal debt, the objection to the judgment was one of form only, & the Ct. of Bkpcy. had no power to go behind the judgment. —*Re* BEAUCHAMP, *Ex p.* BEAUCHAMP, [1901] 1 K. B. 572; 73 L. J. K. B. 311; 90 L. T. 594; 52 W. R. 545; 20 T. L. R. 269; 11 Mans. 5; *sub nom. Re* A DEBTOR, *Ex p.* THE DEBTOR, 48 Sol. Jo. 297, C. A.; *revsd.* on other grounds, *sub nom.* WATT *v.* WATT (1905), 92 L. T. 483, H. L.

Annotations :—**Mentd.** *Re* Persse (1911), 55 Sol. Jo. 311; *Re* A Debtor, No. 211 of 1912, [1912] 2 K. B. 533.

(*c*) *Under R. S. C., Order* 14.

See Married Women's Property Act, 1882 (c. 75), s. 1 (2); R. S. C., Appendix F, Nos. 5A *et seq.*

2227. Whether final judgment may be signed.]—GUNSTON *v.* MAYNARD (1883), 75 L. T. Jo. 102.

Annotation :—**Apld.** Perks *v.* Mylrea, [1884] W. N. 64.

2228. ——.]—An order giving leave to sign final judgment against a married woman in respect of her separate estate by virtue of Married Women's Property Act, 1882 (c. 75), ss. 1, 19, should state that execution is to be limited to such separate estate as deft. is not restrained from anticipating unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself.—BURSILL *v.* TANNER (1884), 13 Q. B. D. 691; 50 L. T. 589 32 W. R. 827, D. C.

Annotations :— **Folld.** Hartland *v.* Smithies (1884), 1 T. L.

the prothonotary they entered a statement that deft. was wife of S. & is & was when the debt was incurred the owner & possessor of separate property, & that the goods were sold with respect to & to bind her separate property :—*Held :* the judgment must be set aside as being against her *in personam*.—WRIGHT *v.* SHERREN (1907), 4 E. L. R. 153.—**CAN.**

d. *In summary proceedings.*]—Summary proceedings upon specially

Sect. 1.—*Civil proceedings: Sub-sect.* 1, *F.* (*c*) & (*d*), & *G.* (*a*), (*b*) & (*c*).]

141. **Dbtd.** Turnbull *v.* Forman (1885), 15 Q. B. D. 234. **Refd.** Smith *v.* Whitlock (1886), 55 L. J. Q. B. 286.

2229. ——.]—Pltf. cannot apply under Ord. 14 for unconditional judgment against a married woman. The Act says that she is not to be liable except as to her separate property (MATHEW, J.). —MOORE *v.* MULLIGAN, [1884] W. N. 34; Bitt. Rep. in Ch. 127.

Annotation:—**Expld.** Perks *v.* Mylrea, [1884] W. N. 64.

2230. ——.]—PERKS *v.* MYLREA, No. 1456, *ante*.

2231. ——.]—DOWNE *v.* FLETCHER, No. 1458, *ante*.

2232. Form of judgment—Defendant a widow.]—Where judgment is recovered in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882 (c. 75), & before the passing of the Married Women's Property Act, 1893 (c. 63), pltf. is not entitled to a judgment in the ordinary form as though deft. were a *feme sole* he can only sign judgment in the form settled by *Scott* v. *Morley*, No. 1469, *ante*, in an action against a married woman with such verbal alterations as are necessary to adapt that form to a judgment against a widow.—SOFTLAW *v.* WELCH, [1899] 2 Q. B. 419; 68 L. J. Q. B. 940; 81 L. T. 64; 47 W. R. 626; 15 T. L. R. 479; 43 Sol. Jo. 655, C. A.

Annotation:—**Consd.** Brown *v.* Dimbleby, [1904] 1 K. B. 28.

See, now, R. S. C., Appendix F, No. 5, c.

(*d*) *Judgments for Costs.*

See Married Women's Property Act, 1893 (c. 63), s. 2.

2233. Execution against wife—Attachment.]—Although husband & wife may be parties to a suit, an attachment for non-payment of costs will not be granted against the wife.—DOE d. ALLANSON *v.* CANFIELD (1838), 6 Dowl. 523; 1 Will. Woll. & H. 183.

2234. —— —— **No separate property.**]—Where the ct. had condemned defts. in costs, & had made an order upon them for the payment of the same, it refused to direct an attachment to issue against them for non-compliance with that order, on their stating on affidavit that they were married women & had no separate property.—HARRIS *v.* BRADBURY & HALLADAY (1862), 2 Sw. & Tr. 459; 31 L. J. P. M. & A. 86; 6 L. T. 163; 10 W. R. 447.

2235. —— —— ——.]—Mrs. W., a married woman, having entered into a hire & purchase agreement of a piano, & failed to pay an instalment, was sued for delivery of piano, & committed to prison for refusal to deliver it. She had no separate property:—*Held:* a married woman without separate property cannot be imprisoned for non-payment of costs, & her discharge ordered on motion under a writ of *habeas corpus*.—*Re* WALTER (1891), 55 J. P. 551; 7 T. L. R. 445.

Payment of costs out of property subject to restraint from anticipation, *see* Part VI., Sect. 2, sub-sect. 2, *ante*.

G. Execution.

(*a*) *What Property Available.*

Property restrained from anticipation.]—*See* Part VI., Sect. 1, sub-sect. 5, C., *ante*.

(*b*) *Receivers.*

Receivers generally, *see* RECEIVERS.

Appointment of receiver by way of equitable execution.]—*See* EXECUTION, Vol. XXI., pp. 664 *et seq.*

2236. Judicature Act, 1873 (c. 66), s. 25 (8)—Judgment for costs.]—Pltf. in an action, which had been followed by a cross-action, obtained an order in both actions that his costs of the cross-action should be paid by deft. in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Pltf. had endeavoured to obtain a sequestration, but failed from not being able to find deft.'s address so as to serve the subpœna for costs. He then moved the ct. for a receiver, under above sub-sect. After service of the notice of motion, but before the motion was heard, deft. made an affidavit, in which her address was set forth:—*Held:* pltf. was entitled to a receiver; & order made on the hearing of the motion accordingly. —BRYANT *v.* BULL, BULL *v.* BRYANT (1878), 10 Ch. D. 153; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.

Annotation:—**Apld.** Oliver *v.* Lowther (1880), 28 W. R. 381.

2237. —— —— ——.]—M., a married woman, by her next friend, applied to tax the bill of costs of her solr. incurred in a suit relating to her separate estate. After the Taxing Master's certificate had been filed, an order was made on the application of the solr. directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment & execution of the ct. & appointing a person to receive it until the amount found due on taxation was paid:—*Held:* this order was proper, & it was necessary to take separate proceedings by action to enforce the demand against the separate estate.—*Re* PEACE & WALLER (1883), 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899, C. A.

Annotation:—**Refd.** Holmes *v.* Millage, [1893] 1 Q. B. 551.

2238. —— —— **Property restrained from anticipation.**]—At the trial of an action pltf., who was a married woman, did not appear, & judgment was entered for defts. with costs which were to be payable out of her separate estate. The only property to which pltf. was entitled was the income under her marriage settlement, which she was restrained from anticipating. Deft.'s solrs. thereafter wrote to pltf.'s solrs. informing

indorsed writs do not apply where, the deft. being a married woman, the judgment can be only of a proprietary nature.—CAMERON *v.* HEIGHS (1890), 14 P. R. 56.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—G. (a).

e. *Only separate estate.*]—*Re* WILDMEYER *v.* MCMAHON (1881), 32 C. P. 187.—**CAN.**

f. ——.]—KINNEAR *v.* BLUE (1884), 10 P. R. 465.—**CAN.**

g. ——.]—QUEBEC BANK *v.* RADFORD (1885), 10 P. R. 619.—**CAN.**

h. ——.]—DOUGLAS *v.* HUTCHISON (1885), 12 A. R. 110.—**CAN.**

T *v.* ARMSTRONG (1892), 14 P. R. 366.—**CAN.**

l. ——.]—MOORE *v.* JACKSON (1893), 22 S. C. R. 210.—**CAN.**

m. ——.]—Where the only property possessed by a married woman, without a settlement, consisted of an interest in personal property given by her husband to her during coverture:—*Held:* this was separate estate liable for her debts.—TRUSTS CORPN. OF ONTARIO *v.* CLUE (1896), 28 O. R. 116.—**CAN.**

n. ——.]—ANDERSON *v.* MCLAREN, [1924] 4 D. L. R. 1076; 56 O. L. R. 26.—**CAN.**

o. ——.]—ALLUMUDDY *v.* BRAHAM (1878), I. L. R. 4 Calc. 140; 2 C. L. R. 431.—**IND.**

p. ——.]—PROSSER *v.* MILLER (1894), 12 N. Z. L. R. 646.—**N.Z.**

q. ——.]—Where in her marriage contract a wife had settled her estate in trust for herself in liferent exclusive of her husband's rights & "of all rights of her or his creditors" but without declaring the fund to be alimentary or imposing any restriction on her power of disposal:—*Held:* the income of the estate was arrestable at the instance of her creditors.—DOUGLAS GARDINER & MILL *v.* MACKINTOSH'S TRUSTEES (1916), S. C. 125.—**SCOT.**

them that the taxing master's certificate had been obtained, & inquiring whether they had any instructions as to payment of the costs. Pltf.'s solrs. replied that they had no instructions in the matter, & that they did not know pltf.'s whereabouts. Subsequently, & after the time for appealing from the judgment had expired, defts. served notice on pltf.'s solrs. that they intended to apply for payment of deft.'s costs out of the income due to pltf. under her marriage settlement, & for the appointment of a receiver of her income up to the amount of the costs:—*Held:* the order asked for should be made.—BAGLEY *v.* MAPLE & CO., LTD. (1911), 27 T. L. R. 284.

2239. Apart from Judicature Act, 1873 (c. 66)—Judgment for costs—Receiver appointed before taxation.]—An action by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, to be taxed & "payable out of her separate property, but not otherwise." The only separate property of pltf. consisted of a share coming to her under a will. Before the taxation of defts.' costs had been completed by certificate, the trustees of the will being about to distribute their estate & pay pltf. her share, defts. applied for the appointment of a receiver to receive the share & hold it as security for the costs when taxed:—*Held:* independently of above Act, s. 25, there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, & a receiver ought to be appointed.—CUMMINS *v.* PERKINS, [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79 L. T. 456; 47 W. R. 214; 15 T. L. R. 76; 43 Sol. Jo. 112, C. A.

2240. Married Women's Property Act, 1882 (c. 75)—Receiver of separate estate.]—BIRD *v.* ARGENT (1887), 4 T. L. R. 12, D. C.

2241. Matrimonial Causes Act, 1857 (c. 85), s. 21—Protection order—Separate property acquired before order.]—A married woman who was entitled to an equitable life interest in the rents of certain premises for her separate use without power of anticipation was deserted by her husband & obtained a protection order under above sect. She subsequently executed a mtge. of her life interest covenanting to pay the mtge. debt. Judgment having been obtained against her as against a *feme sole* in an action on the covenant:—*Held:* her life interest having devolved on her before the desertion, the restraint on anticipation still attached & consequently a receiver of her life interest could not be appointed by way of equitable execution on the judgment.—HILL *v.* COOPER, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423; 69 L. T. 216; 57 J. P. 664; 41 W. R. 500; 9 T. L. R. 457; 37 Sol. Jo. 475; 4 R. 418, C. A.

Annotation:—**Consd.** *Re* Hughes, Brandon *v.* Hughes, [1898] 1 Ch. 529.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 45), s. 194.

2242. Over what property appointed—Not sum ordered to be paid under separation order.]—Ct. has no jurisdiction on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), to appoint a receiver by way of equitable execution of a weekly sum ordered by the ct. of summary jurisdiction to be paid by the husband to his wife for her maintenance.—PAQUINE *v.* SNARY, [1909] 1 K. B. 688; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212, C. A.

2243. —— Not alimony.]—Husband & wife were joint lessees of a dwelling house. The lease was mortgaged. The husband paid the rent, rates, taxes & interest on the mtge. which amounted together to £294. The wife with the children lived in the lower part of the house. The upper part was let to a tenant at a rent of £200. The husband allowed the wife to receive this rent. The value of her occupation of the lower part was £100. The husband instituted proceedings for divorce. The registrar found the amount of alimony *pendente lite* for the wife & children at £836 a year. He treated her as already receiving £300 & an order was made that the husband should pay the wife alimony at the rate of £45 a month, £510 a year for herself & the children. Certain creditors of the wife recovered judgment against her & then obtained an order for the appointment of a receiver of the rents profits & moneys receivable in respect of her interest in the house:—*Held:* the order for a receiver must be discharged.—WALLS (J.), LTD. *v.* LEGGE, [1923] 2 K. B. 240; 92 L. J. K. B. 717; 129 L. T. 129, C. A.

Appointment of receiver of income of property restrained from anticipation.]—*See* No. 750, *ante.*

(c) *Garnishee Proceedings.*

See Married Women's Property Act, 1893 (c. 63), s. 2.

Garnishee proceedings, generally, *see* EXECUTION, Vol. XXI., pp. 617 *et seq.*

2244. Applicability of proceeding.]—Judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee, & for which the judge at the trial had directed judgment to be entered for her:—*Held:* (1) the money could be attached; (2) the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of pltf. to a garnishee order.—HOLTBY *v.* HODGSON (1889), 24 Q. B. D. 103; 59 L. J. Q. B. 46; 62 L. T. 145; 38 W. R. 68; *sub nom. Re* HOLTBY, 6 T. L. R. 24, C. A.

Annotations:—*As to* (1) **Apld.** Aylesford *v.* G. W. Ry., [1892 2 Q. B. 626. **Folld.** Pelton *v.* Harrison (2), [1892] 1 Q. B. 118. **Consd.** *Re* Howett, *Ex p.* Levene, [1895] 1 Q. B. 328; Softlaw *v.* Welch, [1899] 2 Q. B. 419. **Refd.** Bolitho *v.* Gidley, [1905] A. C. 98. *As to* (2) **Consd.** Deighton *v.* Cockle, [1912] 1 K. B. 206. **Refd.** Hood Barrs *v.* Catheart, [1894] 2 Q. B. 559; *Re* Lumley, Hood Barrs *v.* Catheart (1894), 7 R. 400; Hambleton *v.* Brown, [1917] 2 K. B. 93.

2245. ——.]—In an action brought by a husband & wife as co-pltfs. in respect of personal injuries to the wife, the jury awarded damages to the wife & a sum to the husband for expenses, & the whole amount recovered was paid into the hands of their solr.:—*Held:* the amount awarded to the wife was her separate property within Married Women's Property Act, 1882 (c. 75), s. 5 & therefore a garnishee order attaching the whole of the money in the hands of the solr. to answer a judgment debt of the husband was invalid.—BEASLEY *v.* RONEY, [1891] 1 Q. B. 509 60 L. J. Q. B. 408; 65 L. T. 152 55 J. P 566; 39 W. R. 415, D. C.

2246. ——.]—A grantor by deed in 1907 covenanted to pay to a trustee upon trust for X. during her lifetime the quarterly sum of £250 on the usual quarter days, such sums to be for her separate use without power of anticipation. In 1909, X., being then married, accepted a bill of exchange, & on Dec. 29, 1913 judgment was recovered against her for the amount of the bill. On Dec. 24, 1913 the grantor under the deed had

Sect. 1.—*Civil proceedings: Sub-sect.* 1, *G.* (*c*), (*d*),

paid to the trustee the quarterly sum due on the following day, which sum was on Dec. 29 still in the hands of the trustee:—*Held:* on the authority of *Barnett* v. *Howard*, No. 973, *ante*, this quarterly sum could not be attached to answer the judgment debt.—WOOD *v.* LEWIS, [1914] 3 K. B. 73; 83 L. J. K. B. 1046; 110 L. T. 994, C. A.

2247. Liability of wife's property to attachment—For debts of husband.]—Dividends due on a savings bank annuity in the hands of the Comrs. for reducing the National Debt, payable to the wife of a party against whom judgment has been obtained, are not a debt in the hands of a garnishee capable of being attached under C. L. P. Act, 1854 (c. 125), s. 61.—DINGLEY *v.* ROBINSON (1856), 26 L. J. Ex. 55; 28 L. T. O. S. 127; 2 Jur. N. S. 1145; 5 W. R. 122.

Liability of property subject to restraint on anticipation.]—*See* Part VI., Sect. 1, sub-sect. 5, C., *ante*.

(*d*) *Sequestration.*

Sequestration generally, *see* EXECUTION, Vol. XXI., pp. 591 *et seq.*

Sequestration of property subject to restraint on anticipation.]—*See* EXECUTION, Vol. XXI., p. 600, Nos. 1855–1857.

(*e*) *Discovery in Aid of Execution.*

Discovery in aid of execution.]—*See, generally,* EXECUTION, Vol. XXI., pp. 674 *et seq.*

—— **In county courts.**]—*See* COUNTY COURTS, Vol. XIII., p. 514, No. 636.

(*f*) *Attachment and Committal.*

Attachment & committal generally, *see* CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

Judgments against married women—Whether proprietary or personal.]—*See* Sub-sect. 1, F., *ante*.

2248. Disobedience to order of court—By married woman living separate from husband—Liability of husband.]—After a decree against a husband & wife, who were living separate, she living abroad, & disobeying an order of the ct.:—*Held:* the husband was entitled on motion to an order that she should appear separately in all further proceedings in the suit, & that he should not be responsible for any neglect on her part in relation to such proceedings, nor liable to any attachment or process in consequence of such neglect; & it was not necessary to serve notice of the motion upon his wife, service of notice of such a motion on pltf. being sufficient; & leave was given to pltf. to serve the order & any other proceedings on the wife abroad.—HOPE *v.* CARNEGIE (2) (1869), L. R. 7 Eq. 263; *sub nom.* HOPE *v.* HOPE, HOPE *v.* CARNEGIE, 38 L. J. Ch. 410; 20 L. T. 9; 17 W. R. 430.

Annotation:—**Mentd.** Davis *v.* Park (1872), 42 L. J. Ch. 204.

2249. —— Married woman administratrix.]—(1) Where a married woman administratrix is ordered to pay into ct. a sum of money belonging to the estate of the intestate & shown by her account of intestate's personal estate to be in her possession, in the absence of any evidence that she has committed a *devastavit*, the order should be in the common form & should not be restricted to payment out of her separate estate; & if she fails to comply with the order the ct. has jurisdiction to make an order for attachment against her.

(2) *Semble:* if the object of the order had been, not for the better securing of the fund, but to compel the married woman to make good a loss occasioned by her *devastavit*, the order should have been made in the form prescribed in *Scott* v. *Morley*, No. 1469, *ante*, & she would not have been liable to attachment for non-compliance with it.—*Re* TURNBULL, TURNBULL *v.* NICHOLAS, [1900] 1 Ch. 180; 69 L. J. Ch. 187; 81 L. T. 439; 48 W. R. 136; 16 T. L. R. 45; 44 Sol. Jo. 59.

2250. Committal order made before marriage—Enforcement after marriage.] — GREATOREX *v.* WYNNE, BUTLER *v.* WYNNE (1892), 36 Sol. Jo. 527.

Liability of married woman to attachment or committal.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 39, 43, 48, 67, Nos. 409, 451, 508–517, 772.

Committal under Debtors Act, 1869 (c. 64), s. 5.]—*See* BANKRUPTCY, Vol. V., pp. 1034, 1035, Nos. 8461–8464.

Imprisonment in default of distress.] — *See* DISTRESS, Vol. XVIII., p. 433, No. 1699.

Non-payment of costs.]—*See* Sub-sect. 1, F. (*d*), *ante*.

H. Payment Out of Court.

(*a*) *Affidavit of No Settlement.*

Payment out of court generally, *see* PRACTICE.

2251. Necessity for.]—In future, on all applications for wife's money to be paid to husband, an affidavit will be expected that there was no settlement on the marriage.—MINET *v.* HYDE (1789), 2 Bro. C. C. 663; 29 E. R. 368, L. C.

2252. ——.]— Money devised to be laid out in land for *feme covert* in tail with reversion to her in fee; she chose to have it paid to her husband: not paid without affidavit by the husband & wife that there is no settlement.—BINFORD *v.* BAWDEN (1792), 2 Ves. 38; 30 E. R. 512.

Annotation:—**Refd.** Standering *v.* Hall (1879), 11 Ch. D. 652.

2253. —— Application by widow.]—Upon a petition by a widow for payment out of ct. of money, to the payment of which she has become entitled since the death of her husband, the ct. requires an affidavit that no settlement was made on her marriage with her late husband. - ELRINGTON -MAUGHAN *v.* WILKES (1860), 1 Ch. Ch. 91.—**CAN.**

r. *Committal for contempt — Refusal to attend for examination.*]—On the facts:—*Held:* a married woman was liable to committal for contempt in not attending to be examined as a judgment debtor, although the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for nonpayment of costs.—PEARSON *v.* ESSERY (1888), 12 P. R. 466.—**CAN.**

s. —— ——.]—WATSON *v.* ONTARIO SUPPLY CO. (1890), 14 P. R. 96.—**CAN.**

t. —— ——.] -SANFORD MANUFACTURING CO. *v.* MCEWAN (1895), 10 Man. L. R. 630.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—G. (c).

2247 i. *Liability of wife's property to attachment—For debts of husband.*]—ST. MICHAEL'S COLLEGE *v.* MERRICK (1879), 26 Gr. 216; 1 A. R. 520.—**CAN.**

2247 ii. —.]—Pltf. sought to attach as a debt due to pltf.'s debtor, a sum of money deposited in a bank by debtor's wife in her own name. The money, in whole or in part, was obtained from profits earned in carrying on the business of the husband during his absence, it was received by the wife & deposited in her own name, by arrangement with the husband, for the purpose of protecting it against the creditors of the husband:—*Held:* the amount was not a debt due by the wife to the husband, & not attachable under garnishing proceedings by her judgment creditor.—ST. CHARLES *v.* ANDREA (1907), 2 E. L. R. 317; 41 N. S. R. 190. —**CAN.**

PART XII. SECT. 1, SUB-SECT. 1.—G. (f).

2249 i. *Disobedience to order of court—Married woman administratrix.*]—A married woman, living with her husband, was ordered to bring certain accounts, as administratrix into the master's office, & having disobeyed the order an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shows some ground of exemption.

v. ELRINGTON (1859), 4 Drew. 545 ; 7 W. R. 403 ; 62 E. R. 209.

2254. —— When dispensed with—Small fund.]—In paying out of ct. a fund divisible into shares of less than £10 each to some of which married women were entitled, the ct. dispensed with affidavits of no settlement.—VEAL *v.* VEAL (1867), L. R. 4 Eq. 115 ; 36 L. J. Ch. 816.

2255. —— —— ——.]—GUEST *v.* NEAMES, [1884] W. N. 227.

2256. By whom made—Husband & wife.]—BINFORD *v.* BAWDEN, No. 2252, *ante*.

2257. —— Assignment of fund—Refusal by husband & wife—Affidavit by person with knowledge of facts.]—ROWLAND *v.* OAKLEY (1850), 15 L. T. O. S. 325 ; 14 Jur. 845.

Annotation :—**Folld.** Timothy *v.* Crown (1900), 82 L. T. 142.

2258. —— —— —— ——.]—Where a fund has been assigned by a wife & both husband & wife refuse to make an affidavit of no settlement, the fund may be ordered to be paid out on an affidavit of no settlement made by some person likely to be well informed.—TIMOTHY *v.* CROWN (1900), 82 L. T. 142.

2259. —— Wife—Refusal of husband.]—On payment to a married woman, on her separate receipt, of a fund in ct. belonging to her absolutely to her separate use, it is not necessary that she should be separately examined. It is proper to have an affidavit by the husband as to the absence of a settlement. Where such an affidavit cannot be got, however, payment will be ordered on production of an affidavit by the married woman that there was no settlement, or agreement for a settlement, coupled with another affidavit that the husband has expressly refused to make any affidavit on the subject.—ANON. (1857), 3 Jur. N. S. 839.

2260. —— —— Husband permanently abroad.]—*Semble :* where a husband is residing permanently abroad the ct. will act upon an affidavit of no settlement by the wife alone.—WILKINSON *v.* SCHNEIDER (1870), L. R. 9 Eq. 423 ; *sub nom.* WILKINSON *v.* SCHNEIDER, *Re* LE BLANC, 39 L. J. Ch. 410.

Annotations :—**Mentd.** Bristow *v.* Skirrow (1870), L. R. 10 Eq. 1 ; *Re* Davies' Trusts (1871), L. R. 13 Eq. 163 ; *Re* Van Hagan, Sperling *v.* Rochfort (1880), 16 Ch. D. 18 ; Rous *v.* Jackson (1885), 29 Ch. D. 521 ; *Re* Scott, Scott *v.* Hanbury, [1891] 1 Ch. 298 ; *Re* Elen, Thomas *v.* McKechnie (1893), 68 L. T. 816.

2261. —— —— Separated under protection order.]—Where, upon the further consideration of an administration suit instituted by a married woman who had obtained a protection order suing as a *feme sole* by virtue of the provisions of Matrimonial Causes Act, 1857 (c. 85), ss. 21, 25, 26, it was proposed to pay to the married woman her share of testator's estate, the ct. :—*Held :* evidence must be produced that the separation was a continuing one, but accepted the affidavit of the married woman as to this fact, & also as to no settlement or agreement for a settlement having been made.—EWART *v.* CHUBB (1875), L. R. 20 Eq. 454 ; 45 L. J. Ch. 108.

2262. —— Solicitor—Wife resident abroad.]—The ct. will accept as evidence that there was no settlement on the marriage of a woman resident abroad an affidavit by a solr., disclosing facts which make it unlikely that there was a settlement, & stating positively that he was told by the lady & her husband that there was none.—WOODWARD *v.* PRATT (1873), L. R. 16 Eq. 127 ; 42 L. J. Ch. 891.

2263. Contents—Must deny settlement—Or exhibit settlement not affecting fund.]—On application for payment of a sum belonging to a married woman, the affidavit in support of the application must either deny any settlement whatever or if it states a settlement purporting not to embrace the sum in question, such settlement must be produced in ct. for examination.—ANON. (1839), 4 Jur. 5.

2264. —— —— ——.]—On an application for payment out of ct. of money belonging to a *feme covert*, it must either be shown that there has been no settlement or agreement for a settlement ; or if any settlement exist, it must be produced, to enable the ct. to judge whether it affects the fund in question : it is not sufficient to show by affidavit that the particular fund is not the subject of any settlement.—ROSE *v.* ROLLS (1839), 1 Beav. 270 ; 48 E. R. 944.

Annotation :—**Folld.** Bowman *v.* Bell (1847), 1 Coop. *temp.* Cott. 331.

2265. —— —— ——.]—When payment out of ct. is asked of money belonging to a married woman, an affidavit that the fund is not settled is insufficient. It must be shown either that there is no settlement, or what the settlement was.—BRITTEN *v.* BRITTEN (1846), 9 Beav. 143 ; 50 E. R. 298.

2266. —— —— ——.]—Funds of the wife not to be transferred to the husband upon affidavit only that the same are not comprised in their marriage settlement, but the settlement itself must be produced & inspected.—BOWMAN *v.* BELL (1847), 1 Coop. *temp.* Cott. 331 ; 47 E. R. 880.

2267. —— ——.]—The affidavit, that there is no settlement affecting money in ct., the property of the wife, must state that there is no settlement whatever of the money ; & it is not sufficient to say, that there is no settlement, or agreement for a settlement, upon the wife affecting the money in question.—LAWRENCE *v.* JOHNSON (1843), 7 Jur. 1122.

2268. Certificate of council—That funds not affected by settlement.]—A certificate of counsel is necessary to prove that funds in ct., for payment out of which a married woman is a petitioner, are not, so far as concerns her share, affected by the trusts of such petitioner's marriage settlement.—*Re* SMITH, SMITH *v.* NEW (1907), 51 Sol. Jo. 673.

(*b*) *Separate Examination.*

See, now, Law of Property Act, 1925 (c. 20), s. 167 (2).

I. Costs.

2269. Action dismissed with costs—Proceedings in subsequent action stayed till payment.]—If an ejectment be brought on the demise of husband & wife the wife is included in a rule of ct. that "*dimissor' querentis* shall pay the costs," & if, after the death of her husband, she bring a new ejectment for the same premises, the Ct. of K. B. will stay the proceedings until the costs in the former action be paid although such action was brought in, & the rule for costs made by, the Ct. of Common Pleas.—DOE d. HAMILTON (DUCHESS) *v.* ATHERLY (1741), 7 Mod. Rep. 420 ; 2 Stra. 1152 ; 87 E. R. 1330.

Annotations :—**Mentd.** Keene d. Angel *v.* Angel (1796), 6

PART XII. SECT. 1, SUB-SECT. 1.—I.

a. *Security for costs.*]—*Held :* although suing alone & without separate estate, a married woman is not required to give security for costs.—MCKAY *v.* BAKER (1887), 12 P. R. 341.—**CAN.**

b. *Costs of appeal—Set off against costs of judgment.*]—The ct. intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off *pro tanto* against the costs awarded by the judgment to be levied out of deft.'s separate property.—HAMMOND *v.* KEACHIE (1897), 17 P. R. 565.—**CAN.**

c. *Action dismissed with costs.*]—The judge dismissed an action against a

Sect. 1.—*Civil proceedings: Sub-sect.* 1, *I.; sub-sect.* 2, *A. & B.*]

Term Rep. 740; Doe d. Bampton *v.* Standish (1842), 6 Jur. 716; Tichborne *v.* Mostyn (1872), L. R. 8 C. P. 29.

2270. —— ——.]—(1) A married woman may sue alone *in formâ pauperis*, but if she sues by a next friend he must be a substantial person & capable of answering the costs of the suit, if not defts. may obtain an order to stay proceedings on the suit until pltf. appoints some substantial person her next friend.

(2) Where the costs of a former suit for the same purpose, which had been ordered to be dismissed for want of prosecution, were unpaid, the next friend on that suit having died insolvent:—*Held:* the ct. could not stay proceedings in the new suit until those costs were paid.—HIND *v.* WHITMORE (1856), 2 K. & J. 458; 25 L. J. Ch. 394; 27 L. T. O. S. 55; 4 W. R. 379; 69 E. R. 862.

Annotations:—*As to* (1) **Apld.** Elliot *v.* Ince (1857), 7 De G. M. & G. 475. **Refd.** *Re* Barnes (1862), 31 L. J. Ch. 455. *As to* (2) **N.F.** *Re* Payne, Randle *v.* Payne (1883), 23 Ch. D. 288.

2271. —— ——.]—An action was brought by a married woman by her next friend, & an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with the action was dismissed with costs. Afterwards pltf. by a different next friend brought another action for the same purpose:—*Held:* the second action ought to be stayed till the costs of the first action were paid.—*Re* PAYNE, RANDLE *v.* PAYNE (1883), 23 Ch. D. 288; 52 L. J. Ch. 544; 48 L. T. 194; 31 W. R. 509, C. A.

2272. Liability of separate estate in court—For costs of action in respect of it.]—The separate property of a married woman, in the hands of the ct., is liable to the costs of a suit instituted by her touching that property.—BARLEE *v.* BARLEE (1822), 1 Sim. & St. 100; 57 E. R. 40.

Annotation:— **Refd.** *Re* Glanvill, Ellis *v.* Johnson (1886), 31 Ch. D. 532.

2273. Order for costs out of separate estate—Probate action.]—In an action for probate which was tried by a jury, & in which the verdict was for pltf.:—*Held:* the Probate Div. has power to condemn in costs deft., a married woman having general separate estate.—MORRIS *v.* FREEMAN (1878), 3 P. D. 65; 47 L. J. P. 79; 39 L. T. 125; 43 J. P. 7; 27 W. R. 62.

2274. —— **Discretion of court.**]—A judge has power, since the coming into operation of the Married Women's Property Act, 1882 (c. 75), to order the costs of an action to be paid by a married woman out of any of her free separate property, & not only out of that separate property which she held at the time when the cause of action arose; but he has, nevertheless, a discretion, under the Judicature Acts, to order the costs to be paid out of part only of her separate property, & with this discretion the Ct. of Appeal cannot interfere.—NEVILLE *v.* BAKER (1888), 4 T. L. R. 674, C. A.

2275. Injunction dissolved.]—A married woman, pending a petition by her in the Divorce Ct. for a declaration of nullity of marriage, filed a bill & obtained an injunction against her husband, but did not sue by a next friend.

The petition in the Divorce Ct. having been dismissed:—*Held:* upon a motion by the husband to dissolve the injunction, no order to pay the costs of the motion could be made against pltf. or her solrs.—SEALEY *v.* GASTON (1865), 13 W. R. 577.

2276. Dismissal of appeal by married woman.]—An appeal by a married woman will, if it fails, be dismissed with costs in the usual way.—PERRINS *v.* BELLAMY (1899), as reported in 68 L. J. Ch. 397, C. A.

2277. Separate actions by husband & wife—Whether two sets of costs allowed.]—Where defts. contemplated erecting premises which would if completed, it was alleged, interfere with the ancient lights of two messuages, one of which belonged to a husband & the other to his wife, separate actions were brought by husband & wife claiming (*inter alia*) an injunction & damages. The title of the wife did not appear. On a motion for an injunction defts. admitted the right of pltfs., & had previously offered to amend their plans accordingly. They objected, however, to paying two sets of costs:—*Held:* if it should turn out that the wife was not entitled to her separate use, the taxing master should disallow any extra costs occasioned by bringing two actions instead of one.—HEIMBS *v.* NEWCASTLE CO-OPERATIVE SOCIETY (1897), 76 L. T. 109.

Personal liability of married woman for costs.]—*See* Sub-sect. 1, F. (*d*), *ante*.

Costs of probate actions.]—*See* EXECUTORS, Vol. XXIII., p. 272, Nos. 3351–3355.

SUB-SECT. 2.—BETWEEN HUSBAND AND WIFE.

A. Remedies for Protection of Private Property.

See, now, Married Women's Property Act, 1882 (c. 75), s. 12.

2278. Injunction — Interference with house separate property of wife.]—Bill brought by wife by her next friend against husband stated that by a settlement in contemplation of marriage certain leasehold houses (*inter alia*) were settled upon trust for the separate use of the wife for life remainder to her husband. That pltf. & deft. had for some time lived separate & that deft. had possessed himself of one of the leasehold houses in which pltf. lived. Interlocutory injunction restraining deft. from continuing in possession of the premises. A motion to dissolve injunction was refused by V.-C. on the ground that there was nothing unlawful in the settlement & he saw nothing to prevent the ct. from protecting the interests of the parties under it.—GREEN *v.* GREEN (1840), 5 Hare, 400, n.; 67 E. R. 967.

Annotations:—**Consd.** Symonds *v.* Hallett (1883), 49 L. T. 380. **Refd.** Shipman *v.* Shipman, [1924] 2 Ch. 140.

2279. —— —— **Business carried on by wife for her own benefit.**]—Where a husband, by a post-nuptial deed, has settled a house & business to the separate use of his wife, to be managed by her for the benefit of herself as if she were a *feme sole*, he can be restrained from in any way interfering with the business, & even from entering the house.—WOOD *v.* WOOD (1871), 19 W. R. 1049.

Annotations:—**Consd.** Symonds *v.* Hallett (1883), 49 L. T. 380. **Refd.** Shipman *v.* Shipman, [1924] 2 Ch. 140.

2280. —— —— ——.]—It is difficult to say how an order can be so framed as to confine the injunction to protecting the wife in her business without interfering with the husband's right of access to his wife. It is, however, to be borne in

married woman, but refused to give her costs:—*Held:* the action was improperly brought against her & upon its dismissal she was entitled to costs.—WATT *v.* LOGAN (1901), 40 N. S. R. 340.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 2.—A.

d. *Husband farming wife's property—For benefit of family—No liability to account.*]—When husband & wife are living together & he farms her property with his own & uses the produce for the joint benefit of himself & family he cannot be asked to account for it; & the fact that on their separating the husband pays the wife

mind that the property was settled by the husband himself, & therefore the case is not one of enforcing a settlement of property settled upon a married woman by a third person. I will, therefore, under the circumstances, grant an injunction until next motion day or further order in the terms of the deed of assignment, restraining the husband from molesting or otherwise interfering with the wife & from entering upon her premises & otherwise interfering with her business (CHITTY, J.).—DONNELLY *v.* DONNELLY (1886), 31 Sol. Jo. 45.

2281. —— —— Use by husband for his own purposes.]—On a marriage a leasehold house was settled upon the usual trusts for the wife for life, for her separate use, & the husband & wife continued to reside in the house. Differences arose between them, they ceased to cohabit, & the wife instituted proceedings for divorce or judicial separation. The husband claimed the right to go to & to use the house when & as he thought fit, not for the purpose of consorting with his wife, but for his own purposes. In an action by the wife against the trustees & her husband claiming administration of the trusts of the settlement & an injunction to restrain the husband from entering the house:—*Held:* under the circumstances, the wife was entitled to an *interim* injunction.—SYMONDS *v.* HALLETT (1883), 24 Ch. D. 346; 53 L. J. Ch. 60; 49 L. T. 380; 32 W. R. 103, C. A.

Annotations:—**Consd.** Shipman *v.* Shipman, [1924] 2 Ch. 140. **Refd.** Weldon *v.* De Bathe (1884), 14 Q. B. D. 339.

2282. —— —— —— —— —— ——.]—Married Women's Property Act, 1882 (c. 75), s. 12, provides that every woman, whether married before or after this Act, shall have in her name against all persons whomsoever, including her husband, the same civil remedies, & also, subject as regards her husband, to the proviso hereinafter contained, the same remedies & redress by way of criminal proceedings, for the protection & security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In an action founded upon this sect. a wife sought an injunction to restrain her husband from entering into or otherwise trespassing upon a house, which formed the matrimonial home, & was her own separate property. There was evidence that the conduct of the husband & his cruelty to his wife was such that the family, consisting of the wife & her two children by a former husband, could not possibly live together, & that unless the husband were restrained from entering the house its value to the wife would be seriously diminished, & she would be obliged to sell it:—*Held:* an *interim* injunction ought to be granted restraining the husband until trial of the action from entering into or upon the house or otherwise interfering with pltf.'s possession thereof.—SHIPMAN *v.* SHIPMAN, [1924] 2 Ch. 140; 93 L. J. Ch. 382; 131 L. T. 394; 40 T. L. R. 483; 68 Sol. Jo. 498, C. A.

2283. —— Selling or assigning stock—Contingent interest of wife.]—Injunction upon bill by wife against her husband restraining him from selling, assigning, or in any manner disposing of, stocks standing in the names of the wife's grandfather, & great-grandfather, & which the husband was entitled to in her right, in the event of her attaining the age of twenty-five years, subject to prior life interests.—ELLIS *v.* ELLIS (1793), 2 Coop. *temp.* Cott. 234; 47 E. R. 1146.

2284. Action for trespass—Stranger entering house with authority of husband.]—A married woman in sole occupation of a house bought by her out of her own earnings, since Married Women's Property Act, 1870 (c. 93), can now after Married Women's Property Act, 1882 (c. 75), sue alone, without her husband, in an action for trespass, a person who has entered such house against her will, though he did no injury to the house & entered it with the authority of her husband, but for a purpose unconnected with the husband's desire to live with his wife.

Qu.: if the husband himself has a right to enter such house.—WELDON *v.* DE BATHE (1884), 14 Q. B. D. 339; 54 L. J. Q. B. 113; 53 L. T. 520; 33 W. R. 328; 1 T. L. R. 171, C. A.

Annotation:—**Refd.** Shipman *v.* Shipman, [1924] 2 Ch. 140.

2285. Detinue of goods separate property of wife—Order for return.]—BASHALL *v.* BASHALL (1894), 11 T. L. R. 152, C. A.

Annotation:—**Refd.** Larner *v.* Larner (1905), 74 L. J. K. B. 797.

2286. —— ——.]—An action will lie at the suit of a married woman against her husband for the return of her personal property detained by him.—LARNER *v.* LARNER, [1905] 2 K. B. 539; 74 L. J. K. B. 797; 93 L. T. 537; 54 W. R. 62; 21 T. L. R. 637; *sub nom.* LARDNER *v.* LARDNER, 49 Sol. Jo. 725, D. C.

Annotation:—**Consd.** Healey *v.* Healey, [1915] 1 K. B. 938.

2287. —— —— Trustees of settlement not necessary parties.]—By a marriage settlement a husband assigned to trustees certain chattels upon trust to allow them to be used by the wife during her life free from the control of her husband. In an action by the wife against her husband for the wrongful detention of the chattels:—*Held:* the action could be maintained by the wife without joining the trustees of the settlement as parties.—HEALEY *v.* HEALEY, [1915] 1 K. B. 938; 84 L. J. K. B. 1454; 113 L. T. 694.

Actions in respect of separation deeds.]—*See* Part XI., *ante*.

B. In Tort.

See Married Women's Property Act, 1882 (c. 75), s. 12.

2288. Action by husband against wife—Ejectment.]—A wife may be made deft. in ejectment, where a pretended husband is lessor of pltf.—FENWICK *v.* GRAVENOR (1702), 7 Mod. Rep. 70; 87 E. R. 1101; *sub nom.* FENWICK'S CASE, Holt, K. B. 265; 1 Salk. 257.

Annotations:—**Mentd.** Warren *v.* Fuzz (1703), 6 Mod. Rep. 22; Smith d. Dormer *v.* Parkhurst (1738), Andr. 315.

2289. —— ——.]—There is no abstract rule of law prohibiting a husband from maintaining an action of ejectment against his wife. The ct.,

for the produce on hand of her farm cannot in itself be taken as any presumption or recognition of liability of the husband to pay rent under an implied lease or for use & occupation for time past.—ADOLF *v.* ADOLF, [1919] 2 W. W. R. 908; 47 D. L. R. 525.—**CAN.**

e. *Injunction—Interference with house separate property of wife.*]—A woman was possessed of a licensed public-house in which she lived & carried on business. On her marriage the house & business remained her separate property, & the husband agreed not to interfere with the business. The husband lived in the house with the wife. Subsequently he ill-treated her, & systematically interfered with the business, & acted as if he was the owner of it, to the serious detriment of the business. On an originating summons brought by the wife against the husband under M. W. P. Act, 1882, s. 17, an order was made declaring the wife entitled to the property, & restraining the husband from interfering with the business, but no order was made preventing the husband from entering the house.—GAYNOR *v.* GAYNOR, [1901] I. R. 217.—**IR.**

PART XII. SECT. 1, SUB-SECT. 2.—B.

f. *Action by husband against wife—Replevin.*]—A replevin action is an action for a tort, & a husband

Sect. 1.—*Civil proceedings: Sub-sect.* 2, *B., C., D. & E. Sect.* 2: *Sub-sects.* 1, 2 & 3. *Sect.* 3.]

therefore, discharged a rule to set aside a verdict obtained upon that ground.

There is not such a common interest between a husband & wife in property, created by the relation of marriage, that the wife cannot by law be guilty of a trespass upon it. The relation of husband & wife does not justify her in taking possession & holding to his exclusion (LORD DENMAN, C.J.).—DOE d. MERIGAN *v.* DALY (1846), 8 Q. B. 934; 7 L. T. O. S. 160; 10 Jur. 691; 115 E. R. 1126; *sub nom.* DOE d. DALEY *v.* DALEY, 15 L. J. Q. B. 295.

2290. —— Restraint from pledging credit.]—An action will not lie by a husband against his wife for an injunction to restrain her from pledging his credit.—WEBSTER *v.* WEBSTER, [1916] 1 K. B. 714; 85 L. J. K. B. 691; 114 L. T. 701; 32 T. L. R. 290.

Annotation:—**Consd.** Hulton *v.* Hulton, [1916] 2 K. B. 612.

2291. —— For order to deliver up possession of house.]—HILL *v.* HILL, [1916] W. N. 59.

2292. Action by wife against husband—Divorced wife—Assault during coverture.]—A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture. Declaration, that deft. assaulted & beat pltf. Plea, that at the time of the committing of the grievances, etc., pltf. was the wife of deft. Replication, that before suit the marriage of pltf. & deft. was dissolved by the absolute decree of the Ct. of Divorce & Matrimonial Causes. On demurrer:—*Held:* the replication was bad: for the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband & wife are one person in law.—PHILLIPS *v.* BARNET (1876), 1 Q. B. D. 436; 45 L. J. Q. B. 277; 34 L. T. 177; 40 J. P. 564; 24 W. R. 345.

Annotations:—**Consd.** R. *v.* London (Lord Mayor) (1886), 16 Q. B. D. 772; Wennhak *v.* Morgan (1888), 57 L. J. Q. B. 241. **Refd.** Robinson *v.* Robinson (1897), 13 T. L. R. 564.

2293. For libel—Separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—A wife living apart from her husband under a separation order obtained by virtue of above Act, can maintain an action of libel against him.—ROBINSON *v.* ROBINSON (1897), 13 T. L. R. 564.

2294. —— For malicious prosecution.]—Pltf. sued her husband for damages for false imprisonment & malicious prosecution. At the time of the proceedings out of which the action arose the wife was in domestic service, & she alleged that by reason of her husband's acts she lost her situation:—*Held:* the action was not maintainable inasmuch as it was not brought for the protection or security of the wife's separate estate within Married Women's Property Act, 1882 (c. 75), s. 12.—TINKLEY *v.* TINKLEY (1909), 25 T. L. R. 264; 53 Sol. Jo. 242, C. A.

2295. —— For rescission of deed of separation—Obtained by false representations.]—HULTON *v.* HULTON, No. 1984, *ante*.

—— For protection of separate property.]—*See* Sub-sect. 2, A., *ante*.

C. In Contract.

See Part VIII., Sect. 5, *ante*.

D. Inquiry as to Ownership of Property.

See Married Women's Property Act, 1882 (c. 75), s. 17.

2296. Right to.]—A wife who had obtained a decree for judicial separation against her husband claimed certain furniture in his house as her separate property, & applied for an order that he should deliver it up to her. The husband denied that the furniture was her separate property:—*Held:* under Married Women's Property Act, 1882 (c. 75), s. 17, the wife was entitled to an inquiry by the registrar as to whether the furniture was her separate property.—PHILLIPS *v.* PHILLIPS (1888), 13 P. D. 220; 57 L. J. P. 76; 59 L. T. 183; 52 J. P. 407; 37 W. R. 224.

2297. Jurisdiction of registrar.]—In a husband's suit for dissolution the registrar made an order directing the husband to deliver up to the wife certain articles, which she claimed as her property:—*Held:* the registrar had no jurisdiction to make such an order, & it must be discharged, & the registrar directed to inquire & report as to the property in the articles in question.—WOOD *v.* WOOD (1889), 14 P. D. 157; 58 L. J. P. 68; 61 L. T. 338; 38 W. R. 208.

Annotation:—**Refd.** Joseph *v.* Joseph, [1909] P. 217.

2298. ——.]—In contemplation of the marriage of petitioner & resp., both of whom were of the Jewish persuasion, a sum of money, provided by the intended wife or her relations, was handed to the intended husband & was lodged in a bank in their joint names, in accordance with an alleged custom in the Jewish community, the money being treated as in the nature of dower.

A decree annulling the marriage having been granted upon the wife's petition, she presented a "petition to restore dower," the application being referred to the registrar under the Married Women's Property Act, 1882 (c. 75), s. 17.

Upon the report of the registrar as to the facts & figures. The ct. confirmed the report & ordered that a sum of £400 standing in a bank in the joint names of petitioner & resp. should be handed back to petitioner for her sole & absolute use.—JOSEPH *v.* JOSEPH, [1909] P. 217; 78 L. J. P. 51; 100 L. T. 864; 25 T. L. R. 439; 53 Sol. Jo. 400.

2299. Jurisdiction to refer to official referee.]—The ct. has no jurisdiction under Married Women's Property Act, 1882 (c. 75), s. 17 to refer the whole subject-matter of an originating summons taken out under that sect. to an official referee for trial.

Qu.: whether, having regard to the special & peculiar jurisdiction conferred by Married Women's Property Act, 1882 (c. 75), s. 17, the ct. has jurisdiction to refer a matter arising under that sect. to an official referee for trial under Arbitration Act, 1889 (c. 49), s. 14.—*Re* MARRIED WOMEN'S PROPERTY ACT, 1882, *Re* HUMPHERY & HUMPHERY, [1917] 2 K. B. 72; 86 L. J. K. B. 775; 117 L. T. 7; 61 Sol. Jo. 382, C. A.

2300. Proceedings after registrar's report as to ownership—Motion to adopt—Whether necessary.]—Where in proceedings by a husband to recover property from his wife under Married Women's Property Act, 1882 (c. 75), s. 17 the judge refers the question to a registrar for report, it is not necessary for claimant to move to adopt the report; but either party may move to vary the report, & unless so varied the report must be taken to be correct in subsequent proceedings. When the report did not find that the property in dispute was in the wife's possession, an order on the wife

cannot maintain it against his wife.—McGREGOR *v.* McGREGOR (1899), 6 B. C. R. 432.—**CAN.**

g. —— *Slander.*]—An action by a husband against his wife to recover damages for slander is incompetent.—YOUNG *v.* YOUNG (1903), 5 F. (Ct. of Sess.) 330.—**SCOT.**

to deposit it in ct. within three days cannot be supported. On proof of possession such an order may be made under R. S. C., Ord. 50, r. 3, with a view to the interim preservation of the property pending the determination of the right of ownership.—WILDER *v.* WILDER & CHARTERS (No. 2) (1912), 56 Sol. Jo. 571, C. A.

2301. —— Motion to vary.]—WILDER *v.* WILDER & CHARTERS (No. 2), No. 2300, *ante*.

2302. —— Order to deposit in court—On proof of possession.]—WILDER *v.* WILDER & CHARTERS (No. 2), No. 2300, *ante*.

2303. Appeal from judge's order—Discretion of judge.]—*Re* SCHOFIELD (1890), 7 T. L. R. 60, D. C.

E. By Wife de facto.

2304. Action maintainable—Recovery of rents.]—If a married man marry another woman, & receive the rents of her estate, she may maintain an *indebitatus assumpsit* against him to recover them as for moneys received to her use.—ASHER *v.* WALLIS (1707), 11 Mod. Rep. 146; 88 E. R. 956; *sub nom.* ASSER *v.* WILKS, Holt, K. B. 36.

2305. —— Trespass for assault.]—Wife *de facto* only may bring trespass for assault by husband.—WESTBROOKE *v.* STRUTVILLE (1718), 1 Stra. 79; Bull. N. P. 21 a; 93 E. R. 397.

Annotation :—**Refd.** Phillips *v.* Barnett (1876), 24 W. R. 315.

SECT. 2. CRIMINAL PROCEEDINGS BETWEEN HUSBAND AND WIFE.

SUB-SECT. 1.—BY HUSBAND AGAINST WIFE.

See Married Women's Property Act, 1882 (c. 75), s. 12.

Forcible entry of husband's house.]—*See* CRIMINAL LAW, Vol. XV., p. 651, No. 6964.

Larceny of husband's goods.]—*See* CRIMINAL LAW, Vol. XV., pp. 902, 903, Nos. 9891-9896, 9899-9901.

SUB-SECT. 2.—BY WIFE AGAINST HUSBAND.

See Married Women's Property Act, 1882 (c. 75), s. 12.

2306. Articles of peace.]—SEYMOR'S CASE (1613), Moore, K. B. 874; Godb. 215; 72 E. R. 966.

Annotation :—**Refd.** Manby *v.* Scot (1663), 1 Keb. 411.

2307. ——.]—AUDLEY'S (LORD) CASE (1631), Hut, 115; 3 State Tr. 401; 123 E. R. 1140.

Annotations :—**Mentd.** Grigg's Case (1660), T. Raym. 1; R. *v.* Morley (1666), 6 State Tr. 770; Brown's Case (1673), 1 Vent. 243; R. *v.* Fleet, Warden (1699), 12 Mod. Rep. 337; R. *v.* Azire (1725), 1 Stra. 633; R. *v.* Reading (1734), Cunn. 140; R. *v.* Serjeant (1826), Ry. & M. 352; R. *v.* Story (1849), 13 J.P. 766; Reeve *v.* Wood (1864), 5 B. & S. 364.

2308. Rape — Husband principal in second degree.]—AUDLEY'S (LORD) CASE (1631), Hut. 115; 3 State Tr. 401; 123 E. R. 1140.

Annotations :—**Mentd.** Grigg's Case (1660), T. Raym. 1; R. *v.* Morley (1666), 6 State Tr. 770; Brown's Case (1673), 1 Vent. 243; R. *v.* Fleet, Warden (1699), 12 Mod. Rep. 337; R. *v.* Azire (1725), 1 Stra 633; R. *v.* Reading (1734), Cunn. 140; R. *v.* Serjeant (1826), Ry. & M. 352; R. *v.* Story (1849), 13 J. P. 766; Reeve *v.* Wood (1864), 5 B. & S. 364.

2309. Libel.]—An advertisement published by a husband concerning his wife, is not a libel.—R. *v.* MASTERS (1754), Say. 122; 96 E. R. 824.

2310. ——.]—A wife could not before & cannot since Married Women's Property Acts take criminal proceedings against her husband for defamatory libel.—R. *v.* LONDON (LORD MAYOR) (1886), 16 Q. B. D. 772; 55 L. J. M. C. 118; 54 L. T. 761; 50 J. P. 614; 34 W. R. 544; 2 T. L. R. 482; 16 Cox, C. C. 81, D. C.

Annotations :—**Consd.** Wennhak *v.* Morgan (1888), 57 L. J. Q. B. 241. **Mentd.** Public Prosecution Director *v.* Blady (1912), 106 L. T. 302.

2311. ——.]—In law an indictment against a husband for publishing a libel concerning his wife will not lie, & must be quashed.—R. *v.* BARTER (1922), 86 J. P. 176.

See, further, LIBEL & SLANDER.

Larceny of wife's goods.]—*See* CRIMINAL LAW, Vol. XV., p. 903, Nos. 9897, 9898.

SUB-SECT. 3.—COMPETENCY OF SPOUSES TO GIVE EVIDENCE.

See CRIMINAL LAW, Vol. XIV., pp. 450-453, Nos. 4757-4805.

SECT. 3.—RIGHTS AND LIABILITIES IN BANKRUPTCY PROCEEDINGS.

NOTE.—*The references in this part are to pages & numbers in volumes IV. & V. which deal with the title Bankruptcy & Insolvency.*

Whether married woman subject to bankruptcy laws.]—*See* pp. 31-33, Nos. 251—274.

—— As trader—Keeping lodging house.]—*See* p. 22, No. 157.

Act of bankruptcy—Order for payment of costs in divorce suit.]—*See* p. 92, No. 830.

—— Failure to comply with debtor's summons or bankruptcy notice—Issue of summons against married woman & husband.]—*See* pp. 88, 89, Nos. 802, 809.

Bankruptcy petition—By married woman as executrix—Husband must join.]—*See* p. 113, No. 1017.

—— By husband—Debt due to wife as executrix or administratrix.]—*See* p. 114, Nos. 1030-1031.

—— —— Debt due partly to wife & partly to husband.]—*See* p. 114, No. 1032.

Proof of debts—By married woman against husband—Statements in affidavit.]—*See* p. 322, No. 3021.

—— On behalf of married woman.]—*See* p. 245, Nos. 2317-2321.

—— —— & children.]—*See* p. 245, No. 2322.

—— On behalf of trust estate—By wife whose property settled on her if marriage dissolved.]—*See* p. 245, No. 2325.

—— Damages awarded in Divorce Court.]—*See* pp. 314, 316, Nos. 2937, 2953, 2954.

—— Claims arising out of contract—Covenant to pay marriage trustees.]—*See* p. 309, Nos. 2892-2895.

—— —— Sufficiency of consideration.]—*See* pp. 253, 254, Nos. 2408-2410, 2415.

—— Sums payable on happening of event which may or may not happen—Marriage provisions.]—*See* pp. 261-264, Nos. 2468-2491.

—— Sums payable on happening of event which must happen—Marriage settlement covenants.]—*See* p. 279, Nos. 2611, 2612.

—— Alimony & allowances for bastards.]—*See* p. 300, Nos. 2809-2819.

—— Note given in consideration of wife's fortune.]—*See* p. 280, No. 2616.

PART XII. SECT. 2, SUB-SECT. 2.

h. ***Assault.***]—An assault is none the less a breach of the peace because it is committed by the husband upon the person of his own wife, & the wife is a competent person to make the complaint.—*Ex p.* ABEL (1879), 18 N. B. R. 600.—**CAN.**

Sect. 3.—*Rights and liabilities in bankruptcy proceedings. Part XIII. Sect.* 1: *Sub-sects.* 1, 2 & 3.]

—— **Annuities & annuity bonds.**]—*See* pp. 295–300, Nos. 2762–2808.

—— **Collateral proceedings in Chancery.**]—*See* p. 1016, No. 8289.

Property available for distribution amongst creditors—Bankruptcy of married woman trader—No restraint on anticipation.]—*See* p. 689, No. 6091.

—— —— **Restraint on anticipation.**]—*See* p. 689, No. 6092.

—— **Money of wife lent to husband for life.**]—*See* p. 687, No. 6076.

—— **Avoidance of settlements—"Any settlement of property."**]—*See* pp. 837–840, Nos. 7078–7096.

—— —— **"Before & in consideration of marriage."**]—*See* pp. 841–842, Nos. 7097–7103.

—— —— **"Purchaser or incumbrancer in good faith & for valuable consideration."**]—*See* pp. 842–846, Nos. 7104–7123.

—— —— **"Void against the trustee in bankruptcy."**]—*See* pp. 846–848, Nos. 7124–7141.

—— —— **"Parties claiming under the settlement"—"Settlor able to pay all his debts, etc."**]—*See* pp. 848–850, Nos. 7142–7149.

—— —— **"Wherein settlor had not any estate or interest."**]—*See* pp. 850–851, Nos. 7150-7155.

—— —— **"Executed at the date of the commencement of the bankruptcy."**]—*See* pp. 851–852, Nos. 7156–7160.

—— —— **"Transfer of property in pursuance of such covenant or contract."**]—*See* pp. 852, Nos. 7161–7163.

—— **Property of bankrupt's wife.**]—*See* pp. 675–686, Nos. 5974–6069.

—— **Right to administer wife's estate.**]—*See* p. 675, No. 5972.

—— **"Possession, order & disposition"—Property of wife subject to trust.**]—*See* p. 760, Nos. 6539–6541.

—— —— **Bankrupt acting as manager for wife.**]—*See* p. 786, No. 6741.

—— **Avoidance of preference—Bill of sale given to wife of bankrupt.**]—*See* p. 901, No. 7406.

—— **Life interest in wife's after-acquired property.**]—*See* p. 650, No. 5817.

—— **Contingent interest as tenant by curtesy.**]—*See* p. 652, No. 5825.

—— **Validity of forfeiture clause in settlement of funds—Belonging to wife.**]—*See* pp. 653–654, Nos. 5839–5843.

—— —— **Belonging partly to bankrupt & partly to wife.**]—*See* pp. 656-657, Nos. 5856–5859.

—— **Capacity to exercise & effect of bankruptcy on powers.**]—*See* pp. 740, Nos. 6394 *et seq.* &, *generally*, POWERS.

Priority of debts—Postponement of creditors & debts—Loans from wife to husband.]—*See* pp. 481–482, Nos. 4335–4342.

Order of discharge—"Contracting debts without expectation of being able to pay"—Damages in divorce suit.]—*See* pp. 554–555, Nos. 5102–5105.

—— —— **Damages in action for breach of promise.**]—*See* p. 555, Nos. 5106–5107.

—— **Damages & costs incurred by married woman in libel action—Release from custody.**]—*See* p. 587, No. 5372.

—— **Release of debts—Damages in divorce suit.**]—*See* p. 577, Nos. 5306–5307.

—— **Debts due from wife before marriage—Discharge of husband.**]—*See* p. 585, Nos. 5355-5356.

Part XIII.—Matrimonial Causes.

SECT. 1.—DIVORCE DIVISION.

SUB-SECT. 1.—THE COURT.

2312. Description of.]—ANON. (1875), *Times*, Nov. 10.

2313. Administration of law & equity by.]—MARSHALL *v.* MARSHALL, No. 2492, *post.*

SUB-SECT. 2.—BUSINESS OF THE COURT.

See COURTS, Vol. XVI., pp. 129, 130, Nos. 269–277.

2314. Hearing cause in camera—In interests of public decency—Charges of abominable character—Public requested to retire.]—COHEN *v.* COHEN (1897), 13 T. L. R. 255.

PART XIII. SECT. 1, SUB-SECT. 1.

k. *Constitution of.*]—The ct. for the trial of matrimonial causes, at the passing of 23 Vict. c. 37, consisted of a judge of the Supreme Ct. as vice-president, & two members of the Executive Council.—*Ex p.* CHASE (1866), 6 All. 398.—**CAN.**

l. *Jurisdiction—Supreme Court—British Columbia.*]—The Supreme Ct. of British Columbia has in British Columbia all the jurisdiction conferred on the "Ct. for Divorce and Matrimonial Causes" under Matrimonial Causes Act, 1857, as amended by 21 & 22 Vict. c. 108.—M. (FALSELY CALLED S——) *v.* S—— (1877), 1 B. C. R. pt. 1, p. 25.—**CAN.**

m. —— —— ——.]—SHEPPARD *v.* SHEPPARD (1908), 13 B. C. R. 486.—**CAN.**

n. —— —— —— *To hear appeals.*]—Full ct. of Supreme Ct. of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters.—BROWN *v.* BROWN (1909), 14 B. C. R. 142; 10 W. L. R. 15.—**CAN.**

o. —— —— *Ontario.*]—The High Ct. of Justice for Ontario has no jurisdiction to declare invalid a marriage within the prohibited degrees of consanguinity.—MAY *v.* MAY (1910), 18 O. W. R. 515; 2 O. W. N. 413; 22 O. L. R. 559.—**CAN.**

p. —— —— —— Supreme Ct. of Ontario has no power to make a declaration annulling an alleged marriage.—PROWD *v.* SPENCE (1913), 24 O. W. R. 329; 4 O. W. N. 998; 10 D. L. R. 215.—**CAN.**

q. —— —— ——.]—The Ct. of Ontario has no jurisdiction to entertain an action brought for the purpose of having declared void a marriage which has been duly solemnised, unless the case can be brought under Marriage Act, R. S. O., 1914, c. 148, s. 36.—REID *v.* AULL (1914), 26 O. W. R. 365; 6 O. W. N. 372; 19 D. L. R. 309; 32 O. L. R. 68.—**CAN.**

r. —— —— *Manitoba.*]—The jurisdiction of the Ct. of K. B. to deal with divorce & matrimonial causes never having been recognised by the cts. of Manitoba, a petition, to which resp. did not appear, for an order declaring a marriage null & void was dismissed, on the ground that a single judge, even if convinced that the jurisdiction does exist, should not render an authoritative decision to that effect in a case where there is no probability of appeal.—W. *v.* W., [1917] 2 W. W. R. 1029; 35 D. L. R. 207.—**CAN.**

s. —— —— ——.]—The Matrimonial Causes Act, 1857 (c. 85, Imp.) enacts a substantive law of divorce & matrimonial causes, which by virtue of 51 Vict. c. 33 (Dom.), s. 1, is in force in the province of Manitoba, & the Ct. of K. B. of that province has jurisdiction to administer that law.—WALKER *v.* WALKER, [1919] A. C. 947.—**CAN.**

t. —— —— *Alberta.*]—Matrimonial Causes Act, 1857 (c. 85), Imp., enacts a substantive law of divorce & matrimonial causes, which by 49 Vict. c. 25, Dom., s. 3, is in force in the Province of Alberta, & the Supreme Ct. of that Province has jurisdiction to administer that law.—BOARD *v.* BOARD, A.-G. FOR THE PROVINCE OF ALBERTA INTERVENANT, [1919] A. C. 956.—**CAN.**

a. —— —— *Saskatchewan.*]—The law of England as established by Divorce & Matrimonial Causes Act, 1857, forms part of the substantive law of Saskatchewan & any rights under that Act in Saskatchewan may be enforced in the Ct. of K. B.—FLETCHER *v.* FLETCHER & LAVIOLETTE, [1920] 1 W. W. R. 5; 50 D. L. R. 23; 13 Sask. L. R. 51.—**CAN.**

PART. XIII. SECT. 1, SUB-SECT. 2.

b. *Hearing cause in camera.*]—In the absence of statutory provision to the contrary the jurisdiction of the High Ct. must be exercised in open ct.—DICKASON *v.* DICKASON (1913), 17 C. L. R. 50.—**AUS.**

2315. —— In interests of administration of justice—Court may direct.]—DE LISLE *v.* DE LISLE (1904), *Times*, Mar. 15.

2316. .]—In cross-suits for divorce, the case for the wife having been opened in public, & the wife, on being called as a witness, finding it almost impossible to give her evidence by reason of the presence of people in ct., the President directed this part of the case to be heard in camera.—MOOSBRUGGER *v.* MOOSBRUGGER, MOOSBRUGGER *v.* MOOSBRUGGER & MARTIN (1913), 29 T. L. R. 658.

——.]—*See* COURTS, Vol. XVI., pp. 129, 130, Nos. 269–277.

SUB-SECT. 3.—HOW PRACTICE AND PROCEDURE GOVERNED.

See R. S. C. Ord. 78, r. 1 (d); Matrimonial Causes Act, 1857 (c. 85), 1858 (c. 108), 1859 (c. 61), 1860 (c. 144), 1864 (c. 44), 1866 (c. 32), 1873 (c. 31), 1878 (c. 19), 1884 (c. 68), 1907 (c. 12); Divorce Amendment Act, 1868 (c. 77); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 176–200; Matrimonial Causes Rules, 1924.

2317. Whether rules of Supreme Court applicable.]—In a petition by a husband for dissolution of marriage, petitioner applied for an order that resp., who was a minor, should make the usual affidavit as to documents. The only issue in the suit was that of adultery:—*Held:* (1) as *Mayor* v. *Collins* (1890), 24 Q. B. D. 361 turned upon the rules of the Supreme Ct., it was not applicable, since by Ord. 68, r. 1 (d), those rules do not apply to proceedings for divorce.

Qu.: whether an order for discovery cannot be made against an infant in proceedings for divorce.

(2) In the present case an order ought not to be made, for that discovery ought not to be required from a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery.

Discovery was enforced, both in the Ecclesiastical Cts. & in the Ct. of Chancery, long before parties to suits in those Cts. were competent witnesses in such suits, & the statute [Evidence Further Amendment Act, 1869 (c. 68)] in question does not, in truth, relate to discovery at all. A very little reflection will show that, in suits for dissolution of marriage, discovery, whether by interrogatories or affidavit of documents, may be perfectly consistent with the provisions of that Act. In every such suit the marriage of the parties has to be proved; discovery addressed to that subject may be wanted, &, if wanted, is clearly permissible. Again, in a wife's suit for dissolution on the ground of adultery & cruelty or desertion, discovery as to these last matters is equally permissible. On the other hand, adultery being an ecclesiastical offence, & the recognition of this state of the law by the Legislature being obvious from the prohibitory words in the statute, it would be wrong to compel discovery by means of interrogatories, the object of which is to obtain answers tending to show that the person interrogated has been guilty of adultery (LINDLEY, L.J.). —REDFERN *v.* REDFERN, [1891] P. 139; 60 L. J. P. 9; 64 L. T. 68; 55 J. P. 37; 39 W. R. 212; 7 T. L. R. 157, C. A.

Annotations:—*As to* (1) **Refd.** Curtis *v.* Mundy, [1892] 2 Q. B. 178; Spokes *v.* Grosvenor Hotel Co., [1897] 2 Q. B. 124. *As to* (2) **Consd.** Cavendish *v.* Cavendish (1925), 42 T. L. R. 134. **Refd.** Evans *v.* Evans, [1904] P. 378; Franklin *v.* Franklin & Minshall, [1921] P. 407. *Generally*, **Mentd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

2318. —— Where no express provision in Divorce Court Rules.]—The Rules of the Divorce Ct. must not be taken as exhaustive, & where they fail to meet any particular case the Ct. may follow the rules of the Supreme Ct., notwithstanding the provision of Ord. 68, r. 1, that they shall not affect the procedure or practice in proceedings for divorce & other matrimonial causes, except where expressly provided.

So, in a case where a wife petitioner was suing *in formâ pauperis* for a divorce, on the ground of her husband's adultery & cruelty, & resp. was of unsound mind, & confined as a pauper lunatic in an asylum, the ct. in the absence of any express provision in rule 196 of the Divorce Ct. Rules applicable to the particular case:—*Held:* the practice laid down for the other Divisions of the High Ct. by Ord. 13, r. 1, ought to be followed, & adjourned the case in order that petitioner might apply that the official solr. or some other suitable person might be appointed as guardian *ad litem* to such resp.

A wife petitioned *in formâ pauperis*. The husband was a lunatic not so found by inquisition. The husband was served with the petition in the presence of the medical superintendent & an attendant at a pauper lunatic asylum where he was confined. No appearance was entered. On the petition coming on for hearing:—*Held:* an adjournment ought to be granted that a guardian *ad litem* might be appointed to resp.—GILES *v.* GILES, [1900] P. 17; 69 L. J. P. 26; 81 L. T. 823; 48 W. R. 288.

Annotations:—**Apld.** Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260. **Refd.** Bullus *v.* Bullus (1910), 102 L. T. 399; De Gasquet James *v.* Borwin (1914), 30 T. L. R. 329; Paspati *v.* Paspati, [1914] P. 110; B. *v.* B., [1924] P. 176.

2319. ——.]—(1) Divorce Ct. has an inherent jurisdiction to order separate trials of different issues in a matrimonial suit in order to ensure that equal justice may be done between all parties. In the absence of any precise rule of practice in the Divorce Rules or statutes, the Ct. may be guided by the Rules of the Supreme Ct. *e.g.* Ord. 36, r. 7. The jurisdiction should be exercised sparingly & on the principle that so far as possible no disadvantage should be imposed on any particular party to the proceeding.

(2) The right to apply for separate trial of an issue or issues belongs to all the parties to a suit indifferently, & not to co-resps. only.—MYERS *v.* MYERS, CARPENDALE, RADFORD & THOM, [1918] P. 260; 87 L. J. P. 159; 119 L. T. 343; 34 T. L. R. 464; 62 Sol. Jo. 653.

See, now, Matrimonial Causes Rules, 1924, r. 97.

2320. Practice of Ecclesiastical Courts followed—Proceedings other than to dissolve marriage.]—(1) By Matrimonial Causes Act, 1857 (c. 85), s. 22, it is enacted that in suits for judicial separation, the Ct. for Divorce shall proceed, & act, & give relief on principles & rules as nearly as may be conformable to those on which the Ecclesiastical Cts. gave relief, but subject to the provisions contained in the Act; & to the rules & orders under the Act; & by sect. 51 the ct., at the hearing of any suit or petition under the Act, has authority to make such order as to costs as to it may seem just. By rule 159 (1865), the ct. reserves to itself the power to refuse the wife her costs if the decision of the ct. is against her:—*Held:* although by the ordinary practice of Ecclesiastical Cts. the wife, unless she had a separate income, was entitled in every case to her costs of suit, rule 159, which varies from that practice, has been properly made, & gives a reasonable & lawful discretion to the ct. in the matter of costs.

Sect. 1.—*Divorce Division: Sub-sect.* 3. *Sects.* 2 & 3: *Sub-sects.* 1

(2) Alimony is payable to the wife on an appeal, unless it shall appear to the ct. that such appeal is frivolous & vexatious, or she has been guilty of *laches*.—JONES *v.* JONES (1872), L. R. 2 P. & D. 333; 41 L. J. P. & M. 53; 26 L. T. 106; 20 W. R. 449.

Annotations:—*As to* (1) **Refd.** Butler *v.* Butler (1890), 15 P. D. 126. *As to* (2) **Refd.** Dunn *v.* Dunn (1888), 13 P. D. 91.

2321. —— ——.]—By Matrimonial Causes Act, 1857 (c. 85), s. 22, "In all suits & proceedings, other than proceedings to dissolve any marriage, the ct. shall proceed & act & give relief on principles & rules which, in the opinion of the ct., shall be as nearly as may be conformable to the principles & rules on which the Ecclesiastical Cts. have hitherto acted & given relief." In a proceeding for a divorce *a mensâ et thoro* on the ground of cruelty, where the parties resided within its jurisdiction at the commencement of the suit, an Ecclesiastical Ct. would have granted relief irrespective of their domicil, & it would have made no difference that the necessity for protection arose in consequence of cruelty committed outside its jurisdiction, where the apprehension of further acts of cruelty remained. Petitioner for a judicial separation had been, before her marriage, a domiciled Englishwoman. Her husband's domicil was in Australia, where, after her marriage, she resided with him. Owing to cruelty committed by him while they were travelling in Italy, she sought the protection of her parents in England, & established a home for herself & her children in this country. He followed her here & required her to return to him with the children, which she was afraid to do owing to her apprehension of a repetition of the cruelty. At the commencement of the suit both parties were living within the jurisdiction:—*Held:* the ct., exercising the power of the Ecclesiastical Ct. under the sect., had jurisdiction to entertain the suit.

If the ct. grants a wife a judicial separation under such circumstances, it has also power to give her the custody of the children of the marriage.—ARMYTAGE *v.* ARMYTAGE, [1898] P. 178; 67 L. J. P. 90; 78 L. T. 689; 14 T. L. R. 480.

Annotations:—**Apld.** Chetti *v.* Chetti, [1909] P. 67. **Apprvd.** & **Folld.** Anghinelli *v.* Anghinelli, [1918] P. 247. **Consd.** Graham *v.* Graham, [1923] P. 31. **Refd.** Von Eckhardstein *v.* Von Eckhardstein (1907), 23 T. L. R. 539; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Riera *v.* Riera (1914), 112 L. T. 223; Lord Advocate *v.* Jaffrey, [1921] 1 A. C. 146.

2322. Application of Matrimonial Causes Act, 1859 (c. 61)—To rules & orders already published.]—(1) The ct. is not in a position to deal with a petition for custody of children brought under sect. 4 of above Act until both parties are before the ct.

(2) The rules & orders already published do not apply to above Act.

(3) The ct. will not after a decree for judicial separation make an *ad interim* order for the custody of children under sect. 4 of above Act, except upon application made by petition.—STACEY *v.* STACEY (1860), 29 L. J. P. M. & A. 63; 8 W. R. 341.

2323. Matrimonial Causes (Dominion Troops) Act, 1919 (c. 28)—Adoption by Dominions—Proof.]—Where a suit for dissolution of a marriage contracted in the United Kingdom by a member of His Majesty's Forces domiciled in any part of His Majesty's possessions to which above Act applies, has been brought in the English cts., the adoption of that Act is proved by the production of the copy of the Act by the self-governing Dominion adopting the above Act, in accordance with Evidence (Colonial Statutes) Act, 1907 (c. 16), s. 1 (1).—GIBSON *v.* GIBSON (1920), 150 L. T. Jo. 344; 37 T. L. R. 124; 65 Sol. Jo. 175.

2324. Power to make, alter & revoke rules & orders.]—(1) The judge ordinary has power to make & to alter or revoke rules & orders concerning the practice & procedure of the ct. without the concurrence of the other judges.

(2) A petition for an order for permanent maintenance, under Matrimonial Causes Act, 1857 (c. 85), s. 32, must be presented in accordance with rule 96, after the decree *nisi*, & before the decree absolute: & rule 98, which requires resp. to file an answer to it on oath, is a binding rule with which the ct. will not dispense except upon special grounds. The fact that it appears on the face of the petition that petitioner has a separate income, is not a ground on which the ct. will dispense with that rule.

The ct. must find out what is the ability of the husband & the fortune of the wife before it can act on the statute (*per* CUR.).—CHARLES *v.* CHARLES (1866), L. R. 1 P. & D. 260; 36 L. J. P. & M. 17; 15 L. T. 416.

Annotation:—*As to* (1) **Folld.** Wilson *v.* Wilson (1871), L. R. 2 P. & D. 311.

2325. — —.]—(1) The judge ordinary has power to make rules & orders for regulating the practice & procedure of the Ct. of Divorce.

(2) A party who appears absolutely & not under protest, cannot plead to the jurisdiction & delay filing an answer on the merits, until the question of jurisdiction raised by the plea be determined, but in his answer on the merits he may also plead the matters on which he relies as showing that there is no jurisdiction.—WILSON *v.* WILSON & HOWELL (1871), L. R. 2 P. & D. 341; 41 L. J. P. & M. 1; 25 L. T. 600; 20 W. R. 125.

See, now, Supreme Court of Judicature Act, 1255 (c. 49), s. 99.

Variation of settlements.]—*See* Sect. 22, sub-sect. 5, *post.*

Security for costs.]—*See* Sect. 9, sub-sect. 4, *post.*

Discovery of documents.]—*See* DISCOVERY, Vol. XVIII., pp. 52, 53, Nos. 98–104.

SECT. 2.—MARRIAGES VOID AB INITIO.

Requisites of valid marriages.]—*See* Part II., Sect. 2, *ante.*

PART XIII. SECT. 1, SUB-SECT. 3.

2324 i. *Power to make, alter & revoke rules & orders.*]—The Ct. of Divorce & Matrimonial Causes, established in this province by 23 Vict. c. 37, & continued to the present time under B. N. A. Act, ss. 129, 130, is a civil provincial ct., & the provincial legislature has the exclusive right to regulate the procedure therein.—FITZRANDOLPH *v.* F. (1919), 45 D. L. R. 529; 46 N. B. R. 259.—**CAN.**

c. *Whether English rules apply to India.*]—The principles & rules which obtain in the Divorce Ct. in England are to be applied, as nearly as may be, in India, under the Indian Divorce Act, 1869.—HAY *v.* GORDON (1872), 21 W. R. 11.—**IND.**

d. ——.]—JOSEPH *v.* RAMAMA (1922), I. L. R. 45 Mad. 982.—**IND.**

PART XIII. SECT. 2.

e. *Evidence must be clear.*]—The high ct. of justice has jurisdiction, where a marriage correct in form is ascertained to be void *de jure* by reason of the absence of some essential preliminary, to declare the same null & void *ab initio;* but nothing short of the most clear & convincing testimony will justify the interposition of the ct.—WADSWORTH *v.* MCCORD (1886), 12 S. C. R. 466; *affd.* 14 App. Cas. 631.—**CAN.**

f. ——.]—LAWLESS *v.* CHAMBERLAIN (1889), 18 O. R. 296.—**CAN.**

g. ——.]—DILTS *v.* WARDEN (1912), 22 O. W. R. 228; 3 O. W. N. 1319; 5 D. L. R. 186.—**CAN.**

h. ——.]—HARDIE *v.* HARDIE (1900), 7 Terr. L. R. 13.—**CAN.**

k. —— *One party under* 18 *years of age—Marriage not consummated.*]—The ct. will not declare a marriage

SECT. 3.—VOIDABLE MARRIAGES.

SUB-SECT. 1.—IN GENERAL.

2326. Continue as marriages till dissolved.]—(1) A man divorced by reason of perpetual impotency in himself marries again, the issue of the second marriage is legitimate.

(2) A voidable marriage continues a marriage, till it is dissolved.—BURY'S CASE (1598), 5 Co. Rep. 98 b; 2 Dyer 179 a; 77 E. R. 207; *sub nom.* MORRICE *v.* WEBBER, 1 And. 185; 2 Leon. 169; Moore, K. B. 225.

Annotations:—*As to* (1) **Refd.** Harris *v.* Austin (1615), 3 Bulst. 36; Napier *v.* Napier, [1915] 3 P. 184. *As to* (2) **Refd.** Kenn's Case (1607), 7 Co. Rep. 42 b.; Frampton *v.* Stephens (1882), 21 Ch. D. 164. *Generally,* **Refd.** Harrison *v.* Burwell (1670), 2 Vent. 9.

2327. Cannot be avoided after death of either party.]—A voidable marriage cannot be rendered void, after the death of either of the parties.

The canonical disabilities such as . . . certain corporal infirmities only make the marriage voidable & not *ipso facto* void until sentence of nullity be obtained (SIR JOHN NICHOL).—ELLIOTT *v.* GURR (1812), 2 Phillim. 16; 161 E. R. 1064.

SUB-SECT. 2.—FOR IMPOTENCE.

A. In General.

2328. General rule.]—The English law of the validity of marriage is clearly defined . . . There must not be incapacity in the parties to marry . . . as respects physical capability (JEUNE, P.).—Moss *v.* Moss, [1897] P. 263; 66 L. J. P. 154; 77 L. T. 220; 45 W. R. 635; 13 T. L. R. 459.

Annotations:—**Refd.** Holt *v.* Holt (1908), 72 J. P. Jo. 580; Cramp *v.* Cramp & Freeman, [1920] P. 158.

2329. Grounds for granting relief.]—A husband having been about eighteen years married, & having constantly cohabited with his wife for several years, instituted a suit for nullity by reason of the incurable malformation of the wife:—*Held:* (1) time alone will not, but, coupled with other facts proving insincerity, will operate as a bar to such a suit; (2) lapse of time must be accounted for; (3) when the purposes of marriage are defeated by impotency on either side, the law provides a remedy, according to the circumstances of the case.—B——N *v.* B——N (1854), 1 Ecc. & Ad. 248; 23 L. T. O. S. 99; 164 E. R. 144; *sub nom.* B——N *v.* M——E (FALSELY CALLING HERSELF B——N), 2 Rob. Eccl. 580, P. C.

Annotations:—*As to* (1) **Consd.** Anon. (1857), Dea. & Sw. 295; H—— (falsely called C——) *v.* C—— (1860), 1 Sw. & Tr. 605; Matthews *v.* Matthews (1860), 3 Sw. & Tr. 161; W. (falsely called R.) *v.* R. (1876), 1 P. D. 405. **Refd.** M. (otherwise D.) *v.* D. (1885), 10 P. D. 75. *As to* (2) **Refd.** Castleden *v.* Castleden (1861), 9 H. L. Cas. 187. *Generally,* **Refd.** Cavell *v.* Prince (1866), 15 L. T. 83; Napier *v.* Napier (1915), 84 L. J. P. 177. **Mentd.** Scott *v.* Scott, [1912] P. 241.

2330. ——.]—The ground of the interference of the ct. in cases of impotence is the practical impossibility of consummation. In a case where the parties had cohabited for two years & ten months, & the man's capacity & desire to consummate were not questioned, the ct. being satisfied of the *bona fides* of the suit, & of the practical impossibility of consummation, in consequence of the condition of the woman, pronounced a decree of nullity, although there was no structural defect in the woman.—G—— *v.* G—— (1871), L. R. 2 P. & D. 287; 40 L. J. P. & M. 83; 25 L. T. 510; 20 W. R. 103.

Annotations:—**Apld.** H. *v.* P. (falsely called H.) (1873), L. R. 3 P. & D. 126. **Consd.** S. *v.* A. (otherwise S.) (1878), 3 P. D. 72. **Apld.** Dickinson *v.* Dickinson, [1913] P. 198. **Refd.** G. *v.* G., [1924] A. C. 349.

2331. Impotence must exist at time of marriage.]—I think there is enough to satisfy the court, that, at the time when this marriage took place, there was incompetency, on the part of the man, to perform the duties of marriage; a capacity to perform which is necessary to render it valid (SIR WILLIAM SCOTT).—GREENSTREET (FALSELY CALLED CUMYNS) *v.* CUMYNS (1812), 2 Hag. Con. 332; 2 Phillim. 10; 161 E. R. 761.

Annotations:—**Refd.** A. (falsely called B.) *v.* B. (1853), 1 Ecc. & Ad. 12; Hall *v.* Wright (1859), E. B. & E. 765; M—— (falsely called H——) *v.* H—— (1864), 3 Sw. & Tr. 517.

contract null & void, even though one of the parties is under 18 years of age, & no evidence has been adduced on deft.'s behalf, & the consent of the parents had not been obtained, unless pltf. gives satisfactory proof that after the ceremony there has not occurred that which, if a valid marriage had taken place, would have been a consummation thereof.—SABOURIN *v.* BARDORF, [1923] 3 D. L. R. 399; 52 O. L. R. 232.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 1.

l. *May be adopted.*]—A contract of marriage, induced by the fraud of one of the parties, may, like any other contract, be adopted by the innocent party.—ALEXANDER *v.* ALEXANDER, [1920] S. C. 327.—**SCOT.**

m. *Misconduct before marriage.*]—Ante-nuptial incontinence on the part of a wife, even though fraudulently concealed from her husband, cannot be made a ground by the husband for obtaining a decree for nullity of marriage.—PATON *v.* PATON (1909), 28 N. Z. L. R. 840.—**N.Z.**

n. ——.]—*Held:* irrelevant as a defence against a declarator of marriage adherence & aliment to allege that the woman had previously to her marriage with defender had carnal connection with his full brother & had concealed that circumstance from the defender.—HAMILTON *v.* WYLLIE (1827), 5 Sh. (Ct. of Sess.) 716; 2 Fac. Coll. 511.—**SCOT.**

o. ——.]—Concealment by a woman from her husband at the time of their marriage that she was pregnant to another man entitled the husband to have the marriage declared null & void.—STEIN *v.* STEIN, [1914] S. C. 903.—**SCOT.**

p. ——.]—The fact that a woman, who is at the time pregnant, has brought about her marriage to her husband either by fraudulently inducing him to believe that he is the cause of her pregnancy, which is in fact due to another, or by fraudulently concealing from him the existence of such a condition of pregnancy, does not afford the husband a ground for obtaining a decree of nullity of marriage.—LANG *v.* LANG, [1921] S. C. 44; 58 Sc. L. R. 38.—**SCOT.**

PART XIII. SECT. 3, SUB-SECT. 2.—A.

2329 i. *Grounds for granting relief.*]—Where consummation of the marriage is, on the part of the husband, a practical impossibility, the wife is entitled to a decree of nullity of marriage.—P. (OTHERWISE C.) *v.* P. (1905), 11 B. C. R. 369.—**CAN.**

2329 ii. ——.]—A decree of nullity of marriage cannot be granted upon evidence of wilful persistent refusal to submit to marital intercourse alone, it is necessary to prove facts from which an inference of incapacity can be drawn. The only ct. in which such a decree can be validly granted, is that having jurisdiction over the domicile.—BARNES *v.* BARNES (1921), 63 D. L. R. 680; 14 Sask. L. R. 505.—**CAN.**

2329 iii. ——.]—Wilful wrongful refusal of marital intercourse does not in itself justify the ct. in annulling a marriage, unless such refusal has continued for a long enough period, which has been fixed at three years, to raise the inference that the refusal arises from incapacity.—K. *v.* K., [1921] 1 W. W. R. 1072; 57 D. L. R. 746.—**CAN.**

2329 iv. ——.]—Permanent & incurable impotency, existing at such time & of such nature as to render complete & natural sexual intercourse between the parties practically impossible is a good ground for annulment of marriage. Impotency has been taken to mean physical & incurable incapacity from entering into the marriage, that is, incapacity to consummate the marriage.—BIRENDRA, ETC. *v.* HEMLATA, ETC. (1920), I. L. R. 48 Calc. 283.—**IND.**

2331 i. *Impotence must exist at time of marriage.*]—The wilful, persistent & wrongful refusal of the wife to allow marital intercourse is not of itself sufficient in law to justify a decree declaring the marriage a nullity. To justify such decree something must be shown from which it can be inferred that the wrongful refusal resulted from incapacity or impotence existing at the time of the marriage; & such wrongful refusal, though wilful & persistent, is not of itself sufficient for that purpose.—B. *v.* B., A.-G. FOR SASKATCHEWAN INTERVENER, [1921] 3 W. W. R. 558.—**CAN.**

Sect. 3.—*Voidable marriages: Sub-sect.* 2, *A., B. & C.*]

2332. ——.]—To found a sentence of nullity by reason of impotency, the impediment must be shown to have existed at the marriage & to be incurable. *Semble:* an impediment not natural but supervening is no ground of nullity.

A man of sixty who marries a woman of fifty-two should be contented to take her *tam quam soror* (SIR JOHN NICHOLL).—BROWN *v.* BROWN (1828), 1 Hag. Ecc. 523; 162 E. R. 665.

Annotation:—**Refd.** W—— *v.* H—— (falsely called W——) (1861), 2 Sw. & Tr. 240.

2333. Marriage only rendered voidable by.]—ELLIOTT *v.* GURR, No. 2327, *ante.*

2334. ——.]—(1) Impotence does not render a marriage void, but only voidable.

(2) A question as to the impotence of either conjunct as a ground for nullity can only be raised in the Matrimonial Ct., & during the joint lives of both conjuncts. The question can be raised by no person whatever except the non-impotent conjunct.—A. *v.* B. (1868), L. R. 1 P. & D. 559; 17 W. R. 14; *sub nom.* P. *v.* S., 37 L. J. P. & M. 80; *sub nom.* —— *v.* ——, 19 L. T. 22; *sub nom.* ANON., 32 J. P. 743.

Annotation:—**Refd.** Halpin (otherwise Boddington) *v.* Boddington (1881), 29 W. R. 444.

2335. When relief sought—Joint lives of spouses.]—A. *v.* B. (1868), No. 2334, *ante.*

Effect of delay in bringing proceedings.]—*See* Sect. 7, sub-sect. 4, B. (*d*) i., *post.*

2336. Effect of second marriage & issue—After decree obtained.]—STAFFORD *v.* MONGY (1595), 2 Dyer 179 a, n.; 73 E. R. 394.

2337. —— ——.]—ESSEX'S (COUNTESS) CASE (1613), 2 State Tr. 785; 1 Hargrave's State Tr. 307; 2 Dyer 179 a, n.; 73 E. R. 394.

Annotation:—**Refd.** C. (otherwise H.) *v.* C., [1921] P. 399.

2338. —— ——.]—BURY'S CASE, No. 2326, *ante.*

B. Who may seek Relief.

2339. Whether impotent spouse may bring petition—Failure to prove impotency.]—HARRIS (OTHERWISE BALL) *v.* BALL (1790), cited 3 Phillim. at p. 155; 161 E. R. 1286.

Annotations:—**Refd.** Briggs *v.* Morgan (1820), 2 Hag. Con. 324; Norton *v.* Seton (1820), 3 Phillim. 147; Miles *v.* Chilton (otherwise Miles) (1849), 1 Rob. Eccl. 684; B——n *v.* B——n (1854), 1 Ecc. & Ad. 248. **Mentd.** Ferrers *v.* Ferrers (1791), 1 Hag. Con. 130.

2340. ——.]—A man not allowed to plead his own natural impotency as a ground for a sentence of nullity of marriage.—NORTON *v.* SETON (FALSELY CALLED NORTON) (1819), 3 Phillim. 147; 161 E. R. 1283.

Annotations:—**Consd.** Miles *v.* Chelton (otherwise Miles) (1849), 1 Rob. Eccl. 684; G. *v.* G. (falsely called K.) (1908), 25 T. L. R. 328. **Refd.** B——n *v.* B——n (1854), 1 Ecc. & Ad. 248: H—— (falsely called C——) *v.* C—— (1860), 1 Sw. & Tr. 605; Halpin (otherwise Boddington *v.* Boddington (1881), 29 W. R. 444.

2341. ——.]—A. *v.* B. (1868), No. 2334, *ante.*

2342. —— **Discretion of court.**]—G. *v.* G., (FALSELY CALLED K.) (1908), No. 2360, *post.*

2343. Woman no longer virgo intacta.]—SERRELL *v.* SERRELL & BAMFORD, No. 4334, *post.*

2344. Application to make decree nisi absolute—Not maintainable by respondent.]—The ct. will not upon the application of resp. make a decree *nisi* absolute for nullity of marriage by reason of the impotence of resp.—HALFEN (OTHERWISE BODDINGTON) *v.* BODDINGTON (1881), 6 P. D. 13; *sub nom.* HALPEN (OTHERWISE BODDINGTON) *v.* BODDINGTON, 50 L. J. P. 61; 44 L. T. 252; 29 W. R. 444.

Annotation:—**Apld.** Lewis *v.* Lewis, [1892] P. 212.

2345. —— **Impotence quoad hanc et quoad hunc.**]—If the ct. is satisfied that a marriage has not been & that, *quoad hanc et quoad hunc*, it cannot be consummated by the spouses, although no impediment to consummation is clear or apparent in either of them, the ct. is justified in annulling the marriage. In a case of this description, where there are cross-prayers for relief, a decree *nisi* may be pronounced at the suit of both parties, leaving both or either of them to apply for the decree to be made absolute.

There will be a decree *nisi* & an order for costs against the husband, as the wife appears to have no separate estate (BARGRAVE DEANE, J.).—G. *v.* G., [1912] P. 173; 81 L. J. P. 90; 106 L. T. 617; 28 T. L. R. 481.

——.]—*See, generally*, Sect. 25, *post.*

C. What Constitutes Impotence.

2346. Consummation practically impossible—Absence of malformation or structural defect.]—G—— *v.* G—— (1871), No. 2330, *ante.*

2347. ——.]—In an action by a husband against his wife for a decree of nullity of marriage on the ground of impotency, it was proved that the husband, whose potency was admitted, made frequent attempts extending over a protracted period to consummate the marriage, but failed owing to the unreasoning resistance of the wife, & that this resistance continued after she had formally consented to perform her conjugal duty. The medical examination of the wife showed that there was no structural incapacity. The parties were on affectionate terms:—*Held:* the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity,

q. *Jurisdiction—High Court.*]—The High Ct. has no jurisdiction to entertain an action to have a marriage declared null & void by reason of the alleged incapacity & impotence of one of the parties.—T—— *v.* B—— (1907), 10 O. W. R. 1030; 15 O. L. R. 224.—**CAN.**

r. —— ——.]—The High Ct. has no power to declare a marriage a nullity on the grounds of impotency.—LEAKIM *v.* LEAKIM (1912), 23 O. W. R. 227; 4 O. W. N. 214; 6 D. L. R. 875.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 2.—B.

s. *Suit by impotent spouse.*]—An impotent man cannot maintain a nullity-suit merely on the grounds of his own impotency. But if the woman repudiates all relation of wife & the obligations of the marriage contract the impotent man may show that there is no *verum matrimonium* & maintain such a suit.—A. *v.* A. (sued as B.) (1887), 19 L. R. Ir. 403.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 2.—C.

2346 i. *Consummation practically impossible—Absence of malformation or structural defect.*]—In a suit brought by a wife for nullity of marriage it was proved that the marriage had never been consummated, the cause being the impotency of the husband, although there was no malformation or apparent incapacity disclosed by inspection. The cohabitation had lasted for one year & eight months, of which period the parties had occupied the same bed for about a year:—*Held:* in those circumstances a decree *nisi* was granted.—H. (FALSELY CALLED T.) *v.* T. (1893), 11 N. Z. L. R. 766.—**N.Z.**

2346 ii. —— ——.]—The marriage between a husband & wife, who lived on affectionate terms & neither of whom suffered from any structural defect, was never consummated owing to the wife's refusal to permit intercourse throughout a prolonged period in which the husband made repeated but unsuccessful attempts, the refusal being persisted in even after the wife had formally consented to perform her conjugal duty:—*Held:* the wife's refusal was not due to obstinacy or caprice, but to an invincible repugnance to the sexual act which amounted to incapacity; & the husband, accordingly, was entitled to a decree of nullity.—G. *v.* G., [1924] S. C. (H. L.) 42.—**SCOT.**

& the husband was therefore entitled to a decree of nullity.—G. *v.* G., [1924] A. C. 349; 131 L. T. 70; *sub nom.* GRAHAM *v.* REITH (OR GRAHAM), 40 T. L. R. 322; 68 Sol. Jo. 417, H. L.

2348. —— Nervous hysteria of wife.]—In a suit of nullity it appeared, from the husband's evidence, that whenever he had attempted to have intercourse with his wife the act had produced hysteria on her part, & that, although he had cohabited with her for more than three years, the marriage had never been consummated. The wife refused to submit to inspection. On the evidence of the husband the Judge Ordinary made a decree *nisi* to annul the marriage under the provisions of Matrimonial Causes Act, 1873 (c. 31).—H. *v.* P. (FALSELY CALLED H.) (1873), L. R. 3 P. & D. 126.

Annotation :—**Consd.** Dickinson *v.* Dickinson, [1913] P. 198.

2349. Incurable disability.]—BROWN *v.* BROWN, No. 2332, *ante*.

2350. —— Intercourse very imperfect.]—Sentence of nullity of marriage pronounced, by reason of a natural, incurable malformation of the sexual organs of the female, those organs admitting of a partial connection only with the male.

If there be a reasonable probability that the lady can be made capable of a *vera copula*, of the natural sort of *coitus*, though without power of conception, I cannot pronounce this marriage void. If, on the contrary, she is not & cannot be made capable of more than an incipient, imperfect, & unnatural *coitus*, I would pronounce the marriage void. In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the cause is visible & capable of being ascertained, as when it rests in undiscoverable & unascertained causes. But when the *coitus* itself is absolutely imperfect, & unnatural, there is not a natural indulgence of natural desire; almost of necessity disgust is generated, & the probable consequences of other connections with men of ordinary self control become almost certain. No man ought to be reduced to this state of *quasi* unnatural connection, & consequent temptation, &, therefore, I should hold the marriage void (DR. LUSHINGTON).—D——E *v.* A——G (FALSELY CALLING HERSELF D——E) (1815), 1 Rob. Eccl. 279; 163 E. R. 1039.

Apld. L— *v.* L—— (otherwise D——) (1922), 38 T. L. R. 697. **Refd.** W—— *v.* H— (falsely called W——) (1861), 2 Sw. & Tr. 240; Lewis *v.* Hayward (1866), 35 L. J. P. & M. 105; Dickinson *v.* Dickinson, [1913] P. 198; C. *v.* C. (1921), 90 L. J. P. 345. **Mentd.** Scott *v.* Scott, [1912] P. 241.

2351. —— Not where possibility of cure.]—(1) Incapacity to consummate a marriage is no ground for a decree of nullity, unless the incapacity be permanent. If there is a possibility that its cause may be cured, the ct. will not pronounce a sentence of nullity, although such cure may be highly improbable.

S., a married woman, married E., on July 22, & lived with him until Sept. 23. She petitioned for a decree of nullity by reason of his inability to consummate the marriage. He did not appear. The report of medical inspectors negatived any apparent & incurable defect on his part, but ascribed the non-consummation to incapacity caused by a long continued habit of self abuse, which, as further explained by their *viva voce* evidence, they considered might possibly, but not probably, be cured; the question being one of moral restraint. There was no report of inspectors as to the condition of the woman, & their *viva voce* evidence was equivocal as to proof of non-consummation from examination of her person. The ct. refused to make the decree.

Qu.: whether in a case in which there is incurable impotence a decree of nullity will be pronounced where there has been only cohabitation for three months. *Semble:* (2) in a suit by the woman for nullity of marriage on the ground of impotence, there must be a report by sworn medical inspectors as to the state of the woman; (3) when the ct. rejects a petition for a decree of nullity, it will not decree a monition that the petitioner do return to cohabitation, unless such process is prayed by the resp.—S—— (FALSELY CALLED E——) *v.* E—— (1863), 3 Sw. & Tr. 240; 9 Jur. N. S. 698; 164 E. R. 1266; *sub nom.* STAGG (FALSELY CALLED EDGECOMBE) *v.* EDGECOMBE, 2 New Rep. 429; 32 L. J. P. M. & A. 153; 8 L. T. 643; 12 W. R. 19.

Annotation :—*Generally*, **Mentd.** Scott *v.* Scott, [1912] P. 211.

2352. Disability curable—By dangerous operation.]—W—— *v.* H—— (FALSELY CALLED W——) (1861), No. 4347, *post*.

2353. —— Refusal to consent to cure.]—P. *v.* L. (FALSELY CALLED P.) (1873), 3 P. D. 73, n.

Annotations :—**Expld.** S. *v.* A. (otherwise S.) (1878), 3 P. D. 72. **Consd.** G. *v.* G., [1924] A. C. 349.

2354. —— —— ——.]—After a partial cohabitation of two years & eight months it appeared that the woman was impotent, but that she might probably be cured if she would submit to an operation involving no great risk of life. This she refused to do. The ct. made a decree *nisi* of nullity of marriage.—L. *v.* L. (FALSELY CALLED W.) (1882), 7 P. D. 16; *sub nom.* L. *v.* W. (FALSELY CALLED L.), 51 L. J. P. 23; 47 L. T. 132; 30 W. R. 444.

2355. —— —— ——.]—A husband, on account of habits of self abuse, was unable to consummate the marriage. The medical evidence was to the effect that if he discontinued his practices for a year he would probably be able to consummate the marriage, but he refused to do so, & shortly after the marriage he left his wife. In a suit by the wife for nullity, the ct. pronounced a decree of nullity.—J. (OTHERWISE K.) *v.* J. (1908), 24 T. L. R. 622; *subsequent proceedings, sub nom.* JOSEPH (OTHERWISE KING) *v.* JOSEPH, [1909] P. 217.

2356. Not mere incapacity of conception—Where intercourse possible.]—D——E *v.* A——G (FALSELY CALLING HERSELF D——E) (1845), No. 2350, *ante*.

2357. —— ——.]—Incapacity by a woman to conceive is no ground for a decree of nullity of marriage; therefore that relief was refused to a husband whose wife had, before marriage, undergone a surgical operation which rendered her incapable of bearing children, but did not render sexual intercourse impossible.—L—— *v.* L—— (OTHERWISE D——) (1922), 38 T. L. R. 697; 66 Sol. Jo. 613.

2358. Impotence quoad hanc.] — ESSEX'S (COUNTESS) CASE (1613), 2 State Tr. 785; 1 Hargrave's State Tr. 307; 2 Dyer, 179 a, n.; 73 E. R. 394.

Annotation :—**Consd.** C. (otherwise H.) *v.* C., [1921] P. 399.

2348 i. —— *Nervous hysteria of wife.*]—Where petitioner who seeks to have a marriage annulled has proved wilful & persistent refusal of intercourse upon the part of resp. & it appears from the evidence that the marriage cannot be consummated through "incapacity on the part of resp. arising from nervousness, hysteria or uncontrollable aversion" a decree of nullity of marriage will be granted.—EDWARDS *v.* CLAPHAM (1923), 33 B. C. R. 277.—**CAN.**

2348 ii. —— ——.]—Although wilful & persistent refusal by the wife of intercourse is not of itself a ground to support a decree of nullity of marriage yet the ct. may find on the evidence that the marriage cannot be consummated through her incapacity "arising from nervousness, hysteria or unconquerable aversion," & on this ground grant a decree of nullity.—E. *v.* C., [1924] 2 W. W. R. 207.—**CAN.**

Sect. 3.—*Voidable marriages: Sub-sect.* 2, *C. & D.* (*a*), (*b*) & (*c*).]

2359. ——.]—Divorce *causa frigiditatis* is *a vinculo matrimonii*, but if both marry again & have children, they shall cohabit together for the church was deceived.—SABELL'S CASE (1559), 2 Dyer, 178 b; 73 E. R. 394.

Annotation:—**Refd.** Harrison *v.* Burwell (1670), 2 Vent. 9.

2360. —— **Petitioner refusing to undergo operation.**]—The ct. affirmed, in a modified form, a decree of nullity of marriage pronounced on the wife's petition on the ground of the husband's incapacity, although the evidence showed that the incapacity was only relative to the party, & not a general condition of the husband:—*Held:* also it was not necessary that a valid marriage as to form should be proved before granting a decree, & petitioner's refusal to undergo a harmless operation did not disentitle her to relief.

A decree of nullity may be granted at the suit of an impotent person. This was, however, a discretion which the ct. should exercise very carefully (COZENS-HARDY, M.R.).—G. *v.* G. (FALSELY CALLED K.) (1908), 25 T. L. R. 328, C. A.

2361. —— **No apparent reason for non-consummation.**]—G. *v.* G. (1912), No. 2345, *ante*.

2362. —— **Conflicting evidence.**]—An averment of impotency *quoad hanc* was held by the Ecclesiastical Cts., & has been held ever since, to be sufficient to support a decree of nullity. There is no rule of law or practice that in cases of nullity, where the evidence of the parties is conflicting & the medical evidence is consistent with either

ioner if it is contradicted by resp.—C. (OTHERWISE H.) *v.* C., [1921] P. 399; 90 L. J. P. 345; 125 L. T. 768; *sub nom.* COLMAN (OTHERWISE HANKEY) *v.* COLMAN, 37 T. L. R. 759.

the ct. will not act on the evidence of

D. Presumption of Impotence.

(a) Wilful Refusal to Cohabit.

2363. Impotency presumed.]—Where a wife refused either to consummate the marriage or to cohabit with her husband, the ct. inferred incapacity on her part.—F. *v.* F. (OTHERWISE F.) (1911), 27 T. L. R. 429; *sub nom.* F. *v.* F. (OTHERWISE P.), 55 Sol. Jo. 482.

Annotation:—**Refd.** Dickinson *v.* Dickinson (otherwise Phillips) (1913), 109 L. T. 408.

2364. —— **Further refusal to submit to medical examination.**]—Although the parties to a ceremony of marriage may have never since the date of the marriage lived under the same roof, it is competent to the ct., if satisfied of the *bona fides* of the suit, to infer, from the wilful & wrongful refusal of the one party, in this case the wife, to live with the other, coupled with the further refusal of the same party to submit to medical inspection, that there is some impediment to consummation, & to pronounce a decree *nisi* for nullity of marriage at the suit of the party wronged.—W. *v.* W. (OTHERWISE L.), [1912] P. 78; 81 L. J. P. 29.

Annotations:—**Expld.** Dickinson *v.* Dickinson, [1913] P. 198. **Refd.** Napier *v.* Napier (1915), 84 L. J. P. 177.

Medical examination.]—*See* Sub-sect. 2, II., *post*.

(b) Wilful Refusal to Consummate.

2365. Whether impotence presumed—Mere wilful refusal.]—(1) Wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the ct. in declaring a marriage null by reason of impotence.

(2) When, after a reasonable time, it is shown that there has been no sexual intercourse, & that the wife has resisted all attempts, the ct., if satisfied of the *bona fides* of the suit, will infer that the refusal arises from incapacity, & will pronounce a decree of nullity of marriage.—S. *v.* A. (OTHERWISE S.) (1878), 3 P. D. 72; 47 L. J. P. 75; 39 L. T. 127.

Annotations:—*As to* (1) **Expld.** Dickinson *v.* Dickinson, [1913] P. 198. **Apprvd.** Napier *v.* Napier (1915), 84 L. J. P. 177. **Refd.** G. *v.* G., [1924] A. C. 349.

2366. —— **Wilful & persistent refusal—Refusal to be medically examined.**]—Where a wife always refused her husband's request to consummate the marriage & frigidly repelled his advances, though there was no actual attempt by him to consummate the marriage, & the wife refused to submit to a medical examination, the ct. drew the inference of incompetence on her part.—S. *v.* S. (OTHERWISE M.) (1908), 24 T. L. R. 253.

Annotation:—**Refd.** Dickinson *v.* Dickinson, [1913] P. 198.

2367. —— —— **No cohabitation.**]—In a petition for nullity by a husband where there had been no cohabitation the ct. inferred the incapacity of the wife by her persistent refusal to consummate the marriage.—C. *v.* C. (OTHERWISE H.) (1911), 27 T. L. R. 421.

Annotations:—**Refd.** W. *v.* W. (otherwise L.), [1912] P. 78; Dickinson *v.* Dickinson, [1913] P. 198.

2368. —— —— ——.]—F. *v.* P. (OTHERWISE F.) (1911), No. 2363, *ante*.

2369. —— ——.]—Wilful & persistent refusal to allow any marital intercourse is a sufficient ground for a decree of nullity of marriage. Where, upon a petition for nullity of marriage presented by the husband in good faith, it appeared that the consummation of the marriage had been prevented, after repeated attempts on his part, by the wilful, determined, steadfast refusal of the wife, & the refusal was threatened to be, or likely to be, persisted in, the ct. held this constituted a valid & sufficient ground for annulling the marriage.—DICKINSON *v.* DICKINSON, [1913] P. 198; *sub nom.* D. *v.* D. (OTHERWISE P.), 82 L. J. P. 121; 29 T. L. R. 765; 58 Sol. Jo. 32; *sub nom.* DICKINSON *v.* DICKINSON (OTHERWISE PHILLIPS), 109 L. T. 408.

Annotations:—**Overd.** Napier *v.* Napier, [1915] P. 184. The ground on which *Dickinson* v. *Dickinson* was decided was not sufficient to support the decree; the decree may have been justified (by the facts of that case), but not on the ground accepted by the learned President (WARRINGTON, L.J.). **Consd.** Hudston *v.* Hudston (otherwise Newbigging) (1922), 39 T. L. R. 108.

2370. —— —— ——.]—The decision in *Dickinson* v. *Dickinson*, No. 2369, *ante*, that wilful & persistent refusal to allow marital intercourse is of itself a sufficient ground for a decree of nullity of marriage, is not justified in principle or by the authorities & must be overruled.—NAPIER *v.* NAPIER, [1915] P. 184; 84 L. J. P. 177; 113 L. T. 764; 31 T. L. R. 472; 59 Sol. Jo. 560, C. A.

Annotation:—**Consd.** Hudston *v.* Hudston (otherwise Newbigging) (1922), 39 T. L. R. 108.

PART XIII. SECT. 3. SUB-SECT. 2.—D. (b).

2365 i. *Whether impotence presumed—Mere wilful refusal.*]—The circumstances did not permit of an inference being drawn that deft. was incapable of the sexual act, as her refusal to permit intercourse was, in the absence of any adequate test of whether it was involuntary, explicable as being due solely to her voluntary choice; & decree of nullity refused.—G. *v.* G., [1923] S. C. 175.—**SCOT.**

2369 i. —— *Wilful & persistent refusal.*]—While it seems now to be settled that the long-continued refusal by a wife to allow her husband to consummate the marriage may justify the inference that it arises from incapacity or impotency existing at the time of the marriage it can only do so if the circumstances justify the inference; & it is in each case a question whether or not anything is shown which justifies the inference.—K. *v.* K., [1923] 3 W. W. R. 22; 3 D. L. R. 485.—**CAN.**

2371. No evidence of physical incapacity.]—In the circumstances of this case the ct. dismissed a petition for a decree of nullity.

Petitioner in his evidence said that he believed that on the part of resp. there was no physical impediment to marital relations, & that the non-consummation of the marriage was due to the wife's unwillingness alone. Petitioner said he had done all in his power to overcome resp.'s disinclination. Resp. had not submitted to medical examination. In these circumstances it is impossible to draw an inference of physical incapacity. It was a case of persistently declining to consummate without proper reason (LOW, J.).—FINEGAN *v.* FINEGAN (OTHERWISE MCHARDY) (1917), 33 T. L. R. 173.

2372. —— —— ——.]—Persistent refusal of marital intercourse is not, in the absence of incapacity, a ground for decree of nullity of marriage.—HUDSTON *v.* HUDSTON (OTHERWISE NEWBIGGING) (1922), 39 T. L. R. 108.

Persistent refusal after reasonable period of co-habitation—Incapacity presumed.]—*See* Sub-sect. 2, D. (*c*), *post*.

(*c*) *Non-Consummation after Lapse of Reasonable Time.*

Non-consummation after triennial cohabitation.]—*See* Sub-sect. 2, D. (*d*), *post*.

2373. Refusal to consummate—After lapse of reasonable time.]—S. *v.* A. (OTHERWISE S.) (1878), No. 2365, *ante*.

2374. —— ——.]—From the fact of non-consummation of a *de facto* marriage after a period of cohabitation, during which one party made repeated attempts & was always willing & anxious to bring about the consummation of the marriage, the ct., notwithstanding the apparent competence of both parties, may draw the inference that something more than seemingly mere wilful refusal must have animated the party who has, in fact, persistently refused to allow consummation. In a case where petitioner, a widower with children, went through the form of marriage in May, 1893, with resp., a widow without children, & lived & cohabited with her at divers places until the latter part of Oct. 1893, during which time he, being admittedly able & anxious to consummate the marriage, made repeated attempts so to do but was always repelled by resp., who refused to allow any attempt at connection, the ct., notwithstanding the fact that, upon medical inspection, resp. exhibited no structural impediment nor signs of virginity, pronounced a decree *nisi* annulling the marriage, upon the ground that it was open to the ct. to draw from the facts the inference of some latent incapacity on the part of resp.—F. *v.* P. (FALSELY CALLED F.) (1896), 75 L. T. 192.

Annotations:—**Consd.** W. *v.* W. (otherwise L.), [1912] P. 78. **Refd.** Dickinson *v.* Dickinson, [1913] P. 198; Napier *v.* Napier (1915), 84 L. J. P. 177; G. *v.* G., [1924] A. C. 349.

2375. —— Cohabitation for three months.]—Sentence of nullity of marriage by reason of impotence after a cohabitation of three months only.—G——S (FALSELY CALLED T——E) *v.* T—— E (1854), 1 Ecc. & Ad. 389; 164 E. R. 224.

2376. —— For six months.]—The ct. annulled a marriage where it was shown that the wife had resisted all attempts at intercourse for a period of six months. It also varied the marriage settlement ordering resp. to pay an annual sum to petitioner.—E. *v.* E. (OTHERWISE T.) (1902), 87 L. T. 149; 50 W. R. 607; 18 T. L. R. 643; 46 Sol. Jo. 586; *subsequent proceedings*, [1903] P. 88.

2377. —— Or submit to medical examination.]—From the fact of non-consummation of a marriage after a reasonable period of cohabitation, during which one of the parties was always willing & anxious & repeatedly urged that the marriage should be consummated, the ct. may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, & has also refused to obey the usual order to attend for medical inspection. In such a case, the ct. may properly assume the existence of some latent impediment amounting to incapacity.—B. *v.* B., [1901] P. 39; *sub nom.* B. (OTHERWISE H.) *v.* B., 70 L. J. P. 4.

Annotations:—**Refd.** W. *v.* S., [1905] P. 231; Dickinson *v.* Dickinson (otherwise Phillips) (1913), 109 L. T. 408.

2378. Cohabitation for seventeen years.]—The ct. pronounced a decree of nullity of marriage on the husband's petition, the wife having refused to consummate the marriage & not having submitted herself for medical examination, the ct. drawing therefrom the inference of incapacity, notwithstanding the petition was not presented until seventeen years had elapsed after the date of the marriage.—S. *v.* B. (FALSELY CALLED S.) (1905), 21 T. L. R. 219.

2379. —— —— Cohabitation for seven years.]—The ct. inferred incapacity on the part of resp., who did not defend proceedings for nullity of marriage or attend for medical examination, from her refusal, persisted in over a period of seven years, to permit the marriage to be consummated, notwithstanding the fact that she had subsequently written letters to petitioner in which she expressed herself as willing to accord him all the rights of a husband.—VICKERY *v.* VICKERY (OTHERWISE COX) (1920), 37 T. L. R. 332; 65 Sol. Jo. 343.

2380. Cohabitation for three months—Impotence incurable.]—S—— (FALSELY CALLED E—) *v.* E—— (1863), No. 2351, *ante*.

—— Refusal to consummate.]—*See* No. 2375, *ante*.

2381. Cohabitation for twelve years—Admission of impotency—Refusal to be examined.]—In a suit of nullity by reason of the impotence of the man, a certificate, twelve years after the marriage, that the woman was *virgo intacta* & *apta viro*, coupled with two several confessions by the man of his incapacity to two medical witnesses, & with proof that the woman's health had suffered, though the man had not given in his answers, had removed into France, & refused to undergo surgical examination; held sufficient.—POLLARD

2371 i. —— —— *No evidence of physical incapacity.*]—A. B. *v.* C. B. (1906), 8 F. (Ct. of Sess.) 603; 43 Sc. L. R. 411; 13 S. L. T. 923.—**SCOT.**

PART XIII. SECT. 3, SUB-SECT. 2.—D. (c).

2375 i. *Refusal to consummate—Cohabitation for three months.*]—In an action at the instance of a husband against a wife, concluding for declarator of nullity of marriage on the ground of the wife's impotency, it was proved that the marriage had been solemnised seven months before the action was brought; that the parties lived together for three & a half months after the date of the marriage, & then separated; that the marriage never was consummated. No reason was suggested for a wilful refusal on the part of the wife, & it was found that the whole probabilities pointed to an opposite conclusion:—*Held*: the ct. was entitled to draw the inference that there was here a practical incapacity on the part of the wife, & decree of nullity was granted.—A. B. *v.* C. B. (1906), 8 F. (Ct. of Sess.) 603.—**SCOT.**

t. —— *Cohabitation for three years.*]—Where a husband or a wife seek a decree of nullity *propter impotentiam*, if there is no more evidence than that

Sect. 3.—*Voidable marriages: Sub-sect.* 2, *D.* (*c*), (*d*) & (*e*), *E.* & *F.*]

(FALSELY CALLED WYBOURN) *v.* WYBOURN (1828), 1 Hag. Ecc. 725; 162 E. R. 732.

Annotations:—**Refd.** Harrison *v.* Harrison (or Sparrow) (1842), 6 Jur. 899; H—— (falsely called C——) *v.* C—— (1860), 1 Sw. & Tr. 605; M. (otherwise D.) *v.* D. (1885), 10 P. D. 75.

2382. Cohabitation for fourteen years—No apparent defect in either party—Impotence of husband presumed—Onus of proof.]—(1) After a cohabitation of fourteen years, a woman presented a petition in the Ct. for Divorce & Matrimonial Causes for a decree of nullity of marriage, on the ground of the man's impotence. The report of the inspectors & the medical evidence showed that the woman was *virgo intacta et apta viro*, & that there was no apparent defect or malformation in the man:—*Held:* the woman was entitled to a decree that the marriage was null & void, on the ground that the cohabitation had been for a much more lengthened period than was required to raise the presumption against a husband, & the *onus* was thrown upon resp., either of disproving the facts, or of showing, by clear & satisfactory evidence, that the result was attributable to other causes than his own impotency.

It seems, at first sight, extraordinary that any length of time should operate as a bar to a proceeding for the nullity of a marriage. The usual maxim of law is *quod ab initio non valet in tractu temporis non convalescet*. But it seems that in cases of this description, delay in instituting the suit, not satisfactorily explained is taken as a personal exception to petitioner. There is no difficulty, however, in accounting for the delay in this case (LORD CHELMSFORD, C.).

(2) *Semble:* where a decree from the Ct. for Divorce & Matrimonial Causes, dismissing a petition for a declaration of nullity of marriage, is reversed by the House of Lords, the House should not only reverse the decree appealed from, but decree that the marriage was null & void *ab initio*.—LEWIS (FALSELY CALLED HAYWARD) *v.* HAYWARD (1866), 35 L. J. P. & M. 105, H. L.; *revsg.* S. C. *sub nom.* L—— (FALSELY CALLED H——) *v.* H—— (1865), 4 Sw. & Tr. 115; *subsequent proceedings, sub nom.* L. (FALSELY CALLED H.) *v.* H. (1866), L. R. 1 P. & D. 293.

Annotations:—*As to* (1) **Consd.** Cuno *v.* Cuno (1873), L. R. 2 Sc. & Div. 300. **Refd.** G. *v.* M. (1885), 10 App. Cas. 171; Napier *v.* Napier, [1915] P. 184.

(d) Non-Consummation after Triennial Cohabitation.

Non-consummation after lapse of reasonable time]—*See* Sub-sect. 2, D. (*c*), *ante.*

2383. Impotency presumed from.]—Sentence of nullity of marriage by reason of the impotency of the husband, pronounced, without the inspection of his person, there having been sufficient cohabitation to satisfy the expression triennial cohabitation within the meaning of the law.—SPARROW (FALSELY CALLED HARRISON) *v.* HARRISON (1841), 3 Curt. 16; 163 E. R. 638; *affd. sub nom.* HARRISON *v.* HARRISON (1842), 4 Moo. P. C. C. 96, P. C.

Annotations:—**Consd.** N——r (falsely called M——e) *v.* M——e (1853), 2 Rob. Eccl. 625; G. *v.* M. (1885), 53 L. T. 398; M. (otherwise D.) *v.* D. (1885), 10 P. D. 75. **Refd.** Handley *v.* Edwards (1844), 4 Moo. P. C. C. 407; Hall *v.* Wright (1858), E. B. & E. 765.

2384. ——.]—G. *v.* M. (1885), No. 3339, *post.*

2385. —— **Quoad hanc or universal.**]—ESSEX'S (COUNTESS) CASE (1613), 2 State Tr. 785; 1 Hargrave's State Tr. 307; 2 Dyer, 179 a; 73 E. R. 394.

Annotation:—**Consd.** C. (otherwise H.) *v.* C., [1921] P. 399.

2386. —— ——.]—(1) In a suit of nullity of marriage by reason of the husband's impotency the medical inspectors reported that his impotency was not apparent, but that he was impotent *quoad* his wife, with whom he had cohabited for two & a half years. The ct. pronounced for the nullity, & held that the general rule requiring three years cohabitation is not absolutely binding, when there has been an actual cohabitation sufficiently long to overcome, were the man potent, any temporary impediment to consummation.

(2) After a triennial cohabitation without consummation the law presumes impotency, though no defect be apparent; whether impotency *quoad hanc*, or universally, the law says nothing; & can say nothing. This rule is founded upon the principle that there should be a cohabitation of so long an endurance that, if the man were potent & in good health, no temporary impediment could have prevented consummation (DR. LUSHINGTON).—N——R (FALSELY CALLED M——E) *v.* M——E (1853), 2 Rob. Eccl. 625; 163 E. R. 1435; *sub nom.* A. (FALSELY CALLED B.) *v.* B., 1 Ecc. & Ad. 12; *sub nom.* ANON., 17 Jur. 628.

Annotations:—*As to* (1) **Consd.** G. *v.* M. (1885), 10 App. Cas. 171. *As to* (2) **Consd.** M—— (falsely called H——) *v.* H—— (1864), 3 Sw. & Tr. 517. **Folld.** C. (otherwise H.) *v.* C., [1921] P. 399. *Generally*, **Refd.** H—— (falsely called C——) *v.* C—— (1860), 1 Sw. & Tr. 605; Scott *v.* Scott, [1912] P. 241.

2387. Whether triennial cohabitation essential.]—In a suit for nullity of marriage, by reason of impotency, inspection refused because there had not been a triennial cohabitation.—ALESON *v.* ALESON (1728), 2 Lee, 576; 161 E. R. 445.

2388. —— **In absence of proof of incapacity.**]—In a suit for divorce by reason of impotency, it is necessary that there should be either a triennial cohabitation or proof that the party is absolutely incapable.—WELDE (*alias* ASTON) *v.* WELDE (1731), 2 Lee, 580; 161 E. R. 447.

Annotations:—**Consd.** N——r (falsely called M——e) *v.* M——e (1853), 2 Rob. Eccl. 625. **Distd.** U—— n (falsely called F——s) *v.* F—— s (1853), 2 Rob. Eccl. 614. **Folld.** S. (falsely called E.) *v.* E. (1863), 3 Sw. & Tr. 240. **Refd.** W. *v.* H. (falsely called W.) (1861), 30 L. J. P. M. & A. 73.

2389. —— ——.]—Nullity of marriage *impotentiæ causa*, not sustained, the medical certificate negativing the plea of malformation, & there not having been *triennalis cohabitatio*.—SCOTT (FALSELY CALLED JONES) *v.* JONES (1842), 2 Notes of Cases 36.

2390. —— ——.]—M—— (FALSELY CALLED H——) *v.* H—— (1864), No. 2395, *post.*

2391. —— ——.]—G. *v.* M. (1885), No. 3339, *post.*

2392. —— **Cohabitation long enough to overcome impediment sufficient—Proof of impotence quoad hanc.**]—N——R (FALSELY CALLED M——E) *v.* M——E (1853), No. 2386, *ante.*

2393. —— —— **Impotent party going abroad—Genuine admissions of impotence.**]—In a suit of nullity or marriage by reason of impotency, though the party complained of has not undergone an inspection, the rule, in respect of three years' cohabitation, is not absolutely binding;

they have for a period of three years lived together in the same house & with ordinary opportunities of intercourse, & it is clearly proved there has been no consummation, then if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted.—G. *v.* M. (1885), 10 App. Cas. 171; 12 R. (Ct. of Sess.) 36; 22 Sc. L. R. 461, H. L.—**SCOT.**

it may, under circumstances, be dispensed with. —U——N (FALSELY CALLED F——S) *v.* F——S (1853), 2 Rob. Eccl. 614 ; 163 E. R. 1432.

Annotation :—**Consd.** M—— (falsely called H——) *v.* H—— (1864), 3 Sw. & Tr. 517.

2394. —— Impotence plainly proved aliunde.]—When the ct. is satisfied by other evidence, *e.g.* that of petitioner herself, of the man's impotence, the rule of apparent virginity after cohabitation of three years does not apply. In the present case the man did not appear, & did not submit to the order for inspection ; the medical evidence was not conclusive as to the woman's virginity, but the ct., on her evidence on affidavit, took it to be proved, first, that the marriage was never consummated ; secondly, that this was owing to the impotence of the man ; thirdly, that the physical appearance of the woman was to be accounted for otherwise than by consummation ; & pronounced its decree of nullity of marriage.—F. (FALSELY CALLED D.) *v.* D. (1865), 4 Sw. & Tr. 86 ; 164 E. R. 1448 ; *sub nom.* D. (FALSELY CALLED F.) *v.* F., 34 L. J. P. M. & A. 66 ; 12 L. T. 84 ; 11 Jur. N. S. 307 ; 13 W. R. 546.

Annotations : **Consd.** Lewis *v.* Hayward (1866), 35 L. J. P. & M. 105 ; G. *v.* M. (1885), 10 App. Cas. 171 ; Dickinson *v.* Dickinson, [1913] P. 198.

(*e*) *Rebuttal of Presumption.*

2395. General rule.]—(1) In a suit of nullity of marriage on the ground of the impotence of the husband, if the marriage has not been consummated, & there is no visible defect in either party, impotence will not be presumed merely from ineffectual cohabitation, unless such cohabitation has lasted for three years. Cohabitation for two years & ten months in not sufficient.

(2) The presumption of impotence arising from ineffectual cohabitation may be rebutted by proof that the non-consummation of the marriage is due to another cause.—M—— (FALSELY CALLED H——) *v.* H—— (1864), 3 Sw. & Tr. 517 ; 33 L. J. P. M. & A. 159 ; 10 L. T. 787 ; 13 W. R. 108 ; 164 E. R. 1376 ; *sub nom.* MARSHALL (FALSELY CALLED HAMILTON) *v.* HAMILTON, 10 Jur. N. S. 853 ; *subsequent proceedings*, 3 Sw. & Tr. 592.

Annotations :—*As to* (1) **Apprvd.** Lewis *v.* Hayward (1866), 35 L. J. P. & M. 105. **Refd.** T. *v.* M. (falsely called T.) (1865), L. R. 1 P. & D. 31 ; Dickinson *v.* Dickinson, [1913] P. 198. *Generally*, **Mentd.** Scott *v.* Scott, [1913] A. C. 417.

2396. — —.] —G. *v.* M. (1885), No. 3339, *post.*

E. Proof of Impotence.

2397. Sufficiency of—Petitioner's evidence unsupported—Physical appearance consistent with consummation—Cohabitation for eight years without complaint.]—T. (FALSELY CALLED D.) *v.* D. (1866), No. 3357, *post.*

2398. —— —— —— Cohabitation for two years without complaint.]—In a suit of nullity by reason of the husband's impotency, the surgical report stated that the physical appearances of the wife were such that she might have had regular connection with her husband during cohabitation. The wife during the two years' cohabitation, had not complained to her family on this matter, & had separated from her husband by reason of his alleged violence. Resp. affirmed on oath that the marriage had been consummated. The ct. declined to pronounce the marriage invalid on the unsupported oath of the party seeking to be relieved from its obligations.—U. (FALSELY CALLED J.) *v.* J. (1867), L. R. 1 P. & D. 460 ; 37 L. J. P. & M. 7 ; 16 W. R. 518.

Annotation :—**Expld.** C. (otherwise H.) *v.* C., [1921] P. 399.

2399. —— Statement by respondent—Absence of cohabitation—Refusal to submit to medical examination.]—Where there had been entire absence of cohabitation, incapacity to consummate on the part of the wife was found as a fact, on positive evidence arising from a statement made by herself, taken in conjunction with the general facts of the case & her refusal to submit to medical inspection.—W. *v.* S. (OTHERWISE W.), [1905] P. 231 ; 93 L. T. 456 ; *sub nom.* W. *v.* W., 74 L. J. P. 112.

Annotations :—**Consd.** Dickinson *v.* Dickinson, [1913] P. 198 : Napier *v.* Napier (1915), 84 L. J. P. 177.

2400. —— ——.]—The incapacity of a wife found as a fact on a statement made by herself. —P. *v.* P. (OTHERWISE G.) (1909) 25 T. L. R. 638.

2401. —— —— Petitioner not virgo intacta—Plea of seduction before marriage.]—In a wife's suit for nullity on the ground of her husband's impotence, it appeared that the wife, upon being medically examined, was found not to be *virgo intacta*. In her evidence she stated that she was seduced by another man before she married resp., & that that accounted for the medical report. Resp. did not appear to the suit, & when served with the petition said that he would not defend as he must admit the truth of the allegations contained in the petition. The ct. granted a decree *nisi*.—R. (OTHERWISE K.) *v.* R. (1907), 24 T. L. R. 65.

2402. Onus of proof—On complainant.]—CUNO *v.* CUNO, No. 3338, *post.*

2403. Where evidence insufficient—Decree suspended to allow further attempts.]—The woman petitioned for nullity by reason of the man's alleged impotency. The petition was opposed, & at the hearing, the ct., in the circumstances proved, suspended its decree, but now on affidavits to the effect that the woman had returned to cohabitation, & that the marriage remained unconsummated, made a decree of nullity, resp. not appearing on the motion.—M—— (FALSELY CALLED H——) *v.* H—— (1864), 3 Sw. & Tr. 592 ; 34 L. J. P. M. & A. 12 ; 11 L. T. 317 ; 164 E. R. 1405 ; *previous proceedings*, 3 Sw. & Tr. 517.

Annotation :—**Apld.** T. *v.* M. (falsely called T.) (1865), L. R. 1 P. & D. 31.

2404. Admissibility of evidence—Statement to third parties.]—Where one of the parties to a suit for nullity of marriage has made a statement to a third person on the subject of his or her marital relations, that party may be asked whether he or she spoke to that person of the fact of his or her spouses objection to marital intercourse.—O'H. *v.* O'H. (OTHERWISE O.) (1916), 115 L. T. 791 ; 33 T. L. R. 51 ; 61 Sol. Jo. 100.

F. Persons of Advanced Age.

2405. Court may refuse to interfere.]—Nullity of marriage by reason of incurable impotence

PART XIII. SECT. 3, SUB-SECT. 2.—D. (e).

a. *Evidence not consistent with theory of impotency.*]—Where a wife had refused during the five years of the marriage to allow her husband to have intercourse with her, & the evidence of the husband showed that the reasons given by the wife for her long-continued refusal were not consistent with the theory of impotency, decree of nullity was refused. No medical examination had been made, & the husband's evidence was the only evidence before the ct.—K. *v.* K., [1923] 3 W. W. R. 22 ; 3 D. L. R. 485.—**CAN.**

PART XIII. SECT. 3, SUB-SECT. 2.—F.

b. *Woman fifty-four years of age.*]—Circumstances in which the ct. pronounced decree of nullity of marriage on the ground of impotence on the part of the woman who was 54 years of age at the date of the marriage.—C. *v.* M. (1876), 3 R. (Ct. of Sess.) 693 ; 13 Sc. L. R. 463.—**SCOT.**

Sect. 3.—*Voidable marriages: Sub-sect.* 2, *F. & G.; sub-sect.* 3. *Sects.* 4 & 5: *Sub-sect.* 1, *A., B. & C.*]

alleged against the wife, not sustained. The charge allowed to be repelled under the circumstances of age, etc. & by a denial, in the form of protestation, by affidavit.—BRIGGS *v.* MORGAN (1820), 2 Hag. Con. 324; 3 Phillim. 325; 161 E. R. 758.

Annotations:—**Consd.** W—— *v.* H—— (falsely called W——) (1861), 2 Sw. & Tr. 210; Dickinson *v.* Dickinson, [1913] P. 198. **Refd.** B——n *v.* B——n (1854), 1 Ecc. & Ad. 248; Castleden *v.* Castleden (1861), 9 H. L. Cas. 187; W. *v.* R. (1876), 1 P. D. 405. **Mentd.** Martin *v.* Mackonochie (1879), 4 Q. B. D. 697; Combe *v.* De La Bere (1881), 6 P. D. 157.

2406. ——.]—BROWN *v.* BROWN, No. 2332, *ante*.

2407. ——.]—W—— *v.* H—— (FALSELY CALLED W——) (1861), No. 4347, *post*.

G. Medical Examination.

See Sect. 10, sub-sect. 1, D., *post*.

SUB-SECT. 3.—MARRIAGE BY PERSONS UNDER AGE.

See Part II., Sect. 4, sub-sect. 2; Sect. 7, sub-sect. 5, *ante*.

SECT. 4.—JACTITATION OF MARRIAGE.

2408. Nature & object of suit.]—(1) This is a proceeding in a cause of jactitation of marriage, brought by Lord H. against a female, who, as he represents, had usurped the title & character of his wife, a proceeding not now very familiar to this ct., but which it is bound to receive, for the protection of persons against the extreme inconvenience of unjust claims & pretensions to a marriage, which has no existence whatever. If a person pretends such a marriage, & proclaims it to others, the law considers it as a malicious act, subjecting the party, against whom it is set up, to various disadvantages of fortune & reputation, & imposing upon the public, which, for many reasons, is interested in knowing the real state & condition of the individuals, who compose it, an untrue character; interfering in many possible consequences with the good order of society, as well as the rights of those who are entitled to its protection. It is, therefore, a fit subject of legal redress; & this redress is to be obtained, by charging the supposed offender, with having falsely & maliciously boasted of a matrimonial connection, & upon proof of the fact, obtaining a sentence, enjoining him, or her, to abstain in future from such false & injurious representations, & punishing the past offence by a condemnation in the costs of the proceeding.

(2) To a charge of jactitation three different defences may be opposed. It is obvious, that the fact of having made any such representations may be denied, in which case, if not proved, the accusation shares the common fate of other unfounded charges; or secondly, it may be admitted that such representations have been made, but that they are true; for that a marriage had actually passed, &, in such a way, as to give the party a right to claim the benefit of it. In that state of things, the proceeding assumes another shape, that of a suit of nullity, & of restitution of conjugal rights, on an inquiry into the fact & validity of such asserted marriage; & it will depend upon the result of that inquiry, whether the party has falsely pretended, or truly asserted such a marriage. In the former case, the ct. would pronounce a sentence of nullity, & enjoin silence in future. In the latter, the ct. would enjoin the accuser to return to matrimonial cohabitation, unless it could be shown, that some other reason was interposed to dissolve that obligation. A third defence, of more rare occurrence, is, that though no marriage has passed, yet the pretension was fully authorised by complainant, &, therefore, though the representation is false, yet it is not malicious, & cannot be complained of, as such, by the party who has denounced it (SIR WILLIAM SCOTT).—HAWKE (LORD) *v.* CORRI (1820), 2 Hag. Con. 280; 161 E. R. 743.

Annotations:—*As to* (1) **Refd.** Thompson *v.* Rourke, [1892] P. 244; Thompson *v.* Rourke, [1893] P. 70; Cowley *v.* Cowley, [1900] P. 305. *As to* (2) **Consd.** Thompson *v.* Rourke, [1893] P. 70. **Refd.** Clowes *v.* Jones (1843), 3 Curt. 185. *Generally*, **Mentd.** R. *v.* Millis (1844), 10 Cl. & Fin. 534; Miles v. Chilton (1849), 6 Notes of Cases, 636.

2409. ——.]—Jactitation of marriage is an unwarrantable assertion that marriage exists, & it has been within the jurisdiction of this ct. for many years to intervene to put to silence the person making a false declaration of marriage. One answer to such a suit is that the party complaining has acquiesced in the statement; he cannot after such acquiescence put to silence a person who persists in representations which he has previously authorised (DUKE, P.).—GOLDSTONE *v.* GOLDSTONE (1922), 127 L. T. 32; *sub nom.* GOLDSTONE *v.* SMITH (OTHERWISE GOLDSTONE), 38 T. L. R. 403.

2410. When suit will lie—Petitioner convicted of bigamous marriage—With respondent to suit—Prohibition.]—If a man libel in the Spiritual Ct. *pro jactitatione maritagii* after he has been convicted of bigamy in marrying the woman against whom he libels, a prohibition shall go; for a conviction in a ct. of criminal jurisdiction is conclusive evidence of the fact.—BOYLE *v.* BOYLE (1688), 3 Mod. Rep. 164; Comb. 72; 87 E. R. 106.

Annotation:— **Mentd.** Crosby *v.* Leng (1810), 12 East, 409.

2411. Who can petition—One of parties to alleged marriage.]—A suit of jactitation of marriage can only be instituted by one of the parties to the pretended marriage.—*Re* CAMPBELL *v.* CORLEY, *Ex p.* CAMPBELL (1862), 31 L. J. P. M. & A. 60.

2412. —— **Person misrepresented as married.**]—ASCROFT *v.* TREVOR (OTHERWISE FOLEY) (1906), 50 Sol. Jo. 378.

2413. Defences to suit—Charge unfounded.]—HAWKE (LORD) *v.* CORRI, No. 2408, *ante*.

2414. —— **Truth of representation.**]—HAWKE (LORD) *v.* CORRI, No. 2408, *ante*.

2415. —— **Representation authorised by plaintiff.**]—HAWKE (LORD) *v.* CORRI, No. 2408, *ante*.

2416. —— ——.]—In a suit of jactitation of marriage brought by the supposed wife, the jury found that she had at a former period acquiesced in the representations of resp. that she was his wife:—*Held:* upon this finding the petition must be dismissed.—THOMPSON *v.* ROURKE, [1893] P. 70; 67 L. T. 788; 9 T. L. R. 123; 1 R. 501.

2417. —— ——.]—GOLDSTONE *v.* GOLDSTONE, No. 2409, *ante*.

2418. Onus of proof of marriage—On respondent.]—ASCROFT *v.* TREVOR (OTHERWISE FOLEY) (1906), 50 Sol. Jo. 378.

2419. Decree in favour of marriage—Where evidence sufficient.]—WALTON *v.* RIDER (1752), 1 Lee, 16; 161 E. R. 7.

2420. —— **Woman admitted to suppletory oath.**]—In a suit for jactitation of marriage, the woman

admitted to her suppletory oath; the marriage, which had taken place in Scotland, established.—WESCOMBE *v.* DODS (1752), 1 Lee, 59; 161 E. R. 23.

Annotation:—**Refd.** Clowes *v.* Jones (1843), 3 Curt. 185.

2421. Whether sentence of court conclusive—Subsequent proceedings for procuring articles of peace to be exhibited.]—CLEWS *v.* BATHURST (1734), 2 Stra. 960; 93 E. R. 968; *sub nom.* CLUES *v.* BATHURST, Lee *temp.* Hard. 11.

2422. —— Subsequent indictment for polygamy.]—KINGSTON'S (DUCHESS) CASE, No. 6080, *post.*

Conclusiveness of judgments of Ecclesiastical Courts—In matrimonial suits.]—*See* ESTOPPEL, Vol. XXI., p. 237, Nos. 665–672.

r. 5.—MATRIMONIAL OFFENCES AND REMEDIES THEREFOR.

SUB-SECT. 1.—FAILURE TO RENDER CONJUGAL RIGHTS—RESTITUTION.

A. In General.

Discretionary bars to relief, *see* Sect. 7, sub-sect. 4, *post.*

2423. Discretion of court to refuse relief—Effect of Matrimonial Causes Act, 1884 (c. 68), s. 5.]—RUSSELL *v.* RUSSELL, No. 2960, *post.*

2424. —— Suit brought for collateral purpose.]—(1) The ct. has no discretionary power to refuse a decree in a suit for restitution of conjugal rights on the ground that the suit was instituted by petitioner, not in order that he might regain the society of his wife, but for some collateral object.

Unless resp. to a petition for restitution of conjugal rights can establish a legal defence to the petition, the petitioner will be entitled to a decree & the ct. has no discretion to inquire into the sincerity of the petitioner in bringing the suit.

(2) Petitioner in a suit for restitution of conjugal rights is entitled to a decree unless he is proved to have committed a matrimonial offence which would be ground for a judicial separation.

(3) In a suit for restitution of conjugal rights the ct. has no jurisdiction to make a decree until the marriage has been formally proved, although resp. may have filed an answer not taking issue on the marriage.—SCOTT *v.* SCOTT (1864), 4 Sw. & Tr. 113; 34 L. J. P. M. & A. 23; 12 L. T. 211; 164 E. R. 1458.

Annotations:—*As to* (1) **Refd.** Russell *v.* Russell, [1897] A. C. 395. *As to* (2) **Consd.** Russell *v.* Russell, [1895] P. 315; Harnett *v.* Harnett, [1924] P. 41. **Refd.** Weldon *v.* Weldon (1883), 9 P. D. 52.

2425. —— Matrimonial offence committed by petitioner.]—SCOTT *v.* SCOTT, No. 2421, *ante.*

2426. No matrimonial offence committed by petitioner.]—GREENE *v.* GREENE, No. 2465,

2427. Decree for restitution—Not appropriate remedy for desertion.]—DRYSDALE *v.* DRYSDALE, DRYSDALE *v.* DRYSDALE, CORBET & GANE, No. 4032, *post.*

2428. —— Compliance—Wife provided with suitable establishment & income.]—A decree for restitution of conjugal rights implies that the parties are to live together under the same roof.

It is not a sufficient compliance by a husband with a decree for restitution of conjugal rights that he has provided his wife with a suitable establishment & sufficient income.—WELDON *v.* WELDON (1883), 9 P. D. 52; 53 L. J. P. 9; 32 W. R. 231; *subsequent proceedings* (1885), 54 L. J. P. 60, C. A.

Annotation:—**Distd.** Wily *v.* Wily, [1918] P. 1.

2429. When relief granted—Husband refusing to live with wife—Inadequate allowance.]—Restitution of conjugal rights decreed where the husband refused to live with his wife & only made her an allowance which was inadequate.—WINKWORTH *v.* WINKWORTH (1908), 25 T. L. R. 54.

2430. Effect of dismissal of previous nullity proceedings.]—RANKINE *v.* RANKINE (1922), 38 T. L. R. 852.

B. Persons Entitled to seek Relief.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 186.

2431. Not parties cohabiting.]—The Ecclesiastical Ct. can only interfere in the way of restitution where matrimonial cohabitation is suspended. The single duty which it can enforce by its decree in a suit of this nature, is that of married persons living together; it cannot attempt to enforce any, in super-addition to this. Hence, it is incompetent to the wife to sue the husband, or the husband the wife, for restitution of conjugal rights pending cohabitation.—ORME *v.* ORME (1824), 2 Add. 382; 162 E. R. 335.

Annotations:—**Consd.** Rowe *v.* Rowe (1865), 4 Sw. & Tr. 162. **Apld.** Jackson *v.* Jackson, [1921] P. 17. **Refd.** Wily *v.* Wily, [1918] P. 1.

Persons domiciled or resident within jurisdiction.]—*See* CONFLICT OF LAWS, Vol. XI., p. 427, Nos. 921–923.

C. Proof of Marriage.

Presumption & proof of marriage generally.]—*See* Part II., Sects. 11, 12, *ante.*

2432. Insufficient in itself—Evidence of facts of case essential.]—(1) A decree will not be granted in an undefended suit for restitution of conjugal rights, upon mere proof of the marriage, evidence of other facts of the case must be given.

PART XIII. SECT. 5, SUB-SECT. 1.—A.

2424 i. *Discretion of court to refuse relief—Suit brought for collateral purpose.*]—The ct. may, unrestrictedly, give or refuse relief upon wide principles of justice & equity, having regard to the matrimonial state & its obligations & the relationship & conduct of both parties; the ground of the claim being withdrawal of cohabitation without lawful excuse, & the answers to such claim being adultery, cruelty, or sufficient cause for non-cohabitation.

The ct. should not refuse a judgment for restitution of conjugal rights merely because pltf.'s motive is, not the desire to live with her husband, but to have the children.—O'LEARY *v.* O'LEARY, [1923] 1 W. W. R. 501.—**CAN.**

c. *When relief granted.*]—The refusal of a wife to return to her husband & allow him the exercise of conjugal rights constitutes a continuing wrong giving rise to constantly recurring causes of action on demand & refusal.—BAI SARU *v.* SANKLA HIRACHAND (1892), I. L. R. 16 Bom. 714.—**IND.**

d. ——.]—Cohabitation, in a legal sense, is not put an end to by the mere fact that the parties, of necessity, have to live in different places. All that is necessary to be ascertained before granting a decree of restitution of conjugal rites is proof of a settled determination on the part of one of the spouses to put an end to the existing state of cohabitation.—CASTLE *v.* CASTLE (1918), 39 N. L. R. 306.—**S. AF.**

e. *Whether refusal to return necessary—To found action.*]—Where a husband sued to recover possession of his wife, making the wife herself deft. to the suit:—*Held:* it was in substance a suit for the restitution of conjugal rights, & art. 35 of Limitation Act, XV. of 1877, applied. The demand & refusal, which form the starting point for limitation under art. 35 are a demand by the husband & refusal by the wife, or *vice versâ*, being of full age. A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action.—FAKIRGAUDA *v.* GANGI (1898), I. L. R. 23 Bom. 307.—**IND.**

f. *Parties living together.*]—*Held:* refusing a decree for restitution, the ct. acting on the principles & rules upon which the Ecclesiastical Cts. of England acted, could only interfere by way of restitution where matrimonial cohabitation was suspended, & the simple duty which it could enforce by its decree in a suit for restitution was that of married parties "living together" & it could not attempt to enforce any super-addition to this.—TEW *v.* TEW, N. Z. L. R. 113.—**N.Z.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 1, C., D., E. & F. (a).]

(2) Where at the time of pronouncing a decree of restitution of conjugal rights, resp. was abroad, the ct. directed that the decree should be served on resp.'s return to England, & that it should require him to certify within a fortnight after such service that he had obeyed it.—PEARSON *v.* PEARSON (1864), 33 L. J. P. M. & A. 156.

Annotations:—*As to* (1) **Refd.** Field *v.* Field (1888), 59 L. T. 880. *As to* (2) **Expld.** Dicks *v.* Dicks, [1899] P. 275. **Refd.** De Gasquet James *v.* Mecklenburg Schwerin, [1914] P. 53.

2433. Necessity for.]—SCOTT *v.* SCOTT, No. 2424, *ante.*

2434. Effect of proof of validity of marriage—In previous suit of similar nature—Between same parties.]—In a suit for restitution of conjugal rights, the validity of the marriage in Jamaica having been proved in a previous suit of a similar nature between the same parties, further proof of its validity was not required.—VERNEY *v.* VERNEY (1920), 36 T. L. R. 203.

Whether fresh proof of marriage required—In subsequent petition for dissolution.]—*See* No. 4377, *post.*

In other matrimonial causes.]—*See* Sect. 11, sub-sect. 2, *post.*

In actions against husband for ante-nuptial obligations of wife.]—*See* Part VII., Sect. 1, sub-sect. 3, *ante.*

D. Written Demand for Return to Cohabitation.

See, now, Matrimonial Causes Rules, 1925, r. 3.

2435. Necessity for.]—*Re* TUCKER, No. 2448, *post.*

2436. Nature of—Must be conciliatory.]—(1) In a suit for restitution of conjugal rights the "written demand for cohabitation & restitution of conjugal rights," referred to in rule 175, need not necessarily be made by petitioner, but may be made by a solr. on behalf of petitioner.

(2) A wife cannot take proceedings for the restitution of conjugal rights until she has used reasonable means to induce her husband to take her back, & although the written demand to be made before the filing of the petition need not be in any particular form, it must be of a conciliatory character. Where therefore a formal letter was written by the petitioner's solr. on her behalf, demanding restitution with a threat of legal proceedings in default, & it did not appear that there had been any previous friendly communications upon the subject between the parties:—*Held:* such letter was not a proper written demand within rule 175.—FIELD *v.* FIELD (1888), 14 P. D. 26; 58 L. J. P. 21; 59 L. T. 880; 37 W. R. 134; 5 T. L. R. 81, C. A.

Annotations:—**Distd.** Smith *v.* Smith (1890), 15 P. D. 47. **Consd.** Neumann *v.* Neumann (1913), 108 L. T. 48. **Refd.** Mason *v.* Mason (1889), 61 L. T. 304; Naylor *v.* Naylor (1920), 122 L. T. 801.

2437. ——— ———.]—The preliminary letter, which must be sent by petitioner to resp. demanding a resumption of cohabitation before a suit for restitution of conjugal rights can be ascertained, must be of a friendly character, & not a hostile demand. It is not to be expected that a letter written under such circumstances should be of an affectionate nature, &, provided the request is clear, the ct. will not inquire too closely into the peremptory character of the precise words which were used.—ELLIOTT *v.* ELLIOTT (1901), 85 L. T. 648.

Annotation:—**Refd.** Naylor *v.* Naylor (1920), 122 L. T. 801.

2438. ——— ———.]—The "written demand" in accordance with rule 175 should be conciliatory in tone & devoid of any threat; the spirit & not the letter of the rule should be observed.—NEUMANN *v.* NEUMANN (1913), 108 L. T. 48; 29 T. L. R. 213; 57 Sol. Jo. 228.

Annotation:—**Refd.** Naylor *v.* Naylor (1920), 122 L. T. 801.

2439. ——— ———.]—It is desirable that a letter relied on as the demand required by the rule should be of a conciliatory & not of a minatory character, but it need not be affectionate, & the ct. will, in judging of its propriety, take into consideration the circumstances under which it was written & the nature of resp.'s reply.—NAYLOR *v.* NAYLOR (1920), 122 L. T. 801; 36 T. L. R. 244; 64 Sol. Jo. 257.

2440. By whom made—Petitioner's solicitors—Not necessarily by petitioner.]—FIELD *v.* FIELD, No. 2436, *ante.*

2441. Sufficiency of—Letter threatening legal proceedings in default—By solicitors—No previous friendly communication.]—FIELD *v.* FIELD, No. 2436, *ante.*

2442. ——— ——— ——— **Previous friendly applications.**]—Upon the hearing of a suit for restitution of conjugal rights instituted by a wife, where, prior to the institution of any proceedings, friendly & conciliatory applications had been made by petitioner to her husband, & a letter had been subsequently written by her solrs., asking resp. to take his wife back, & threatening proceedings in case of his refusal; & that letter followed by a formal peremptory demand in writing, by the wife, upon his non-compliance with those requests for cohabitation:—*Held:* (1) taken together, these demands for cohabitation constituted a sufficient compliance with the statute & rule 175; (2) evidence of alleged incontinence on the part of petitioner, before marriage, with the view of showing that her child, born after marriage, was not resp.'s child, was inadmissible, on the ground of irrelevance to this issue; & the ct. also refused to consider, on the hearing of the petition for restitution of conjugal rights, any question as to the amount of allowance which resp. should be ordered to pay to his wife, in the event of a decree for restitution being pronounced, & of his refusing to comply therewith.—MASON *v.* MASON (1889), 61 L. T. 304.

Annotation:—*As to* (1) **Refd.** Naylor *v.* Naylor (1920), 122 L. T. 801.

2443. ——— ——— **By petitioner—Refusal after admitting receipt.**]—In a petition by a wife for restitution of conjugal rights it appeared that after eleven years' separation, & before filing the petition, she addressed a letter to her husband expressing a desire to return to cohabitation, & demanding restitution of conjugal rights, & threatening to commence legal proceedings in case of refusal. The husband acknowledged the receipt of his wife's letter, but refused to receive her back:—*Held:* the wife's letter was a sufficient written demand within rule 175 of the additional

PART XIII. SECT. 5, SUB-SECT. 1.—D.

2435 i. *Necessity for.*]—Unless very special circumstances exist, it should be a condition precedent to the right of a petitioner to institute a suit for the restitution of conjugal rights against a resp. that a demand for the resumption of cohabitation, couched in conciliatory terms, be made & be refused or ignored by resp.:—*Held:* such special circumstances did exist where resp. had for three years lived away from his wife, though within a few miles of her, & had in that time contributed nothing to her support, & had not since the made any offer after the had been he had refused HARRISON *v.* H, N. Z. L. R. 230.— of the writ & where, a demand to return, which comply with.— (1906), 26

& Regulations, 1875, & she was entitled to a decree for restitution of conjugal rights.—SMITH *v.* SMITH (1890), 15 P. D. 47 ; 59 L. J. P. 9 ; 62 L. T. 237 ; 38 W. R. 276 ; 6 T. L. R. 159, C. A.

Annotations :—**Consd.** Neumann *v.* Neumann (1913), 108 L. T. 48 ; Naylor *v.* Naylor (1920), 122 L. T. 801. **Refd.** Elliott *v.* Elliott (1901), 85 L. T. 648.

2444. Service of—Whether personal service essential—Power to order substituted service.]—PALMER *v.* PALMER, *Re* THOMASSON'S PETITION, No. 4767, *post.*

2445. —— —— Respondent out of the jurisdiction—Service on solicitor.]—In a suit for restitution of conjugal rights, where resp. was shown to be living out of the jurisdiction, & her address could not be obtained from any of her friends, the ct. dispensed with the rule 175, requiring personal service of the written demand requiring the resp. to return to cohabitation, & allowed it to be served on her solr.—WATERS *v.* WATERS (1875), 34 L. T. 33 ; 24 W. R. 190.

2446. —— —— Respondent evading suit—Service on father.]—Where there was reason to believe that the husband was keeping out of the way to avoid a suit for restitution of conjugal rights, the ct. allowed the written demand required by rule 175 to be served on his father, coupled with the requirement that it should be advertised.—*Re* SHEEHY (1876), 1 P. D. 423 ; *sub nom.* O'SHEEHY *v.* O'SHEEHY, 34 L. T. 367.

Annotation :—**Refd.** Palmer *v.* Palmer (1921), 125 L. T. 861.

2447. —— —— Inability to ascertain respondent's whereabouts—Service on solicitor.]—Where, in a suit for restitution, petitioner, being unable to ascertain the whereabouts of resp., applied for substituted service of, first, the written demand for cohabitation necessary to satisfy rule 175 ; secondly, the citation ; &, thirdly, the petition :—*Held :* the demand to return to cohabitation might be served on resp.'s solr., but the citation & petition must be made the subject of a further application.—MACARTHUR *v.* MACARTHUR (1889), 58 L. J. P. 70 ; *sub nom. Re* MCARTHUR'S PETITION, 61 L. T. 308.

2448. —— —— Registered letters returned unopened—Respondent out of the jurisdiction.]—Where the intended resp. in a suit for restitution of conjugal rights had left the country, & letters addressed to him by his wife at his last known residence & place of business respectively, & containing a written demand for cohabitation, had been returned through his solrs., who declined to furnish her with her husband's address, the ct. allowed substituted service of the demand for cohabitation required by rule 175 to be made on the husband's solrs.

Before a citation in a suit for restitution of conjugal rights is permitted to issue, the ct. must be satisfied by affidavit that a written demand for cohabitation & restitution of conjugal rights has previously been made by petitioner on the party to be cited.—*Re* TUCKER, [1897] P. 83 ; 66 L. J. P. 65 ; 77 L. T. 140 ; 45 W. R. 656.

2449. —— Service by post—Necessity for registration.]—BARRY *v.* BARRY (1902), 46 Sol. Jo. 500.

2450. Service out of the jurisdiction—Whether court has power to order.]—BATEMAN *v.* BATEMAN, No. 3870, *post.*

2451. Affidavit of service—Recital of form of demand—Annexing copy of demand.]—DAINES *v.* DAINES (1888), 5 T. L. R. 4.

E. Sincerity of Petitioner.

2452. Necessity for.]—Where a husband & wife are living apart under a deed of separation, & the wife, having unsuccessfully endeavoured to induce her husband to resume cohabitation, presents a petition for restitution of conjugal rights, & there is evidence that she sincerely desires the return of her husband, the existence of the separation deed & the fact that she may have it in her mind if he disobeys the decree, to take subsequent proceedings for a divorce, constitute no bar to her right to a decree for restitution.

The question whether the existence of the deed of separation constitutes a bar against the granting of a decree for restitution has often been discussed, & in the Ecclesiastical Cts. it was not treated as a bar. Sect. 22 of the Act of 1857 [Matrimonial Causes Act, 1857 (c. 85)] provides for the grant of a decree for the restitution of conjugal rights upon the principles of the Ecclesiastical Cts., & that being so, the law must be considered as it was before Matrimonial Causes Act, 1857 [(c. 85)]. . . . The husband did not appear, nor set up the deed. The wife appeared & revealed it, & said that she had been coerced into signing it & had made an appeal to the husband to return to her. Under these circumstances, if the ct. is satisfied of the good faith on her part & that there is evidence that she is really desirous that her husband should return to her, I think she is entitled to the decree for which she asks (DUKE, P.).—PALMER *v.* PALMER, [1923] P. 180 ; 92 L. J. P. 129 ; 129 L. T. 665 ; 39 T. L. R. 609 ; 67 Sol. Jo. 748, C. A.

Annotation :—**Folld.** Harnett *v.* Harnett, [1924] P. 126.

2453. ——.]—HARNETT *v.* HARNETT, No. 2462, *post.*

2454. Where sincerity proved—Intention to apply for divorce on disobedience to decree—No disqualification.]—PALMER *v.* PALMER, No. 2152, *ante.*

F. Defences.

(*a*) *In General.*

2455. Respondent must establish legal defence—Sincerity of petitioner.]—SCOTT *v.* SCOTT, No. 2421, *ante.*

2456. Facts amounting to neither cruelty nor adultery.]—An allegation responsive to the libel in a suit for restitution of conjugal rights admitted to proof, although the facts pleaded amounted to a charge of neither cruelty nor adultery against the party by whom a sentence of restitution was prayed.—MOLONY *v.* MOLONY (1824), 2 Add. 249 162 E. R. 285.

Annotations :—**Expld.** Connelly *v.* Connelly (1850), 2 Rob. Eccl. 201. **Consd.** Sopwith *v.* Sopwith (1861), 2 Sw. & Tr. 160. **Refd.** Connelly *v.* Connelly (1851), 7 Moo. P. C. C. 438.

PART XIII. SECT. 5, SUB-SECT. 1.—E.

2452 i. *Necessity for.*]—The ct. should not refuse a judgment for restitution of conjugal rights merely because pltf.'s motive is, not the desire to live with her husband, but to have the children.—O'LEARY *v.* O'LEARY, [1923] 1 W. W. R. 501.—**CAN.**

2454 i. *Where sincerity proved—Intention to apply for divorce on disobedience to decree—No disqualification.*]—An essential condition in a suit for restitution of conjugal rights is the sincerity or good faith of petitioner, that is to say, a sincere desire on his or her part for the return of the absent spouse & the resumption of normal matrimonial relations. If the true object of petitioner is the ulterior purpose of obtaining a divorce in consequence of the other spouse's disobedience to the decree, the application for restitution is not made in good faith & will be dismissed. The ct. will not, however, attribute to a petitioner who is in truth genuinely ready & willing to do his or her duty if the other does return, a want of good faith merely because he or she contemplates or intends consequential proceedings in divorce in the event of the other's refusal to obey the decree.—MORRIS *v.* MORRIS, N. Z. L. R. 1101.—**N.Z.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 1, F. (a) & (b).]

2457. Facts entitling respondent to decree of judicial separation.]—A plea in bar to a suit for restitution of conjugal rights is bad, unless it set forth matter sufficient to entitle resp. to a decree of judicial separation. A plea that resp. had reasonable suspicion that petitioner had committed adultery, is bad.—BURROUGHS *v.* BURROUGHS (1861), 2 Sw. & Tr. 303; 30 L. J. P. M. & A. 186; 4 L. T. 374; 7 Jur. N. S. 610; 9 W. R. 680; 164 E. R. 1012.

Annotation:—**Refd.** Russell *v.* Russell, [1897] A. C. 395.

2458. Petitioner guilty of impropriety—Not amounting to matrimonial offence.]—RIPPINGALL *v.* RIPPINGALL & DELACOUR, RIPPINGALL *v.* RIPPINGALL, No. 2468, *post.*

2459. Petitioner's refusal of conjugal intercourse.]—RIPPINGALL *v.* RIPPINGALL & DELACOUR, RIPPINGALL *v.* RIPPINGALL, No. 2468, *post.*

2460. Offer of matrimonial cohabitation—Not mere cohabitation.]—An offer by a husband to live under the same roof with his wife, each party being free from molestation by the other, is not an offer of matrimonial cohabitation & is no defence to a suit for restitution of conjugal rights.—WILY *v.* WILY, [1918] P. 1; 87 L. J. P. 31; 117 L. T. 703; 34 T. L. R. 33; 62 Sol. Jo. 55.

Annotation:—**Refd.** Jackson *v.* Jackson, [1924] P. 19.

2461. —— —— Return pending proceedings.]—After the wife had filed a petition for restitution of conjugal rights in consequence of her husband having left her, he returned to her & occupied the same bed with her for eighteen days, but refused marital intercourse or to associate with her, & he also kept on an establishment of his own. He stated to his wife that he only returned to her to avoid the publicity of the proceedings for restitution, & never intended to live with her as her husband. He then left her again, & stated the above again in a letter which he left for her:—*Held:* there was no genuine attempt or intention on the part of the husband to return to his wife, & a decree was pronounced on the wife's petition.—WEBSTER *v.* WEBSTER (1922), 66 Sol. Jo. 486.

2462. Effect of Divorce Rules, r. 175—Upon former doctrine of Ecclesiastical Courts.]—(1) The former doctrine of the Ecclesiastical Cts. that there was no defence to a suit for restitution of conjugal rights but a matrimonial offence by petitioner, is now, having regard to above rule, no longer law.

(2) It is essential to the success of a petition for restitution of conjugal rights that petitioner should prove that he or she has a sincere desire for a real restitution of those rights & a corresponding willingness to render them to the other spouse.—HARNETT *v.* HARNETT, [1924] P. 126; 93 L. J. P. 49; 131 L. T. 4; 40 T. L. R. 269; 68 Sol. Jo. 366, C. A.

(b) Justifiable Withdrawal from Cohabitation.

2463. General rule.]—By the law of this country, married persons are bound to live together; & if either withdraws without lawful cause, the other may, by suit in the Ecclesiastical Ct., compel the party withdrawing to return to cohabitation. The only lawful cause for withdrawing is the cruelty or adultery of the other party; for this ct. can take no cognisance of disputes about property or mutual agreements to live separate. To amount to cruelty there must be personal violence, or manifest danger of it; for unkindness & reproachful language on the one side, or vain & unfounded fear on the other, do not constitute any case of cruelty which the law can notice. It need scarcely be added, that it is not sufficient to allege & charge cruelty; it must be judicially established by evidence (SIR JOHN NICHOLL).—BARLEE *v.* BARLEE (1822), 1 Add. 301; 162 E. R. 105.

Annotation:—**Refd.** Weldon *v.* Weldon (1883), 9 P. D. 52.

2464. ——.]—(1) Suits for restitution of conjugal rights by the husband against the wife, in reply to which the wife pleaded adultery, cruelty & unnatural practices upon herself, on the part of the husband, & prayed a separation on the three grounds:—*Held:* adultery alone was proved, & sentence of separation accordingly.

(2) I have stated that the law admits, generally speaking, of no excuse to married parties from withdrawing from mutual cohabitation, but cruelty, adultery, or the particular offence [unnatural offence] alleged in this case (SIR H. JENNER FUST).

(3) The principle laid down in all the cases which have been referred to is, that everything which tends to bodily hurt or peril, is a sufficient ground for the interposition of the ct. Many acts are not required; one is sufficient, if it be likely to occur again; & it is not necessary that the wife should be entirely without blame; a reasonable apprehension of personal violence is sufficient, & words of menace, creating an apprehension of bodily harm or injury, will be sufficient . . . & it is not necessary in all cases to prove actual personal violence (SIR H. JENNER FUST).

(4) I am of opinion . . . that there is proof of an act of legal cruelty by the husband; & undoubtedly the ct. would have been in a situation to pronounce a sentence of separation on the ground of cruelty if the parties had ceased to cohabit at that time. But they cohabited for six months afterwards, for it was not until Sept. 1845, that they separated, & not on the ground of an act of violence of this description, but on another ground; & the question arises whether anything occurred to revive the cruelty thus condoned (SIR H. JENNER FUST).

I pronounce that the husband has been guilty of the crime of adultery, & that, on that ground, the wife is entitled to a sentence of separation (SIR H. JENNER FUST).—GEILS *v.* GEILS (1848), 6

PART XIII. SECT. 5, SUB-SECT. 1.—F. (a).

2457 i. *Facts entitling respondent to decree of judicial separation.*]—Conduct in order to amount to an answer to a petition for restitution of conjugal rights must be such as would entitle resp. to a decree of judicial separation.—BUSCH *v.* BUSCH (1911), 31 N. Z. L. R. 503.—**N.Z.**

g. *Separation order.*]—An order under "Married Persons Summary Separation Act, 1896," that applt. be no longer bound to cohabit with her husband, is while in force a statutory authority to the wife, should she so desire, to refuse to cohabit with her husband or to render him conjugal rights. Such order while in force is a bar to a suit by the husband for restitution of conjugal rights.—SIBBALD *v.* SIBBALD (1906), 26 N. Z. L. R. 135. **N.Z.**

h. *Apprehension of bodily injury.*]—In the circumstances the inference was legitimate that deft. would have a reasonable apprehension of bodily injury if she returned to her husband, & the ct. refused pltf. a decree of restitution.—BABU *v.* MUSAMMAT KOKLA (1923), I. L. R. 46 All. 210.—**IND.**

k. *Apprehension of danger to health.*]—Under the Indian law cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.—KONDAL, ETC. *v.* RANGANAYAKI AMMAL (1923) I. L. R.

PART XIII. SECT. 5, SUB-SECT. 1.—F. (b).

l. *Impossibility of sexual intercourse.*]—A plea by a wife that sexual intercourse with her is impossible

Notes of Cases, 97 ; *subsequent proceedings* (1851), 3 H. L. Cas. 280, H. L.

2465. ——.]—The ct. has discretion to refuse relief to a petitioner seeking a decree of restitution of conjugal rights, even in the absence of a matrimonial offence on the part of the petitioner. The question for decision is whether resp. had reasonable cause for leaving petitioner, & the test is whether it has become practically impossible for the spouses to live together. A wife may develop habits of intemperance & may exhibit jealousy of her husband & frivolity of conduct, & these facts may constitute no reasonable grounds for the husband deserting his wife.—GREENE *v.* GREENE, [1916] P. 188 ; 85 L. J. P. 224 ; 115 L. T. 127 ; 32 T. L. R. 520 ; 60 Sol. Jo. 620.

Annotation :—**Distd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

Adultery of petitioner—Discretionary bar to relief.]—*See* Part XIII., Sect 7, sub-sect 4, D. (*c*). *post.*

Cruelty of petitioner— Discretionary bar to relief.]—*See* Part XIII., Sect. 7, sub-sect. 4, E. (*d*), *post.*

2466. Commission of unnatural offence.]—GEILS *v.* GEILS, No. 2464, *ante.*

2467. Frivolous or improper conduct—Antenuptial.]—PERRIN *v.* PERRIN, No. 2806, *post.*

2468. —— Not amounting to matrimonial offence.]—It is no ground for dismissing a wife's suit for restitution of conjugal rights that she has been guilty of impropriety of behaviour not amounting to a matrimonial offence, nor yet that she has previously refused to permit conjugal intercourse.—RIPPINGALL *v.* RIPPINGALL & DELACOUR, RIPPINGALL *v.* RIPPINGALL (1876), 24 W. R. 967.

Annotations :—**Consd.** Synge *v.* Synge, [1900] P. 180. **Refd.** Russell *v.* Russell, [1895] P. 315 ; Russell *v.* Russell, [1924] A. C. 687.

2469. —— ——.]—In a suit by a wife for restitution of conjugal rights, where the husband alleged that the wife's conduct, though she had not been guilty of adultery, had been such as to disentitle her to a decree, the ct. declined, on a consideration of all the circumstances, to exercise its discretion by refusing to grant a decree.—FLETCHER *v.* FLETCHER (HOBSON CITED), FLETCHER *v.* FLETCHER & HOBSON (1915), 31 T. L. R. 306.

2470. ——.]—GREENE *v.* GREENE, No. 2465, *ante.*

2471. Inability to maintain petitioner.]—GREEN *v.* GREEN, No. 3563, *post.*

2472. Pre-nuptial incontinence of petitioner.]—MASON *v.* MASON, No. 2442, *ante.*

2473. Intemperance.]—BUTLAND *v.* BUTLAND, No. 3604, *post.*

2474. —— Bordering on delirium tremens.]—(1) A wife petitioned for a decree of restitution of conjugal rights, & her husband pleaded in reply that she had been addicted to drink for a long period, had become dangerous to herself & others, & had on one occasion been in a condition bordering on delirium tremens. Upon the evidence :—*Held :* the husband had "just cause" for withdrawing from cohabitation, though such evidence was not enough to entitle him to a decree of judicial separation.

(2) In a suit for restitution of conjugal rights the ct. will decline to make the usual order for wife's costs where the grounds of the litigation are altogether unreasonable.—BEER *v.* BEER (1906), 94 L. T. 704 ; 54 W. R. 564 ; 22 T. L. R. 338, 367.

Annotations :—*As to* (1) **Distd.** Greene *v.* Greene, [1916] P. 188. **Refd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

2475. —— Habitual.]—GREENE *v.* GREENE, No. 2465, *ante.*

2476. —— —— Danger to husband & children.]—Habitual drunkenness making a wife dangerous to her husband & children is legal ground for refusing her a decree of restitution of conjugal rights.—FISK *v.* FISK (1920), 122 L. T. 803 ; 36 T. L. R. 248.

2477. Jealousy.]—GREENE *v.* GREENE, No. 2465,

2478. Marriage induced by false representation.]—GREEN *v.* GREEN, No. 3563, *post.*

2479. Neglect of domestic duties.]—In a suit by the wife for restitution of conjugal rights, the husband, in his answer, pleaded that during cohabitation the wife had neglected & refused to discharge her domestic duties, & had endeavoured to provoke him to strike her ; also that the separation had occurred by mutual consent :—*Held :* on motion to strike out these paragraphs as irrelevant, they were material to the issue, and ought not to be struck out.—WOODEY *v.* WOODEY (1874), 31 L. T. 647 ; 23 W. R. 386.

Annotation :—**Refd.** Russell *v.* Russell, [1895] P. 315.

2480. Petitioner leaving home—Inability to agree with stepchildren.]—By Matrimonial Causes Act, 1884 (c. 68), s. 5, "If the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, & a suit for judicial separation may be forthwith instituted, & a sentence of judicial separation may be pronounced, although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights."

In a suit for restitution of conjugal rights brought by a second wife, it appeared that differences had arisen between her & her husband, due to her inability to agree with her step-children, his daughters by the former marriage, & that she had in consequence left her home, & her husband had refused to receiver her back :—*Held :* on consideration of the evidence, the wife had done nothing to disentitle her to maintain a suit for desertion without reasonable cause, within Matrimonial Causes Act, 1884 (c. 68), s. 5, as interpreted in *Russell* v. *Russell*, No. 4671, *post*, she was therefore entitled to a decree for restitution of conjugal rights.—OLDROYD *v.* OLDROYD, [1896] P. 175 ; 65 L. J. P. 113 ; 75 L. T. 281 ; 12 T. L. R. 442.

Annotations : **Consd.** Beer *v.* Beer (1906), 94 L. T. 704. **Refd.** Synge *v.* Synge, [1901] P. 317 ; Frowd *v.* Frowd, [1904] P. 177 ; Greene *v.* Greene, [1916] P. 188.

2481. Physical violence.]—BUTLAND *v.* BUTLAND, No. 3604, *post.*

2482. Refusal to permit conjugal intercourse.]—RIPPINGALL *v.* RIPPINGALL & DELACOUR, RIPPINGALL *v.* RIPPINGALL, No. 2468, *ante.*

2483. —— Without just cause.]—The rights of husband & wife as to marital intercourse are mutual, & either party refusing such intercourse without sufficient reason gives just cause to the other for withdrawal from cohabitation. The ct. will therefore, in its discretion, regard such a refusal as a valid defence to a wife's petition for restitution of conjugal rights.—DAVIS *v.* DAVIS, [1918] P. 85 ; 87 L. J. P. 53 ; 118 L. T. 649 ; 62 Sol. Jo. 384.

Annotation :—**Refd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

2484. —— Cohabitation not rendered impossible by.]— A husband & his wife parted, & the husband then filed a petition for nullity of marriage on the

owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal rights.—PURSHOTAMDAS MANEKLAL *v.* BAIMANI (1896), I. L. R. 21 Bom. 610.—**IND.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 1, F. (b), (c) & (d).]

ground that the wife was incapable of consummating it, & that by reason of such refusal it was impossible for him to live with her. The wife by her answer alleged that the husband was incapable & she prayed for a decree of nullity. The judge dismissed the petition & the prayer of the answer. Subsequently the wife asked her husband to receive her back as his wife, &, on his refusal, she filed a petition for restitution of conjugal rights. The husband alleged that his wife was not in truth ready to return to cohabitation:—*Held:* though the ct. would not grant a decree for restitution of conjugal rights to petitioner if she was not ready to return to cohabitation, yet on the facts there had been no such wilful refusal of marital intercourse by the wife as to make it impossible for her husband to live with her, & the husband ought not to have taken nullity proceedings, & therefore he had no reasonable excuse for withdrawal from cohabitation, & there would be a decree for restitution of conjugal rights.—PARKES *v.* PARKES (1923). 40 T. L. R. 42.

(c) *Separation by Mutual Consent.*

Covenant not to sue, *see* Sub-sect. 2, F. (*d*), *post.*
Contracts for separation, generally, *see* Part XI., *ante.*

2485. Whether restitution suit barred by—Agreement to live separate.]—An agreement between husband & wife to live separate is no bar to a suit for restitution of conjugal rights.—SPERING *v.* SPERING (1863), 3 Sw. & Tr. 211; 32 L. J. P. M. & A. 116; 9 L. T. 24; 11 W. R. 810; 164 E. R. 1255.

Annotation:—**Refd.** Williams *v.* Williams, [1921] P. 131.

2486. —— ——.]—LACEY *v.* LACEY, [1919] W. N. 304.

2487. —— ——.]—The ct. granted to a wife a decree for restitution of conjugal rights in an undefended suit, although the parties had been living apart under a deed of separation.—PUGH *v.* PUGH (1920), 37 T. L. R. 105.

2488. —— **Refusal to cohabit from date of deed.**]—ANQUEZ *v.* ANQUEZ, No. 4021, *post.*

2489. —— ——.]—(1) A husband & wife executed a deed of separation, which provided for payment by the husband of an allowance of £100 a year for the maintenance of their child, & abandonment by him of all control & supervision over the child. The allowance was paid only for half a year:—*Held:* though the terms of the deed might be such as to make it invalid in a ct. of equity, the separation was voluntary, & the breach of his contract by the husband could not by relation back make it involuntary. The petition by the wife for dissolution of marriage on the ground of the husband's adultery, coupled with desertion without cause for two years & upwards, was therefore dismissed.

(2) It has always been held in the Divorce & Matrimonial Causes Ct. that deeds of separation are utterly inoperative to abrogate the duty of cohabitation involved in the contract of marriage. It is accordingly quite competent to either party, the day after they have parted in obedience to their mutual agreement, to come to the ct. in defiance of such agreement, & obtain a decree for restitution of conjugal rights.—CRABB *v.* CRABB (1868), L. R. 1 P. & D. 601; 37 L. J. P. & M. 42; 18 L. T. 153; 16 W. R. 650.

Annotations:—*As to* (1) **Consd.** Piper *v.* Piper, [1902] P. 198. **Refd.** Parkinson *v.* Parkinson (1869), L. R. 2 P. & D. 25; Williams *v.* Williams, [1921] P. 131.

2490. —— **Trifling breaches of separation agreement.**]—(1) Where a deed of separation had been executed between a husband & wife who had continued to live apart, & the wife more than five years afterwards, by counterclaim to an action by the husband to enforce the deed, claimed as against him a judicial separation on the ground of alleged cruelty:—*Held:* her right to judicial separation was barred by lapse of time & by the execution of the deed of separation.

(2) A married woman can contract to live apart from her husband, & the husband is entitled to come to the Court to enforce specific performance of such a contract.

(3) A husband is not debarred from enforcing a deed of separation & from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. Where, in a separation deed, the husband had covenanted to allow an infant child to reside with the wife, & had subsequently concurred as next friend of the infant in a petition under Infants' Custody Act, 1873 (c. 12), for the removal of the infant from the wife's custody which had been ordered by the ct.:—*Held:* this was not a breach of the husband's covenant. Injunction granted to restrain the wife from suing for restitution of conjugal rights.—BESANT *v.* WOOD (1879), 12 Ch. D. 605; 40 L. T. 445; 23 Sol. Jo. 443.

Annotations:—*As to* (1) **Refd.** Russell *v.* Russell, [1895] P. 315; Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. *As to* (2) **Consd.** Cahill *v.* Cahill (1883), 8 App. Cas. 420; Clark *v.* Clark (1885), 10 P. D. 188. **Apld.** Aldridge *v.* Aldridge (1888), 13 P. D. 210; McGregor *v.* McGregor (1888), 21 Q. B. D. 424; Sweet *v.* Sweet, [1895] 1 Q. B. 12. **Refd.** Hart *v.* Hart (1881), 18 Ch. D. 670; Gandy *v.* Gandy (1882), 7 P. D. 168; Rose *v.* Rose (1883), 8 P. D. 98; Wennhak *v.* Morgan (1888), 57 L. J. Q. B. 241; Gooch *v.* Gooch, [1893] P. 99; *Re* Weston, Davies *v.* Tagart, [1900] 2 Ch. 164. *As to* (3) **Consd.** Kunski *v.* Kunski (1898), 68 L. J. P. 18. **Distd.** Kennedy *v.* Kennedy, [1907] P. 49. *Generally*, **Mentd.** Horwood *v.* Millar's Timber & Trading Co., [1916] 2 K. B. 44; Eccl. Comrs. for England *v.* I. R. Comrs., [1918] 2 K. B. 602.

2491. —— ——.]—It is not every breach of covenant in a deed of separation which will prevent the party committing it from setting up the deed in answer to a suit for restitution of conjugal rights. To have this effect a breach must be substantial, serious, & deliberate. In a case where the only breach consisted in the fact that the husband was four days late in paying a weekly allowance payable to his wife under a deed of separation, the ct. held that the deed was a complete answer to the wife's petition for conjugal rights, & refused to make the usual order for the wife's costs.—KUNSKI *v.* KUNSKI (1898), 68 L. J. P. 18.

—— **Breach of covenant to maintain.**]—*See* Sub-sect. 1, F. (*d*), *post.*

2492. —— **Reciprocal covenants in agreement by deed—Renunciation of rights in wife's property.**]—In a suit for restitution of conjugal rights, resp. moved for an injunction & stay of proceedings, upon affidavit, showing that petitioner was bound by deed not to institute such a suit:—*Held:* (1) such a defence must be alleged by plea, &

PART XIII. SECT. 5, SUB-SECT. 1.—F. (c).

m. *Whether restitution suit barred by—Agreement repudiated.*]—A deed of separation between a husband & his wife which both parties have repudiated is not a bar to a petition for restitution of conjugal rights.—SMYTHE *v.* SMYTHE (1922), 30 C. L. R. 165.—**AUS.**

n. —— *No covenant not to sue.*]—Where a deed of separation is in existence, even without a covenant not to sue for restitution of conjugal rights, etc., in England the cts. have power to refuse a decree for restitution whenever the result of such decree would be to compel the ct. to treat one of the spouses as deserting the other without

afforded no ground for a summary dismissal of the suit.

Upon such defence being subsequently alleged by plea:—*Held:* (2) it was such an equitable plea as the Divorce Ct. since Jud. Acts is bound to consider; (3) a wife is bound by a deed of separation, containing a covenant not to sue her husband for restitution of conjugal rights. Suit instituted by her in violation of such a covenant dismissed.—MARSHALL *v.* MARSHALL (1879), 5 P. D. 19; 48 L. J. P. 49; 39 L. T. 640; 27 W. R. 399.

Annotations:—*As to* (1) **Folld.** Gleig *v.* Gleig (1906), 22 T. L. R. 716. *As to* (2) **Refd.** Clark *v.* Clark (1885), 10 P. D. 188; Aldridge *v.* Aldridge (1888), 13 P. D. 210; Russell *v.* Russell, [1895] P. 315; Kennedy *v.* Kennedy, [1907] P. 49. *As to* (3) **Consd.** Besant *v.* Wood (1879), 12 Ch. D. 605. **Folld.** Clark *v.* Clark (1885), 10 P. D. 188. **Refd.** McGregor *v.* McGregor (1888), 20 Q. B. D. 529. *Generally*, **Consd.** Welch *v.* Welch (1916), 85 L. J. P. 188.

2493. —— —— No breach of covenants by respondent.]—By a separation deed the wife agreed to live apart from her husband, & not to molest him or bring proceedings against him for restitution of conjugal rights. The husband agreed to pay the wife an allowance, which was to determine if she committed any breaches of the deed. Both parties having acknowledged & acted upon the deed, the wife committed breaches of its provisions, whereupon the husband, in accordance with his power under the deed, stopped her allowance. The wife then presented a petition for restitution of conjugal rights. Upon a summons by the husband to dismiss the petition:—*Held:* the petition was frivolous & vexatious, & must be dismissed.—WELCH *v.* WELCH (1916), 85 L. J. P. 188; 115 L. T. 1, C. A.

2494. —— Steps not taken to set agreement aside—Effect of Matrimonial Causes Act (c. 68), 1884.]—(1) Though an agreement between husband & wife to live apart is not in itself a bar to a petition for restitution of conjugal rights, the effect of above Act, which enacts that resp. who fails to comply with a decree for restitution shall be deemed guilty of desertion without reasonable cause, & that a suit for judicial separation may be at once instituted, is that the ct. has power to refuse a decree for restitution where such an agreement exists, & neither party has taken steps to set it aside.

(2) A valid agreement between the spouses to live apart may exist in the absence of a formal deed of separation & without an express covenant not to sue for restitution of conjugal rights.—WALTER *v.* WALTER, [1921] P. 302; 90 L. J. P. 372; 125 L. T. 575; 37 T. L. R. 673; 65 Sol. Jo. 607.

Annotation:—*As to* (1) **Refd.** Mann *v.* Mann (1921), 91 L. J. P. 204.

2495. —— Proof of petitioner's sincerity—Matrimonial Causes Act, 1857 (c. 85), s. 22.]—PALMER *v.* PALMER, No. 2452, *ante*.

2496. Sincerity of petitioner—Must be proved.]—In a wife's suit for restitution of conjugal rights, where the original separation of the parties has been by mutual consent, as under a deed of separation, the ct. will require evidence that appct. sincerely desires that her husband should return to cohabitation. Without this the power given by Matrimonial Causes Act, 1884 (c. 68), would tend to create an artificial state of desertion.—MANN *v.* MANN, [1922] P. 238; 91 L. J. P. 204; 126 L. T. 222; 66 Sol. Jo. (W. R.) 7.

Annotation:—**Refd.** Harnett *v.* Harnett, [1924] P. 41.

(d) Covenant by Petitioner not to sue.

2497. Whether restitution suit barred by.]—WESTMEATH *v.* WESTMEATH, No. 3196, *post*.

2498. —— Proceedings restrained.]—A covenant was entered into for a valuable consideration by a husband with the trustees of his wife under a separation deed, not to sue for the restitution of conjugal rights. An application for an injunction to restrain such a suit commenced by the husband, was refused by the ct. On appeal, the decision was reversed & an injunction awarded.—HUNT *v.* HUNT (1862), 4 De G. F. & J. 221; 31 L. J. Ch. 161; 5 L. T. 778; 26 J. P. 243; 8 Jur. N. S. 85; 10 W. R. 215; 45 E. R. 1168, L. C.

Annotations:—**Consd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185; Besant *v.* Wood (1879), 12 Ch. D. 605; Marshall *v.* Marshall (1879), 5 P. D. 19. **Expld.** Cahill *v.* Cahill (1883), 8 App. Cas. 420. **Consd.** Clark *v.* Clark (1885), 10 P. D. 188; *Re* Hope Johnstone, Hope Johnstone *v.* Hope Johnstone, [1904] 1 Ch. 470; Wilson *v.* Carnley (1908), 98 L. T. 265; Williams *v.* Williams, [1921] P. 131. **Refd.** Kitchin *v.* Kitchin (1869), 19 L. T. 674; Symonds *v.* Hallett (1883), 53 L. J. Ch. 60; McGregor *v.* McGregor (1888), 20 Q. B. D. 529; Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Mentd.** Fearon *v.* Aylesford (1884), 32 W. R. 718.

2499. —— ——.]—By a deed of separation dated in Dec. 1862, husband & wife agreed to live separate & apart, the husband to allow the wife an annuity of £200 for their joint lives & twelve months after the husband's death if the wife survived him. The trustee of the deed covenanted with the husband that the wife should not molest him, etc., & that she should not seek to compel him to live with her again, or bring any citation in the Divorce Ct. for the restitution of conjugal rights. The annuity had been duly paid. The wife had commenced proceedings in the Divorce Ct. for a restitution of conjugal rights. Thereupon the husband filed his bill for (*inter alia*) an injunction to restrain the wife from further proceedings in the Divorce Ct. On motion for the injunction:—*Held:* the wife ought to be restrained from further proceedings until the hearing, the deed not having been impeached, & injunction granted, with liberty for her to file a cross-bill to impeach the deed, or as she should be advised, without filing it in the name of a next friend.—KITCHIN *v.* KITCHIN (1869), 19 L. T. 674.

2500. —— Covenant by either spouse.]—By a deed of separation between the husband, the wife, & a trustee, containing a recital that the husband & wife had agreed to live separate, the husband covenanted with the trustee to pay the wife £25 a year till their only child should attain twenty-one, or die under that age or become chargeable to the husband, & to allow her to enjoy all her present & future property for her separate use, & the trustee covenanted with the husband to indemnify him against the debts of the wife, & that the wife should not take any proceedings to compel him to live with her. The annuity was paid until the child died, a minor. The wife after this presented her petition for the restitution of conjugal rights, & the husband pleaded the separation deed:—*Held:* (1) an agreement entered into by a wife for valuable consideration, & without fraud or duress, that she will not take proceedings to compel her husband to return to cohabitation, is a bar to such proceedings; (2) the recital of the agreement to live separate, being contained in a deed to which the wife was a party, was evidence of a contract by her to allow her husband to live separate from her, & that after

reasonable cause contrary to the real truth of the case, & the same considerations apply with added force in New Zealand where the authority to make such a decree as a preliminary to divorce is discretionary.—FIELDING *v.* **N.Z.** [1921] N L. R. 1059,—

5.—Matrimonial offences and remedies there- [illegible] 1, *F.* (*d*), *G.* & *H.*; *sub-sect.* 2

accepting benefits under the deed, she could not be heard to say that she had not contracted, because the covenant not to sue was entered into only by the trustee & not by her.—CLARK *v.* CLARK (1885), 10 P. D. 188; 54 L. J. P. 57; 52 L. T. 234; 49 J. P. 516; 33 W. R. 405, C. A.

Annotations:—*As to* (1) **Refd.** Russell *v.* Russell, [1895] P. 315. **Refd.** *Re* Weston, Davies *v.* Tagart,

2501. —— Deed not set up by respondent.]—The parties in a suit for restitution of conjugal rights had been living apart under a deed of separation by which the wife covenanted not to take any proceedings to compel her husband to cohabit with her. The husband, who had not fulfilled his covenant to pay his wife £200 a year, did not appear in the suit. The ct., notwithstanding the covenant in the deed, granted the wife a decree of restitution.—TRESS *v.* TRESS (1887), 12 P. D. 128; 56 L. J. P. 93; 57 L. T. 501; 51 J. P. 504; 35 W. R. 672.

Annotations:— **Consd.** Gleig *v.* Gleig (1906), 22 T. L. R. 716; Kennedy *v.* Kennedy, [1907] P. 49. **Folld.** Gill *v.* Gill (1917), 62 Sol. Jo. 37; Phillips *v.* Phillips, [1917] P. 90. **Consd.** Williams *v.* Williams, [1921] P. 131. **Refd.** Beauclerk *v.* Beauclerk, [1895] P. 220; Hardie *v.* Hardie, Bateman *v.* Bateman (1901), 70 L. J. P. 29; Roe *v.* Roe, [1916] P. 163. **Mentd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138; Holroyd *v.* Holroyd (1920), 36 T. L. R. 479; Pugh *v.* Pugh (1920), 37 T. L. R. 105.

2502. — ——.]— BATEMAN *v.* BATEMAN, No. 3870, *post*.

2503. — — —.]— A husband & wife agreed to live apart, & a separation deed was executed under which the husband covenanted to pay his wife an allowance, & the wife covenanted not to sue for restitution of conjugal rights. The husband subsequently ceased to pay his wife the allowance, & stated his intention not to make any more payments to her. The wife brought a suit for restitution of conjugal rights, to which the husband filed no answer, & the suit was undefended:—*Held:* though the husband had not set up the covenant in the separation deed not to sue for judicial separation, the ct. could & ought to take notice of it; but as the husband had broken his covenant to pay the allowance & had expressed his intention to make no more payments, & had thus rendered the deed useless to the wife, the ct. would not refuse to make an order for restitution.—KENNEDY *v.* KENNEDY, [1907] P. 49; 76 L. J. P. 34; 96 L. T. 476; 23 T. L. R. 139.

Annotations:—**Consd.** Balcombe *v.* Balcombe, [1908] P. Welch (1916), 85 L. J. P. 188. **N.F.** [1917] P. 90. **Consd.** Williams *v.* s, [1921] P. 131. **Refd.** Waller *v.* Waller (1910), 26 T. . R. 223; Lipman *v.* Lipman, [1916] P. 25; Roe [1916] P. 163; Pugh *v.* Pugh (1920), 37 T. L. R. 105. **entd.** Thompson *v.* Thompson (1916), 85 L. J. P. 159.

2504. — husband separated from his wife under a deed by which each covenanted not to take legal proceedings to compel the other to cohabit with him or her. The wife subsequently brought a suit for restitution of conjugal rights, to which the husband did not file any answer & did not appear:—*Held:* in the absence of a plea founded on the covenant in the deed, the ct. would grant a decree of restitution.—GLEIG *v.* GLEIG (1906), 22 T. L. R. 716.

2505. ——.]—The wife brought a suit for restitution of conjugal rights. She & her husband were separated under a deed in which there were mutual covenants not to sue for restitution. The husband did not defend the suit & set up the deed. The ct. granted a decree.—GILL *v.* GILL (1917), 34 T. L. R. 17; 62 Sol. Jo. 37.

2506. ——.]—Where a mutual covenant in a deed of separation gives rise to no question of public policy or of statutory bar to matrimonial proceedings, but is such that either party may take advantage of it, or both may set it aside, as for instance a mutual covenant not to sue for restitution of conjugal rights, the ct. is not bound to take notice of the covenant in a suit seeking a remedy which may be contrary to the covenant, if resp. in the suit does not appear or set up the covenant. The ct. granted a wife a decree for restitution of conjugal rights, in spite of the existence of a deed of separation disclosed to the ct. containing a covenant not to sue for restitution of conjugal rights which resp. did not appear to set up.—PHILLIPS *v.* PHILLIPS, [1917] P. 90; 86 L. J. P. 57; 116 L. T. 544; 33 T. L. R. 226; 61 Sol. Jo. 370.

Annotations:—**Folld.** Gill *v.* Gill (1917), 34 T. L. R. 17; Lacey *v.* Lacey, [1919] W. N. 304. **Refd.** Pugh *v.* Pugh (1920), 37 T. L. R. 105. **Mentd.** Holroyd *v.* Holroyd (1920), 36 T. L. R. 479.

2507. —— — Proof of petitioner's sincerity.]—A covenant by the wife in a separation deed not to sue for restitution of conjugal rights is not a bar to her petition for restitution if the husband does not set up the deed; provided that the ct. is convinced of the sincerity of the wife in asking her husband to return.—WILLIAMS *v.* WILLIAMS, [1921] P. 131; 90 L. J. P. 97; 124 L. T. 768; 37 T. L. R. 131; 65 Sol. Jo. 156.

Annotations: **Refd.** Mann *v.* Mann, [1922] P. 238; Harnett *v.* Harnett (1921), 93 L. J. P. 49.

2508. —— Respondent's breach of covenant.]—TRESS *v.* TRESS, No. 2501, *ante*.

2509. ——.]—KENNEDY *v.* KENNEDY, No. 2503, *ante*.

2510. ——.]—By a separation deed the wife covenanted to abstain from suing for restitution of conjugal rights before the year 1913, & the husband covenanted to pay money to the wife for her support. In August, 1909, the husband intimated to the wife that he did not intend to continue the payments under the deed, or to resume cohabitation with her in 1913 or at all:—*Held:* in those circumstances the wife was entitled to sue for restitution of conjugal rights.—WALLER *v.* WALLER (1910), 26 T. L. R. 223.

2511. ——.]—The annual sum payable to the wife under the separation deed being provable in the husband's bkpcy., but no action being maintainable against the husband, after he has obtained his discharge, under his covenant to pay the allowance specified in the deed, the deed is no bar to the proceedings for restitution of conjugal rights subsequently instituted by the wife.

The very foundation of the deed is the obligation to maintain the wife & child, & the essence of the agreement is that the contributions shall be kept up (EVANS, P.).—MCQUIBAN *v.* MCQUIBAN, [1913] P. 208; 83 L. J. P. 19; 109 L. T. 412; 29 T. L. R. 766.

G. Service of Citation and Decrees.

See Sect. 8, sub-sect. 5, D. (*c*), *post*.

PART XIII. SECT. 5, SUB-SECT. 1.—F. (d).

2501 i. *Whether restitution suit barred by—Deed not set up by respondent.*]—Where there is an existing deed of separation between husband & wife containing mutual covenants not to institute proceedings for restitution of conjugal rights, the ct. has a discretion to refuse restitution of conjugal rights notwithstanding that resp. to the suit has not set up any defence & has not pleaded as a bar the covenant in the deed.—WIRTH *v.* WIRTH (1918), 25 C. L. R. 402.—**AUS.**

II. Enforcement of Decrees.

See, generally, Sect. 23, *post.*

2512. Not enforceable by attachment—Effect of Matrimonial Causes Act, 1884 (c. 68).]—WELDON *v.* WELDON, No. 5931, *post.*

SUB-SECT. 2.—CRUELTY.

A. In General.

2513. Either party may be guilty of offence.]—KIRKMAN *v.* KIRKMAN, No. 2579, *post.*

Cruelty by wife.]—*See* Sub-sect. 2, C., *post.*

2514. Ground of court's interference.]—MIL- *v.* MILFORD, No. 2526, *post.*

2515. Suit must be brought for protection from cruelty.]—A wife prayed for a dissolution of marriage on the ground of adultery, coupled with cruelty. Evidence was given of the adultery & of some instances of cruelty, but it did not appear to the satisfaction of the ct. that the wife had left the husband under an apprehension of personal injury from his violence, or had taken any steps in consequence of the cruelty until after she had discovered the adultery. A decree of dissolution was refused, but a decree of judicial separation was pronounced on the ground of adultery.—HORTON *v.* HORTON (1859), 23 J. P. 534.

2516. —— Access to children desired—Danger to wife on return to cohabitation.]—COOKE *v.* COOKE, No. 3173, *post.*

2517. Cruelty by insane person—Court's inference.]—HALL *v.* HALL, No. 3022, *post.*

B. What Constitutes.

(a) In General.

2518. General rule.]—BAKER *v.* BAKER (1919), *Times*, Dec. 11, C. A.

2519. —— Question for jury.]—(1) When a question of cruelty comes before a jury as a ground for judicial separation, the jury are to determine, not only whether the acts complained of were done, but whether they constitute legal cruelty. (2) Bodily injury, reasonable apprehension thereof, or injury to health are the general tests of legal cruelty.—TOMKINS *v.* TOMKINS (1858), 1 Sw. & Tr. 168; 31 L. T. O. S. 122; 164 E. R. 678.

Annotations:—As to (2) **Apprvd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Foster *v.* Foster, [1921] P. 438.

2520. Relative cruelty.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post.*

2521. Question of fact & degree.]—RUSSELL *v.* RUSSELL, No. 2661, *post.*

2522. Whether bodily harm actual or menaced must be proved.]—(1) What is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such, as fall within the most restricted definition of cruelty, they affect not only the comfort, but they affect the health, & even the life of the party. I shall therefore decline the task of laying down a direct definition. . . . What merely wounds the mental feelings, is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention & accommoda tion, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty (SIR WILLIAM SCOTT).

(2) I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the ct. has proceeded to a separation. . . . I have heard no one case cited in which the ct. has granted a divorce without proof of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the ct. is not to wait till the hurt is actually done; but the apprehension must be reasonable: it must not be an apprehension arising merely from an exquisite & diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine. but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance—by calling in the succours of religion & the consolation of friends; but the aid of the cts. is not to be resorted to in such cases with any effect (SIR WILLIAM SCOTT).—EVANS *v.* EVANS (1790), 1 Hag. Con. 35; 161 E. R. 466.

Annotations:—As to (1) **Consd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470; Greenway *v.* Greenway (1848), 6 Notes of Cases, 221; Paterson *v.* Paterson (1850), 3 H. L. Cas. 308; Tomkins *v.* Tomkins (1858), 1 Sw. & Tr. 168. **Apld.** White *v.* White (1859), Sea. & Sm. 77. **Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192; Milford *v.* Milford (1866), 36 L. J. P. & M. 30; Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum (1867), 11 Moo. Ind. App. 551; Fisk *v.* Fisk (1920), 122 L. T. 803. *As to* (2) **Consd.** Kelly *v.* Kelly (1870), L. R. 2 P. & D. 59. **Refd.** Neeld *v.* Neeld (1831), 4 Hag. Ecc. 263; Lockwood *v.* Lockwood (1839), 2 Curt. 281; Saunders *v.* Saunders (1846), 10 Jur. 143; Bostock *v.* Bostock (1858), 1 Sw. & Tr. 221. *Generally*, **Mentd.** Trevanion *v.* Trevanion (1836), 1 Curt. 406; *Re* Cochrane (1840), 8 Dowl. 630; Clowes *v.* Jones (1843), 3 Curt. 185; *Re* Bartlett, *Ex p.* Bartlett (1846), 2 Coll. 661; Connelly *v.* Connelly (1851), 2 Rob. Eccl. 201; R. *v.* Burton (1854), 23 L. J. M. C. 52; R. *v.* Stephens (1888), 58 L. T. 776; Armytage *v.* Armytage (1898), 78 L. T. 689.

2523. ——.]—(1) A separation *a mensâ et thoro* decreed on account of the cruelty & adultery of the husband.

A more profligate case of adultery cannot be made out—this being so fully proved, it is not necessary to scan with exactness the charge of cruelty—acts of personal violence are not proved—but a series of most unwarrantable behaviour is. The case cited shows that it is not necessary to prove acts of personal violence to substantiate a charge of cruelty: it is the acknowledged doctrine that danger to the person & health is sufficient (SIR JOHN NICHOLL).

(2) It is objected that she could have no apprehensions, for she had lived with him twenty years, & no damage had ensued; but I have yet to learn that such passions, so indulged in, do not increase (SIR JOHN NICHOLL).

(3) If no adultery had been proved. I am not

PART XIII. SECT. 5, SUB-SECT. 1.—H.

o. *In general.*]—In most cases the ct. would refuse to enforce the judgment by attachment & would enforce it only indirectly by awarding alimony.—O'LEARY *v.* O'LEARY, [1923] 1 W. W. R. 501.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. B. (a).

2519 i. *General rule—Question for* Cruelty," as used in divorce , has a much more restricted sense that of its popular use; to constitute legal cruelty there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it; what must be the extent of the injury or what will reasonably excite the apprehension will depend upon the circumstances of each case.—DORSETT *v.* DORSETT, [1921] 1 W. W. R. 708; 57 D. L. R. 636.—**CAN.**

2522 i. *Whether bodily harm actual or menaced must be proved.*]—In a suit for divorce *a mensâ et thoro* on the ground of cruelty, pltf. must prove either actual bodily hurt or injury to health, or such acts or circumstances as are likely to produce an apprehension of such hurt or injury.—CURREY *v.* CURREY (1910), 40 N. B. R. 96.—**CAN.**

2522 ii. ——.]—Separation of married persons is not justified by conduct on the part of the husband rendering the wife's life miserable & uncomfortable, but unaccompanied by violence, actual or menaced, to her life, limb, or health, or cruelty & maltreatment, rendering it impossible for her to live with him.—PATERSON *v.* RUSSELL (1850), 7 Bell Sc. App. 337; 22 Sc. Jur. 628; *revg.* 11 Dunl. (Ct. of Sess.) 421; 21 Sc. Jur. 116.—**SCOT.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 2, B. (a) & (b).]

prepared to say that a sufficient ground has not been shown for a separation; but the adultery in this case is connected with the cruelty; the ct. cannot separate the one from the other (SIR JOHN NICHOLL).—OTWAY *v.* OTWAY (1812), 2 Phillim. 95; 161 E. R. 1088.

Annotations:—As to (1) **Distd.** Cousen *v.* Cousen (1865), 4 Sw. & Tr. 164. **Refd.** Gale *v.* Gale (1852), 2 Rob. Eccl. 421.

2524. ——.]- PATERSON *v.* PATERSON, No. 2533, *post.*

2525. ——.]- TOMKINS *v* TOMKINS, No. 2519, *ante.*

2526. ——.]—The essential feature of cruelty, such as, when coupled with adultery, will entitle a wife to a divorce, is, that there must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.—MILFORD *v.* MILFORD (1868), 37 L. J. P. & M. 77, H. L.

Annotations:—**Consd.** Besant *v.* Wood (1879), 12 Ch. D. 605; Russell *v.* Russell, [1897] A. C. 395.

2527. Reasonable apprehension of danger to person.]—EVANS *v.* EVANS, No. 2522, *ante.*

2528. ——.]—OTWAY *v.* OTWAY, No. 2523, *ante.*

2529. ——.]—(1) In a suit for separation by the wife for cruelty, where the ct. is convinced that her personal safety is in jeopardy, or where it may see reasonable ground to apprehend such a consequence, it is bound to protect her; but the ct. can only interfere where there is actual personal ill-treatment, or such threats as would reasonably excite in a mind of ordinary firmness a fear of personal injury.

(2) When circumstances of sufficient violence are admitted to proof, minor circumstances may also be admitted, but they should be *ejusdem generis*, & not light or trifling.

(3) Letters of the husband exhibited by the wife are evidence against him, & explanations therein contained of his conduct, with respect to the matter charged, are to be taken into the ct.'s consideration, but other statements therein are not evidence for the husband, at least in debating the plea.

(4) An interdict of intercourse with her family is not cruelty to a wife, though under circumstances, it might tend to illustrate the temper of the husband.

(5) A mere violent act which occasioned pain & injury to the wife, unaccompanied by any threat or any intentional blow, will not warrant a sentence of separation, because it does not infer future risk.—NEELD *v.* NEELD (1831), 4 Hag. Ecc. 263; 162 E. R. 1442.

Annotations:—As to (1) **Consd.** Russell *v.* Russell, [1897] A. C. 395. *Generally*, **Mentd.** Gosling *v.* Veley (1853), 4 H. L. Cas. 679.

2530. ——.]—DYSART *v.* DYSART, No. 2547, *post.*

2531. ——.]—GEILS *v.* GEILS, No. 2464, *ante.*

2532. ——.]—To support the charge of cruelty, such conduct must be shown by the husband as to create in the mind of the wife a reasonable apprehension of danger to her person. If the treatment complained of has been brought about by acts of violence on her part which have provoked her husband to violence, she, being the aggressor, cannot complain of cruelty which is the consequence of her own misconduct (HILL, J.).—ALLEN *v.* ALLEN & D'ARCY (1859), Sea. & Sm. 84; 30 L. J. P. M. & A. 2.

Annotation:—**Mentd.** Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17.

2533. ——.]—(1) Neglect, silence, shunning the wife's company, & declarations by the husband that he will never cohabit with her, do not constitute that "cruelty & maltreatment" in respect of which the law will grant to the wife a divorce *a mensâ et thoro.*

(2) Actual personal violence, or the immediate menace of it, is not the only ground of maltreatment in respect of which such a divorce will be granted. *Qu.:* whether constant revilings & accusations of all sorts of crimes made, & falsely made, before friends & servants, would constitute a ground for such a divorce.

(3) The general principle of the law as to divorce *a mensâ et thoro* is the same in England & Scotland. But it seems that a special principle exists in the law of Scotland which permits a divorce for a wilful desertion continued for four years.

Personal violence, as assault upon the person of the woman; threats of violence, which induce the fear of immediate danger to her person; constraint of her person; maltreatment of her person, so as to injure her health, these are, both by the law of Scotland & the law of England, sufficient grounds of divorce *a mensâ et thoro.* Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life or danger to her health, that, too, must be taken as regarded by the law of Scotland & by the law of England a sufficient ground of divorce. It is not true, as the learned judges have stated in the ct. below, that the law of England stops short at personal violence, & requires either actual injury to the person, or a threat of such injury in order to constitute a ground of divorce. Although there be no actual violence offered, & no menace of violence held out, the wife may yet obtain a divorce from the bed & board of her husband, if he shall, by such conduct as places her life, or even only her health, in jeopardy, render it impossible for her safely to consort any longer with him in the marriage state (LORD BROUGHAM).—PATERSON *v.* PATERSON (1850), 3 H. L. Cas. 308; 10 E. R. 120; *sub nom.* PATERSON *v.* RUSSELL (OR PATERSON), 15 L. T. O. S 537, H. L.

Annotations:—As to (1) **Refd.** Oldroyd *v.* Oldroyd, [1896] P. 175. *As to* (2) **Consd.** Mackenzie *v.* Mackenzie, [1895] A. C. 384; Russell *v.* Russell, [1897] A. C. 395. **Refd.** Leete *v.* Leete (1862), 2 Sw. & Tr. 568; Griffith *v.* Griffith (1864), 33 L. J. P. M. & A. 81.

2527 i. *Reasonable apprehension of danger to person.*]—On a petition for divorce, resp. is entitled to know clearly the charges he is called upon to meet. Thus, the cruelty alleged should be such as to cause danger to life, limb or health, bodily or mental, or a reasonable apprehension of it.—EDMONDS *v.* EDMONDS (1911), 17 B. C. R. 28; 1 D. L. R. 550.—**CAN.**

2527 ii. ——.]—The conduct of a husband is insufficient to support a charge of cruelty where the wife states that she became nervous through his keeping a razor or sharp knife under his pillow, but does not state that she feared acts of violence, or that the weapons were kept by him for that purpose.—WALSH *v.* WALSH (1914), 20 B. C. R. 482.—**CAN.**

2527 iii. .] — Unpleasant behaviour, in the absence of causing bodily hurt, a damage to health, or reasonable apprehension thereof, is not such cruelty as justifies a wife in leaving her husband or entitles her to alimony.—FORGET *v.* FORGET (1918), 40 D. L. R. 662.—**CAN.**

2527 iv. ——.]—*Held:* although the husband had been violent, harsh, & domineering, & had alienated the affections of his wife & children, his acts of violence were not of such a character as to have produced in pltf. physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, & that there was no reasonable apprehension that in the future acts would occur likely to produce such a result.—BAILEY *v.* BAILEY (1919), 45 O. L. R. 59; 16 O. W. N. 46; 48 D. L. R. 750.—**CAN.**

2527 v. ——.]—NEWTON *v.* NEWTON, [1924] 2 W. W. R. 840; 3 D. L. R. 887; 34 Man. L. R. 190.—**CAN.**

p. *Cruelty & drunkenness.*]—In a suit by a wife for dissolution of marriage upon the ground that resp. "

2534. Cumulative effects of acts not cruelty per se.]—(1) Various acts, not singly or by themselves amounting to acts of cruelty, to justify a sentence of divorce, taken together, & considered with reference to the proved habits of intoxication of the husband, held sufficient to justify such sentence. The wilful communication of a cutaneous disorder held to be an act of legal cruelty, though not by itself sufficient to found a sentence of separation.

(2) The use of blasphemous language & habits of intoxication which occasioned mental suffering & bodily ill-health to the wife, without bodily ill-treatment or threats thereof, do not constitute legal cruelty.—CHESNUTT *v.* CHESNUTT (1854), 1 Ecc. & Ad. 196; 23 L. T. O. S. 130; 164 E. R. 114; *sub nom.* C—— *v.* C——, 18 Jur. 360.

Annotation:—*As to* (1) **Refd.** Browning *v.* Browning, [1911] P. 161.

2535. ——.]—Cruelty may consist in the aggregate of the acts alleged in a petition or answer, & each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought.—GREEN *v.* GREEN (1864), 33 L. J. P. M. & A. 64.

2536. ——.]—Cruelty is in its nature a cumulative charge. It must be sustained & evince a continued want of self control, & it must be referable to permanent causes so as to endanger the future safety of the wife's person or health. Where the charges were confined to three days alone of a cohabitation of three years:- *Held:* the legal offence had not been committed.—PLOWDEN *v.* PLOWDEN (1870), 23 L. T. 266; 18 W. R. 902.

2537. ——.]—COCHRANE *v.* COCHRANE, No. 2558, *post*.

Single acts of cruelty.] —*See* Sub-sect. 2, B. (*b*), *post*.

Course of conduct rendering cohabitation unsafe.] —*See* Sub-sect. 2, B. (*c*), *post*.

Subjection of wife to course of indignity neglect, etc.]—*See* Sub-sect. 2, B. (*h*), *post*.

2538. Mere unhappiness from ill-assorted marriage.]—HARRIS *v.* HARRIS, No. 2575, *post*.

2539. ——.]—HUDSON *v.* HUDSON, No. 2598, *post*.

2540. Adultery & cruelty considered together.]—OTWAY *v.* OTWAY, No. 2523, *ante*.

2541. After revival of condoned adultery—Lesser degree of cruelty required.]—BRAMWELL *v.* BRAMWELL, No. 3205, *post*.

2542. Acts conducing to adultery—With view to separation.]—DILLON *v.* DILLON, No. 4008, *post*.

2543. Causing fictitious execution in wife's house.]—SIMMONS *v.* SIMMONS, No. 2797, *post*.

(*b*) *Single Acts of Cruelty.*

Cumulative effect of acts not cruelty per se.]—*See* Sub-sect. 2, B. (*a*), *ante*.

2544. General rule—Sufficiency.]—(1) One act of cruelty of an inflamed nature & sufficiently gross to excite terror entitles the wife to relief.

(2) It is not necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct.

It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution. Here he attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, & attempted in the most improper & violent manner. It has been said that he was unconscious of the malady; that is for him to show; though it is improbable at present that he should succeed in establishing his ignorance (SIR WILLIAM SCOTT).

(3) It is legal & meritorious to be patient as long as possible. Forbearance does not weaken her [the wife's] title to relief. Mere time is no bar in the case of a woman. Mere flux of time is no condonation (SIR WILLIAM SCOTT).

(4) A husband's attempt to debauch his own women servants is a strong act of cruelty.—POPKIN *v.* POPKIN (1794), 1 Hag. Ecc. 765, n.; 162 E. R. 745.

Annotations:—*As to* (2) **Consd.** Snow *v.* Snow (1842), 2 Notes of Cases, Supp. 1; Browning *v.* Browning, [1911] P. 161. **Apprvd.** Foster *v.* Foster, [1921] P. 438. **Refd.** Cooke *v.* Cooke (1863), 3 Sw. & Tr. 126. *As to* (3) **Consd.** Durant *v.* Durant (1825), 1 Hag. Ecc. 733. *As to* (4) **Consd.** Cousen *v.* Cousen (1865), 4 Sw. & Tr. 164; Russell *v.* Russell, [1897] A. C. 395. *Generally*, **Mentd.** R. *v.* Clarence (1888), 22 Q. B. D. 23.

2545. —— ——.]—HOLDEN *v.* HOLDEN, No. 2563, *post*.

2546. —— ——.]—WESTMEATH *v.* WESTMEATH, No. 3196, *post*.

2547. —— ——.]—(1) Rudeness of language, austerity of temper, & petulance of manners, if they threaten bodily harm, amount to legal cruelty, reasonable apprehension of danger to life, limb, or health being the ground upon which the ct. will grant a separation.

(2) Many acts are not required; one, if of that description which would induce the ct. to expect that it would occur again, & occur with real suffering, will be sufficient to found a sentence.

(3) The wife's conduct need not be free from blame, as her misconduct will not justify the ferocity of the husband.

These, then, are the principles by which the ct. is to be governed in determining the case before ct. I am to consider whether there has been that which is cruelty in the eye of the law, or whether an apprehension of bodily injury exists, arising from the conduct of the husband, for if that apprehension be reasonable, it will be sufficient to entitle the wife to her prayer. I am to remember that if the conduct of the husband has tended to produce bodily injury & harm to the wife, it is not necessary that her conduct should be altogether free from blame; that if to a certain extent she has given some provocation nevertheless, if the return on his part was out of proportion to the offence given, it will be the duty of the ct. to interpose its protection (SIR H. JENNER FUST).

(4) It was pleaded that he [petitioner] refused to go to see his child who was ill at B. . . . & that on one occasion he refused to admit lady D. [his wife]; but these circumstances cannot be considered as partaking of the nature of legal cruelty (SIR H. JENNER FUST.)—DYSART *v.* DYSART (1847), 1 Rob. Eccl. 470; 5 Notes of Cases, 194; 11 Jur. 490; 163 E. R. 1105.

Annotations:—*As to* (1) **Refd.** Curtis *v.* Curtis (1858), 27 L. J. P. & M. 73; Martin *v.* Martin (1860), 29 L. J. P. M. & A. 106; Kelly *v.* Kelly (1870), L. R. 2 P. & D. 59; Beauclerk *v.* Beauclerk, [1891] P. 189; Russell *v.* Russell, [1895] P. 315. *As to* (2) **Refd.** Geils *v.* Geils (1848), 8 Notes of Cases, 97. *Generally*, **Mentd.** H. (falsely called C.) *v.* C. (1860), 29 L. J. P. M. & A. 81.

2548. —— —— ——.]—GEILS *v.* GEILS, No. 2464, *ante*.

four years & upwards been an habitual drunkard, & has habitually been guilty of cruelty towards her" it is not necessary for her to prove that the habitual drunkenness of resp. has continued up to the date of the petition, at all events where the parties have separated previously thereto, or that the cruelty was habitual over a full period of four years; nor if petitioner left resp. in consequence of his cruelty, is it necessary for her to prove any subsequent act of cruelty.—THOMAS *v.* THOMAS, [1916] N. Z. L. R. 676.—**N.Z.**

t. 5.—Matrimonial offences and remedies thereof: Sub-sect. 2, B. (b), (c) & (d).]

2549. —— ——.]—WODEHOUSE *v.* WODEHOUSE, No. 2568, *post.*

2550. Single act of personal violence—Unaccompanied by threat or intentional blow.]—NEELD *v.* NEELD, No. 2529, *ante.*

2551. —— Slight injury—Not repeated.]—(1) A single act of personal violence by the husband towards the wife, not producing any considerable injury to the person & not repeated, is not, though unwarrantable, sufficient to found a decree of judicial separation.

(2) Delay in instituting a suit for judicial separation on the ground of cruelty, is not a bar to the suit, but it is a material fact for the consideration of the ct., as tending to show that there was no serious apprehension of further violence.—SMALLWOOD *v.* SMALLWOOD (1861), 2 Sw. & Tr. 397; 31 L. J. P. M. & A. 3; 5 L. T. 324; 8 Jur. N. S. 63; 10 W. R. 65; 164 E. R. 1050.

2552. — — Slight blow under provocation.]—RUSSELL *v.* RUSSELL, No. 2661, *post.*

2553. —— Apprehension of repetition.]—Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, the wife is entitled to the protection of a matrimonial ct.—REEVES *v.* REEVES (1862), 3 Sw. & Tr. 139; 32 L. J. P. M. & A. 178; 8 L. T. 174; 11 W. R. 111; 164 E. R. 1227.

2554. Abuse accompanied by violence.]—(1) It is said that he [the husband] abused her without cause, seized her arm with great violence, so that by his continued compression of it the arm was bruised, & that she was, in consequence, ill the next day. . . . I think considering that this is a solitary charge of cruelty, & that there is one witness only in support of it, that I should go too far to hold that it is sufficient to found a sentence of separation upon (DR. LUSHINGTON).

(2) If, after he had been warned . . . he had intercourse with his wife & infected her [with a venereal disease] that would have been a deliberate act of cruelty (DR. LUSHINGTON).

(3) If there be medical evidence speaking to the fact of venereal disease, & there be sufficient opportunities for the medical witness to form his opinion, I am bound, unless his evidence be discredited, to believe it (DR. LUSHINGTON).—COLLETT *v.* COLLETT (1838), 1 Curt. 678; 163 E. R. 237.

Annotations:—*As to* (2) **Consd.** Browning *v.* Browning, [1911] P. 161. **Refd.** Morphett *v.* Morphett (1869), L. R. 1 P. & D. 702.

(c) *Conduct injurious to Health or rendering Cohabitation unsafe.*

2555. Health actually impaired—Systematic exertion of force—To compel submission of wife.]—If force, whether physical or moral, is systematically exerted to compel the submission of the wife in such a manner, to such a degree, & during such length of time, as to break down her health & render serious malady imminent, the interference of the law cannot be justly withheld, by any ct. which affects to have charge of the wife's personal safety.

The object of the Matrimonial Ct. in exercising its jurisdiction in decreeing judicial separation for cruelty, is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the ct. must supply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence; but the cts. have never limited their jurisdiction to such cases alone; & a wife does not lose her title to the protection of the ct. merely because she has proved unable to bear with perfect patience & with unfailing propriety of conduct the ill-usage of her husband (*per* CUR.).—KELLY *v.* KELLY (1870), L. R. 2 P. & D. 59; 39 L. J. P. & M. 28; 22 L. T. 308; 18 W. R. 767.

Annotations:—**Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Bethune *v.* Bethune, [1891] P. 205; Walmesley *v.* Walmesley (1893), 1 R. 529; Moss *v.* Moss, [1916] P. 155; Litton *v.* Litton (1921), 40 T. L. R. 272.

2556. Habitual insults & neglect.] BETHUNE *v.* BETHUNE, No. 2618, *post.*

2557. —— False charge of immorality.]—Where a husband left his wife & children without any means for their support & subsequently filed a petition for dissolution of marriage in which he made a false charge against her that he was not the father of her last child, which was born after he left her, all of which conduct had the effect of impairing her health:—*Held:* the ct. might find that this conduct amounted to legal cruelty.—JEAPES *v.* JEAPES (1903), 89 L. T. 74; 19 T. L. R. 451.

Annotation:—**Refd.** Everett *v.* Everett & McCullum, [1919] P. 298.

2558. —— Cumulative effects of acts.]—*Held:* the cumulative effect of resp.'s infidelity, of the indignities to which he had subjected petitioner, the threats in his correspondence, & the suggestion that she should go to another man & be unfaithful, all of which had tended to prejudice her health, constituted a case of cruelty entitling petitioner to a decree of divorce.—COCHRANE *v.* COCHRANE (1910), 27 T. L. R. 107.

2559. —— Constructive cruelty.]—Where a husband's conduct has an injurious effect on his wife's health, his conduct may be held to amount to constructive cruelty.—FENWICK *v.* FENWICK (1922), 38 T. L. R. 603.

2560. Health endangered.]—SARKIES *v.* SARKIES (1884), *Times*, June 28.

PART XIII. SECT. 5, SUB-SECT. 2.—B. (b).

2552 i. *Single act of personal violence—Slight blow under provocation.]*—Where two violent assaults were proved against a husband, together with habitual neglect in his treatment of his wife, evidence of a slight assault by the wife did not disentitle her to a decree for judicial separation, even though she had, under provocation, shown violent & uncontrolled temper in her conduct towards him.—CHAPMAN *v.* CHAPMAN (1896), 14 N. Z. L. R. 552.—**N.Z.**

PART XIII. SECT. 5, SUB-SECT. 2.—B. (c).

2557 i. *Health actually impaired—False charge of immorality.]*—Pleading adultery of the wife as an answer to an action for alimony & unsuccessfully attempting to support the plea by evidence is not in itself a ground for awarding alimony. Alimony might be granted if it were shown that the wife's health was affected by the conduct of the husband in making the charge, that might be cruelty in a legal sense.—WHIMBEY *v.* WHIMBEY (1919), 45 O. L. R. 228; 16 O. W. N. 17; 48 D. L. R. 190.—**CAN.**

q. ——.]—Where a husband, without actually using physical violence, was guilty of such treatment & conduct as caused his wife's health to suffer:—*Held:* such treatment amounted to cruelty.—THOMPSON *v.* THOMPSON (1911), I. L. R. 39 Calc.

2560 i. *Health endangered.]*—To entitle a wife to a divorce *a mensâ et thoro* on the ground of cruelty, there must be acts of violence or ill-treatment by the husband, by which her life or health is endangered.—HUNTER *v.* HUNTER (1863), 5 All. 593.—**CAN.**

2560 ii. ——.]—The question of

2561. —— Persistent course of harsh conduct —Unaccompanied by actual violence.]—A persistent course of harsh, irritating conduct unaccompanied by actual violence but carried to such a point as to endanger petitioner's health, & renewed after the resumption of interrupted cohabitation:—*Held:* even if these later acts did not amount to legal cruelty yet, if taken in connection with his habitually harsh treatment since the resumption of cohabitation they did constitute such a measure of cruelty, when taken in conjunction with the earlier cruelty, as entitled the wife to a decree of judicial separation.—MYTTON *v.* MYTTON (1886), 11 P. D. 141; 57 L. T. 92; 50 J. P. 488; 35 W. R. 368.

Annotations:—**Refd.** Walmesley *v.* Walmesley (1893), 69 L. T. 152; Moss *v.* Moss, [1916] P. 155.

2562. Cohabitation rendered unsafe.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post*.

2563. ——.]—(1) The ct. has had a frequent occasion to observe, that everything is, in legal construction, *sævitia*, which tends to bodily harm & in that manner renders cohabitation unsafe; whenever there is a tendency only to bodily mischief it is a peril from which the wife must be protected; because it is unsafe for her to continue in the discharge of her conjugal duties; & to enforce that obligation upon her might endanger her security & perhaps her life (SIR WILLIAM SCOTT).

(2) The law does not require that there should be many acts. The ct. has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because, if only one such instance of ill-treatment, & that of a slight kind occurs in many years, it may be hoped & presumed that it will not be repeated. But it is only on this supposition that the ct. forbears to interpose its protection, even in the case of a single act, because if one act should be of that description which should induce the ct. to think, that it is likely to occur again, & to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference (SIR WILLIAM SCOTT). —HOLDEN *v.* HOLDEN (1810), 1 Hag. Con. 453; 161 E. R. 614.

Annotations:—**Consd.** Westmeath *v.* Westmeath (1827), 2 Hag. Ecc. Supp. 1; Geils *v.* Geils (1848), 6 Notes of Cases, 97. **Refd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470; Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192; Martin *v.* Martin (1860), 29 L. J. P. M. & A. 106; Kelly *v.* Kelly (1870), L. R. 2. P. & D. 59; Russell *v.* Russell, [1897] A. C. 395.

2564. ——.]—HARRIS *v.* HARRIS, No. 2575, *post*.

2565. ——.]—WESTMEATH *v.* WESTMEATH, No. [illegible], *post*.

2566. ——.]—CURTIS *v.* CURTIS, No. 4050, *post*.

2567. ——.]—KELLY *v.* KELLY, No. 2555, *ante*.

2568. ——.]—A wife, in order to support an allegation of cruelty against her husband where there has been no actual injury to her health, must show such conduct in the past that there is a reasonable probability that it will be continued, & if continued will be injurious to her health.

Although it is not necessary that there should be several acts of cruelty, yet, if there are only one or two, they must be of such a nature as to induce the ct. to conclude that, if the cohabitation continued, there would be a course of conduct on the part of the husband which would be injurious to the health of the wife (COTTON, L.J.). —WODEHOUSE *v.* WODEHOUSE (1885), 1 T. L. R. 528, C. A.

2569. ——.]—The same evidence which since Matrimonial Causes Act, 1857 (c. 35), enabled the Divorce Ct. to pronounce a decree for dissolution of marriage considered by the House of Lords sufficient ground for passing a Divorce Bill relating to Ireland, where that Act did not apply.

I think that the conduct of W. to his wife was such as not only to inflict bodily injury upon her upon one occasion, but also to put her in reasonable fear on many occasions; & that his behaviour to one of the children in her presence, & his threats to her on one or two occasions, & his conduct to the children when she was in a delicate state of health were such as to reasonably cause fear on her part so that she could not continue to cohabit with him with any reasonable prospect of maintaining her health & well-being (LORD HERSCHELL, C.). —WESTROPP'S DIVORCE BILL (1886), 11 App. Cas. 294; 2 T. L. R. 628, H. L.

Annotation:—**Refd.** Gifford's Divorce Bill (1886), 12 App. Cas. 361.

(*d*) *Physical Violence.*

2570. Single act of violence—Followed by minor acts of violence & cruelty.]—A wife, married in 1842, discovered in May, 1861, an adulterous intercourse of her husband, left his house, & petitioned for dissolution by reason of adultery & cruelty. It was proved that her husband struck her in the face in 1852; it did not appear that since that he had intentionally struck her; but he had, while drunk, cut her hand, & in 1858 had cut her finger by throwing a jug of water at her. There was also evidence of his having frequently thrown cold water over her, & of several cruelty is one of fact, & is, whether the husband has so treated his wife as to inflict boldily injury upon her, or cause reasonable apprehension of suffering to her, physically or mentally.—TIMMS *v.* TIMMS (1910), 13 W. L. R. 636; 15 B. C. R. 39.—**CAN.**

2560 iii. ——.]—Where the chief matter of cruelty alleged was that deft. insisted on sexual intercourse with pltf. during periods of menstruation, & there was no evidence as to the effect of this upon her physical or mental health:—*Held:* not legal cruelty.—BAGSHAW *v.* BAGSHAW (1920), 48 O. L. R. 52; 54 D. L. R. 634; 18 O. W. N. 334.—**CAN.**

2560 iv. ——.]—Legal cruelty to support a claim for alimony must be such as to cause danger to life, limb or health present or future.—TORSELL *v.* TORSELL, [1921] 1 W. W. R. 905; 16 Alta. L. R. 200; 58 D. L. R. 575.—**CAN.**

2560 v. ——.]—The evidence not showing that the wife's health had been injuriously affected or that there was a reasonable apprehension of any such injury in the future, legal cruelty had not been proved.—NEWTON *v.* NEWTON, [1924] 2 W. W. R. 840; 3 D. L. R. 887; 34 Man. L. R. 190.—**CAN.**

2560 vi. ——.]—Cruelty in the legal sense need not necessarily be physical violence. A course of conduct which if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.—KONDAL, ETC. *v.* RANGANAYAKI AMMAL (1923), I. L. R. 46 Mad. 791.—**IND.**

2560 vii. ——.]—If the wife raise a defence of cruelty, she must prove violence of such a character as to endanger or cause a reasonable apprehension of danger to her personal health or safety.—MOONSHEE BUZLOOR RUHEEM *v.* SHUMSOONNISSA BEGUM & JODON, BOSE *v.* SHUMSOONNISSA BEGUM (1867), 8 W. R. 3; 11 Moo. Ind. App. 551.—**IND.**

2560 viii. ——.]—To constitute legal cruelty there must be danger to life, limbs, or health, bodily or mental, or a reasonable apprehension of it.—TOPP *v.* TOPP, [1920] N. Z. L. R. 442.—**N.Z.**

2561 i. —— *Persistent course of harsh conduct — Unaccompanied by actual violence.*]—Legal cruelty does not necessarily depend on physical acts or threats of violence. Where such course of harsh conduct on the husband's part towards his wife, a woman of delicate constitution, created such mental distress as was sufficient to & did impair her health:—*Held:* there was such matrimonial cruelty shown as justified the wife leaving her husband, & entitled her to a judgment for alimony. —LOVELL *v.* LOVELL (1906), 8 O. W. R. 517; 13 O. L. R. 569.—**CAN.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 2, B. (d), (e), (f) & (g).]

times having spit in her face:—*Held:* she was entitled to a dissolution of the marriage.—WADDELL *v.* WADDELL (1862), 2 Sw. & Tr. 584; 31 L. J. P. M. & A. 123; 6 L. T. 552; 8 Jur. N. S. 623; 164 E. R. 1124.

———.]—*See* Sub-sect. 2, B. (*b*), *ante*.

2571. Husband's right of reasonable castigation.]—CLOBORN *v.* CLOBORN (1630), Het. 149; 124 E. R. 414.

Annotations:—**Consd.** Saunders *v.* Saunders (1847), 1 Rob. Eccl. 549; Russell *v.* Russell (1896), 61 J. P. 771; Russell *v.* Russell, [1897] A. C. 395.

2572. Unintentional violence in assertion of marital rights.]—OLIVER *v.* OLIVER, No. 2574, *post*.

2573. Personal violence.]—KELLY *v.* KELLY, No. 2555, *ante*.

Accompanied by abuse.]—*See* Sub-sect. 2, B. (*f*), *post*.

Accompanied by threats.]—*See* Sub-sect. 2, B. (*e*), *post*.

Accompanied by drunkenness.]—*See* Sub-sect. 2, B. (*g*), *post*.

Accompanied by neglect & indignity.]—*See* Sub-sect. 2, B. (*h*), *post*.

Accompanied by groundless charge of immorality.]—*See* Sub-sect. 2, B. (*i*), *post*.

(*e*) *Threats with or without Violence.*

2574. General rule.]—(1) Of words, it is sufficient to say, that, if they are words of mere present irritation, however reproachful, they will not enable this ct. to pronounce a sentence of separation (SIR WILLIAM SCOTT).

(2) Words of menace, importing the actual danger of bodily harm, will justify the interposition of the ct.; as the law ought not to wait till the mischief is actually done. But the most innocent & deserving woman will sue, in vain, for its interference for words of mere insult, however galling; & still less will that interference be given, if the wife has taken upon herself to avenge her own wrongs of that kind, & to maintain a contest of retaliation (SIR WILLIAM SCOTT).

(3) It must not be said, that a slight inattention or carelessness on the part of the husband, though it may accidentally, & contrary to his intention, produce mischief, will warrant the ct. to pronounce a sentence of separation by reason of cruelty. Affection may exist, though accidents may happen in petty quarrels . . . A husband is not to be deprived of his marital rights because a wife pertinaciously resists them, &, in the course of that resistance, encounters accidental injuries which never were meant to be inflicted (SIR WILLIAM SCOTT).—OLIVER *v.* OLIVER (1801), 1 Hag. Con. 361; 161 E. R. 581.

Annotations:—**Refd.** Neeld *v.* Neeld (1831), 4 Hag. Ecc. 263; Dysart *v.* Dysart (1847), 5 Notes of Cases, 194; Gale *v.* Gale (1852), 2 Rob. Eccl. 421; Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192; *Re* Curtis (1859), 28 L. J. Ch. 458; Russell *v.* Russell, [1895] P. 315.

2575. ———.]—The ct. is not in the habit of interfering in ordinary domestic quarrels; & there may be much unhappiness from unkind treatment, or violent & abusive language, in which parties can obtain no relief in this form; but must be left to correct the intemperance of which they complain, by such private means as they can employ for the purpose. There must be something which renders cohabitation unsafe or is likely to be attended with injury to the person, or to the health of the party in order to sustain an application to this ct.

Words of menace may partake of either of these characters; they may be merely the language of passion, or they may be the expression of determined malignity, which if they are likely to be carried into effect, may warrant the ct. to interpose, & prevent the actual mischief which is thus threatened. Where such violence of language is accompanied with blows, it is a more aggravated case, & the mischief is actually inflicted. It is impossible for the ct. to say, there has not been that species of ill-treatment in the present case (SIR WILLIAM SCOTT).—HARRIS *v.* HARRIS (1813), 2 Hag. Con. 148; 2 Phillim. 111; 161 E. R. 697.

Annotations:—**Refd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470; Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192; Kelly *v.* Kelly (1870), L. R. 2 P. & D. 59; Russell *v.* Russell, [1897] A. C. 395.

2576. ———.]—GEILS *v.* GEILS, No. 2464, *ante*.

2577. Without personal violence.]—Cruelty may consist in menaces without actual personal violence.—HULME *v.* HULME (1823), 2 Add. 27; 162 E. R. 206.

2578. —— Necessity for reasonable probability of violence.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post*.

2579. —— ——.]—Divorce, by reason of cruelty, inflicted by the wife on the husband, sustained.

The persons of both parties, however, must be protected from violence . . . words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity, & threaten pain. It will be the duty of the ct. to say that the suffering party is not obliged to continue in cohabitation under such treatment. . . . This evidence most clearly establishes, that the wife is not mistress of her own passions; & the ct. would be wanting in due attention to the safety of the injured party in this case if it did not pronounce for a separation as absolutely necessary for that purpose (SIR WILLIAM SCOTT).—KIRKMAN *v.* KIRKMAN (1807), 1 Hag. Con. 409; 161 E. R. 598.

Annotations:—**Consd.** Furlonger *v.* Furlonger (1847), 5 Notes of Cases, 422; White *v.* White (1859), 1 Sw. & Tr. 591. **Mentd.** Goodden *v.* Goodden, [1892] P. 1.

2580. ——— ———.]—NEELD *v.* NEELD, No. 2529, *ante*.

2581. Previous violence condoned.]—BOSTOCK *v.* BOSTOCK, No. 3260, *post*.

2582. ——— ——— **Petitioner under no real apprehension.**]—BIRCH *v.* BIRCH, No. 2608, *post*.

2583. ——— **Subsequent violent conduct.**]—Where a husband threatened to cut his wife's throat, but did not accompany the threat with any act of violence, & subsequently, after cohabitation had ceased, broke into the house in which his wife was living, & kicked through her bedroom door:—*Held:* these acts did not amount to legal cruelty.—BROWN *v.* BROWN (1866), 14 W. R. 318.

——— **As part of course of conduct.**]—*See* No. 2558, *ante*.

2584. Accompanied by violence.]—HARRIS *v.* HARRIS, No. 2575, *ante*.

2585. ———.]—BARRETT *v.* BARRETT (1903), 20 T. L. R. 73.

PART XIII. SECT. 5, SUB-SECT. 2.—B. (d).

2573 i. *Personal violence.*]—Where a man was constantly making charges of adultery against his wife, which on the evidence apparently had no foundation, & the outcome of one such charge was an altercation in which the wife received certain bodily injuries, in consequence of which she left her home:—*Held:* the wife did not leave her home "without just cause," & she was justified in staying away until her husband came to a better mind.—NEWELL *v.* NEWELL (1909), 28 N. Z. L. R. 857.—**N.Z.**

(f) Abuse with or without Violence.

2586. Mere abuse—No ground for interference by court.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post.*

2587. ——— —.] OLIVER *v.* OLIVER, No. 2574, *ante.*

2588. ———.]—EVANS *v.* EVANS, No. 3198, *post.*

2589. Abusive language by a husband to a wife is most undoubtedly highly improper, but the ct. cannot take upon itself to protect [the wife] by pronouncing that she is entitled, on such proof, to a sentence of separation on the ground of cruelty (SIR H. JENNER FUST).—GREENWAY *v.* GREENWAY (1848), 6 Notes of Cases, 221.

2590. Abuse accompanied by violence.]—CLOBORN *v.* CLOBORN (1630), Het. 149; 124 E. R. 414.

Annotations:—**Consd.** Saunders *v.* Saunders (1847), 1 Rob. Eccl. 549; Russell *v.* Russell (1876), 61 J. P. 771; Russell *v.* Russell, [1897] A. C. 395.

2591. ———.]—COLLETT *v.* COLLETT, No. 2554, *ante.*

2592. ———.]—Spitting in the face of a wife, together with insulting words & acts of violence:—*Held:* to be legal cruelty, so as to entitle the wife to a separation.—SAUNDERS *v.* SAUNDERS (1847), 1 Rob. Eccl. 549; 5 Notes of Cases, 408; 9 L. T. O. S. 358, 496; 11 Jur. 738; 163 E. R. 1131.

Annotations:—**Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Smallwood *v.* Smallwood (1861), 2 Sw. & Tr. 397; Waddell *v.* Waddell (1862), 2 Sw. & Tr. 581; Sant *v.* Sant (1874), L. R. 5 P. C. 512. **Mentd.** Saunders *v.* Saunders (1858), 6 W. R. 328.

2593. ——.]—Cruelty established by proof of habitually insulting conduct & violent temper, connected with an adulterous intercourse carried on by the husband, & leading to frequent quarrels, & occasionally to slight acts of violence, & causing mental & bodily suffering.—KNIGHT *v.* KNIGHT (1865), 4 Sw. & Tr. 103; 34 L. J. P. M. & A. 112; 13 L. T. 252; 11 Jur. N. S. 568; 164 E. R. 1455.

2594. Abuse accompanied by threats of personal violence.]—ROBINSON *v.* ROBINSON (1728), 2 Lee, 593; cited in Poynter on Marriage, 2nd ed., p. 209, n.; 161 E. R. 451.

Annotations:—**Refd.** Otway *v.* Otway (1812), 2 Phillim. 95; Geils *v.* Geils (1848), 6 Notes of Cases, 97.

2595. —— **Petitioner under no real apprehension.**]—BIRCH *v.* BIRCH, No. 2608, *post.*

2596. —— **Petitioner put in apprehension.**]—SARKIES *v.* SARKIES (1884), *Times*, June 28.

(g) Drunkenness.

2597. Not cruelty per se.]—CHESNUTT *v.* CHESNUTT, No. 2534, *ante.*

2598. ——.]—The wife petitioned for judicial separation, alleging cruelty & adultery, which the husband's answer traversed. The cause came on before the ct. itself, & on objection taken to the admissibility of petitioner's evidence as to cruelty, the ct. ruled that on the issues as they stood it was inadmissible, but struck out the issue of adultery as an immaterial issue, counsel for the husband not objecting.

The ct. will not grant a decree of judicial separation to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort caused by drunkenness.—HUDSON *v.* HUDSON (1863), 3 Sw. & Tr. 314; 33 L. J. P. M. & A. 5; 9 L. T. 579; 9 Jur. N. S. 1302; 12 W. R. 216, 354; 164 E. R. 1296.

Annotation:—**Refd.** Browning *v.* Browning, [1911] P. 161.

2599. ——.]—(1) Habitual drunkenness, & a series of annoyances, & extraordinary conduct on the part of the husband, do not constitute legal cruelty. (2) The communication of a venereal disorder to the wife must have been wilful on the part of the husband to establish it as cruelty. But that wilfulness may be presumed from the surrounding circumstances, by the condition of the husband, & by the probabilities of the case, after such explanations as he may offer. *Primâ facie*, the husband's state of health is to be presumed to be within his own knowledge; but he may rebut this by his own oath, when admissible as a witness, or by other proof.—BROWN *v.* BROWN (1865), L. R. 1 P. & D. 46; 35 L. J. P. & M. 13; 13 L. T. 645; 11 Jur. N. S. 1027; 14 W. R. 149.

Annotations:—*As to* (2) **Folld.** Browning *v.* Browning, [1911] P. 161. **Refd.** R. *v.* Clarence (1888), 22 Q. B. D. 23.

2600. As part of charge—Accompanied by violence.]—EVANS *v.* EVANS, No. 3198, *post.*

2601. ———.]—CHESNUTT *v.* CHESNUTT (1851), 1 Ecc. & Ad. 196; 23 L. T. O. S. 130; 164 E. R. 114; *sub nom.* C—— *v.* C——, 18 Jur. 360.

Annotation:—**Consd.** Browning *v.* Browning, [1911] P. 161.

2602. ———.]—A husband who had for six years been addicted to intemperance, & had suffered from delirium tremens, had on occasions inflicted bodily injury on his wife, & had by his general course of conduct towards her materially injured her health:—*Held:* the ct. being satisfied from the whole course of the evidence, that the wife could not return to cohabitation without incurring great peril of a renewal of the bodily injuries inflicted upon her, she was entitled to a judicial separation.—MARSH *v.* MARSH (1858), 1 Sw. & Tr. 312; 28 L. J. P. & M. 13; 32 L. T. O. S. 197; 5 Jur. N. S. 46; 7 W. R. 129; 164 E. R. 744.

Annotations:—**Refd.** Boynton *v.* Boynton (1861), 2 Sw. & Tr. 275; Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39; Thomasset *v.* Thomasset, [1894] P. 295.

2603. ———.]—On the question of cruelty, the ct. will consider the liability of danger which the wife would incur by returning to cohabitation with a husband subject to uncontrollable fits of drunkenness, such husband having used a certain amount of violence to the wife while under the influence of drink; & particular acts of violence will be viewed in connection with the cumulative misconduct of the married life.—POWER *v.* POWER (Ct. of Sess.) 1104 22 Sc. Jur. 509.—**SCOT.**

PART XIII. SECT. 5, SUB-SECT. 2.—B. (f).

2586 i. *Mere abuse—No ground for interference by court.*]—Deft.'s conduct towards pltf. was often morose & unkind, & he swore at her, but the only act of violence charged since settlement of a previous action in 1892 was one in 1904 which had been provoked by pltf.:—*Held:* pltf. had not made out a case of legal cruelty, entitling her to live apart from her husband.—WILLEY *v.* WILLEY (1908), 18 Man. L. R. 298; 9 W. L. R. 166.—**CAN.**

2586 ii. ——.]—The fact that on one occasion a husband came home drunk & called his wife terrible names before people does not constitute legal cruelty sufficient together with acts of adultery to entitle her to divorce, his adultery alone not entitling her to divorce.—B. *v.* B., [1919] 3 W. W. R. 894.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 2.—B.

2597 i. *Not cruelty per se.*]—Habitual intoxication on the part of the husband, not accompanied with acts of personal violence, or other cruelty, will not warrant a decree of separation.—FULTON *v.* FULTON (1850), 12 Dunl. (Ct. of Sess.) 1104 22 Sc. Jur. 509.—**SCOT.**

2600 i. *As part of charge—Accompanied by violence.*]—In an action of separation at the instance of the wife against her husband:—*Held:* to entitle the pursuer to a decree of separation *a mensâ et thoro* it was not necessary for her to instruct personal injury to herself but proof of the husband's habitual intoxication & violent conduct inducing a reasonable fear of violence to the pursuer was enough.—M'GAAN *v.* M'GAAN (1880), 8 R. (Ct. of Sess.) 279; 18 Sc. L. R. 155.—**SCOT.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 2, B. (g), (h), (i) & (j).]

(1865), 4 Sw. & Tr. 173; 34 L. J. P. M. & A. 137; 12 L. T. 824; 11 Jur. N. S. 800; 13 W. R. 1113; 164 E. R. 1483.

2604. —— Accompanied by communication of skin disease—& use of blasphemous language.]—CHESNUTT *v.* CHESNUTT, No. 2534, *ante*.

2605. —— Accompanied by threats.]—MAXWELL'S DIVORCE BILL, [1911] W. N. 220, H. L.

2606. —— Knowledge of habits before marriage.]—(1) If a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her as a result of his continued drunken habits.

(2) In a case where a wife charges her husband with cruelty, & complains (*inter alia*) that he has made against her in the presence of other persons charges of pre-marital misconduct, which he stated to her he had discovered some time after the marriage, although documents may be admitted as tending to prove the *bona fides* of the husband in making the charges, yet, neither oral evidence nor documents are admissible in proof of the facts alleged by the husband against the wife, unless he himself be called to state upon oath that he believed & acted upon the reports which reached him as to his wife's former conduct.—WALKER *v.* WALKER (1898), 77 L. T. 715.

(h) Subjection to Indignity, Neglect, Indifference, Aversion from Society, etc.

2607. Course of systematic neglect or subjection to indignity—Whether amounting to legal cruelty—No bodily injury actual or menaced.]—EVANS *v.* EVANS, No. 2522, *ante*.

2608. —— —— ——.] A husband constantly abused & swore at his wife, & refused to provide delicacies ordered by her doctor. He also used threats towards her, & on several occasions wantonly beat her child in her presence:—*Held:* such conduct did not constitute legal cruelty, it not appearing that the wife had suffered in health in consequence of it, or been apprehensive for her personal safety. *Semble:* the wanton ill-treatment of a child in the mother's presence & for the purpose of giving her pain, would, if carried to such an extent as to affect the mother's health, constitute legal cruelty.—BIRCH *v.* BIRCH (1873), 42 L. J. P. & M. 23; 28 L. T. 540; 21 W. R. 463.

Annotation:—**Consd.** Russell *v.* Russell, [1895] P. 315.

2609. —— —— ——.]—EVANS *v.* EVANS, No. 3198, *post*.

2610. —— —— —— —.]—PATERSON *v.* PATERSON, No. 2533, *ante*.

2611. —— —— —— —.]—Indifference, neglect, aversion to the wife's society, cessation of matrimonial intercourse, without personal violence or words of menace, do not amount to legal cruelty, though the husband is carrying on an adulterous intercourse with a servant under the same roof where he is residing with his wife.—COUSEN *v.* COUSEN (1865), 4 Sw. & Tr. 164; 34 L. J. P. M. & A. 139; 12 L. T. 712; 11 Jur. N. S. 656; 164 E. R. 1479.

2612. —— —— Accompanied by some actual violence.]—On the wife's petition for judicial separation by reason of her husband's cruelty towards her, certain acts of violence on his part being admitted which took place in disputes between the parties arising at least in part out of the wife's jealousy of a maid servant, the ct. took into consideration the position in which the wife was placed in the family by reason of any authority or control exercised over her by the servants by the direction of the husband, & the state of the wife's feelings arising from reasonable suspicion of undue familiarity between the husband & a maid servant.—ANTHONY *v.* ANTHONY (1860), 1 Sw. & Tr. 594; 1 L. T. 413; 164 E. R. 875.

2613. —— —— ——.]—Where the evidence of actual violence used by the husband towards the wife is not sufficient of itself to warrant a decree on the ground of cruelty, the ct. will take into consideration his general conduct towards her, &, if this is of a character tending to degrade the wife & subjecting her to a course of annoyance & indignity injurious to her health, will feel itself at liberty to pronounce the cruelty proved.—SWATMAN *v.* SWATMAN (1865), 4 Sw. & Tr. 135; 164 E. R. 1467.

2614. —— —— Where acts of physical violence condoned.]—Upon a petition by the wife for dissolution of her marriage on the grounds of cruelty, & adultery, where the only acts of physical violence had long since been condoned:—*Held:* wilfully depriving the wife of her proper position in the household, neglecting her, degrading her to the level of a servant, & compelling her to do the menial work of the house & to take her meals & to sleep apart from the rest of the household, was, in itself, cruelty which would entitled the wife to relief; &, although the wife had lived apart from her husband under a deed of separation, when coupled with adultery on the part of the husband, entitled the wife to have her marriage dissolved.—AUBOURG *v.* AUBOURG (1895), 72 L. T. 295.

2615. —— —— Calculated to injure health.]—SARKIES *v.* SARKIES (1884), *Times*, June 28.

2616. —— —— ——.]—LE COUTEUR *v.* LE COUTEUR (1896), *Times*, Mar. 2.

2617. —— —— Health actually impaired.]—KELLY *v.* KELLY, No. 2555, *ante*.

2618. —— —— ——.]—In an undefended suit by the wife for divorce on the ground of adultery coupled with cruelty, the facts relied on at the hearing to establish the charge of cruelty consisted of a long course of systematic neglect & insult. The husband refused to allow his wife to occupy the same room with him or to go out with him. He was frequently absent, & refused to give any account of his absences. He told her he hated her presence, frequently used violent language, & threatened to leave her if she did not do as he wished. Her health rapidly failed during her married life, & in the opinion of her medical attendants her husband's conduct & the mental distress & anxiety caused by her marital relations generally, accounted fully for the serious condition in which they found her:—*Held:* this conduct on the part of the husband constituted legal cruelty, & a decree *nisi* granted.—BETHUNE *v.* BETHUNE, [1891] P. 205; 60 L. J. P. 18; 63 L. T. 259.

Annotations:—**Folld.** Walmesley *v.* Walmesley (1893), 69 L. T. 152. **Refd.** Beauclerk *v.* Beauclerk, [1891] P. 189; Jeapes *v.* Jeapes (1903), 89 L. T. 74; Moss *v.* Moss, [1916] P. 155.

2619. —— —— ——.]—Petitioner & resp. were married in 1889, both being in a good position. There was no allegation by the wife that her husband had ever treated her with physical violence, nor even that quarrels or angry words had ever arisen between them. The cruelty alleged consisted solely of neglect, coldness, & insults, from which petitioner's health had been affected to such an extent that it was said it would be dangerous for her to continue to live with resp. Within a few days of the marriage the latter refused to occupy the same bedroom with her,

never went anywhere with her, & ceased to speak to her unless an answer became absolutely necessary. When their child was born he took no notice of it, & refused to allow it to be christened after him. He declined to take things from his wife's hands, &, in one house where they were stopping, rather than eat his meals with her, he took them in the kitchen. On one occasion he said to a lady, in his wife's presence, that the best way to treat a wife was to tie her to a bedpost & keep her there. She suffered great mental agony from his treatment, which told upon her appearance, & at length her health quite gave way. A doctor who attended her was of opinion that, if subjected to a longer continuation of this course of ill-treatment, she would develop melancholia. In 1892 she first learnt of resp.'s relations with another woman, & eventually instituted these proceedings:—*Held:* resp. had been guilty of such cruelty as, coupled with the adultery, entitled the wife to have the marriage dissolved.—WALMESLEY *v.* WALMESLEY (1893), 69, L. T. 152; 1 R. 529.

2620. —— —— ——.]—In a wife's suit for dissolution of marriage on the ground of the husband's cruelty & adultery the ct. held that cruelty had been established, as the husband pursued a course of conduct with the intention of making his wife disgusted with him & it was well calculated to have that effect & had the natural effect of seriously affecting the wife's health.—LITTON *v.* LITTON (1924), 40 T. L. R. 272.

2621. Living with successive mistresses—Telling wife of infidelities & preferences for other women.]—BEAUCLERK *v.* BEAUCLERK, No. 3326, *post*.

2622. Wife treated as a prostitute in the street.]—Where a husband assaulted his wife in the street in such a manner as to induce a passer by to believe her to be & to treat her as a prostitute:—*Held:* although resp. had inflicted no personal injury upon her, yet that he was guilty of cruelty. MILNER *v.* MILNER (1861), 4 Sw. & Tr. 240; 31 L. J. P. M. & A. 159: 164 E. R. 1508.

Annotations:—**Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Sant *v.* Sant (1874), L. R. 5 P. C. 542.

(i) Groundless Charges of Immorality.

2623. Whether amounting to cruelty.]—DURANT *v.* DURANT, No. 3171, *post*.

2624. ——.]—A charge of incest, pleaded, in effect, to be falsely made, coupled with substantial acts of violence, is pleadable in a suit for divorce by reason of cruelty.

The charge of having committed incest is not *per se* sufficient to constitute legal cruelty; but, coupled with other averments of a substantial character, I think . . . that charge may form a part of the libel (SIR JOHN DODSON).—GALE *v.* GALE (1852), 2 Rob. Eccl. 421; 165 E. R. 1366.

Annotation:—**Consd.** Russell *v.* Russell, [1897] A. C. 395.

See, also, No. 2557, *ante*.

2625. Accompanied by violence.]—DURANT *v.* DURANT, No. 3171, *post*.

2626. ——.]—GALE *v.* GALE, No. 2624, *ante*.

(j) Communication of Disease.

2627. Venereal disease—Whether proof of wilful & reckless communication essential.]—POPKIN *v.* POPKIN, No. 2544, *ante*.

2628. —— ——.]—COLLETT *v.* COLLETT, No. 2554, *ante*.

2629. ——.]—JONES *v.* JONES (1860), Sea. & Sm. 138.

Annotations:—**Consd.** Boardman *v.* Boardman (1866), L. R. 1 P. & D. 233; Browning *v.* Browning, [1911] P. 161.

2630. —— ——.]—N—— *v.* N—— (1862), No. 2830, *post*.

2631. —— ——.]—(1) If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, & thereby communicates the disease to her, he is guilty of cruelty.

(2) Petitioner & resp. in a suit for dissolution of marriage, who are examined under sect. 6 of Matrimonial Causes Act, 1859 (c. 61), upon an issue of cruelty or desertion, may be cross-examined upon issues of their own adultery, & of each other's adultery. The Queen's Proctor intervening, & alleging collusion & the adultery of petitioner, is entitled to cross-examine all the witnesses called by petitioner & resp. When resp. has been examined under the above sect. the Queen's Proctor may, therefore, cross-examine him for the purpose of proving petitioner's adultery.—BOARDMAN *v.* BOARDMAN (1866), L. R. 1 P. & D. 233; 14 W. R. 1024.

Annotations:—*As to* (1) **Consd.** Browning *v.* Browning, [1911] P. 161. **Refd.** R. *v.* Clarence (1888), 22 Q. B. D. 23. *As to* (2) **Refd.** Sottomayer *v.* De Barros (1879), 5 P. D. 94.

2632. —— —— **Presumption of wilfulness—Rebuttal of presumption.**]—BROWN *v.* BROWN, No. 2599, *ante*.

2633. —— —— **Whether proof of mere communication sufficient—No evidence that husband infected.**]—(1) In support of a charge of cruelty, evidence was given that the wife was infected with disease & that she had not been unchaste before marriage or unfaithful after it; but there was no evidence beyond the presumption arising from the state of the wife, that the husband had ever suffered from the disease. The husband positively denied that he ever was diseased. The jury found that the husband was guilty of cruelty:—*Held:* there was not sufficient evidence to support the verdict, & a rule was made absolute for a new trial on payment of costs.

The mere fact that a husband has communicated disease to his wife, whatever may be thought of it in other points of view, is not sufficient to constitute legal cruelty. It is abundantly clear, that for this purpose the act must be a wilful one (*per* CUR.).

(2) The case or cases in the spiritual cts. which show or tend to show that a husband might disease his wife over & over & yet compel her to return, unless she could establish affirmatively that he not only was diseased & diseased her, but knew of his state when he did so, could only be tolerable under a system which excluded the evidence of the husband. Now that he can be heard if he thinks proper in explanation, those cases are only valuable

PART XIII. SECT. 5, SUB-SECT. 2.—B. (i).

2623 i. *Whether amounting to cruelty.*]—Pltf. left deft. because he made an unfounded charge of adultery against her:—*Held:* deft.'s conduct in making the unfounded charge, though reprehensible, did not amount in law to cruelty.—MOON *v.* MOON (1913), W. L. R. 153; 6 D. L. R. 46; 6 Sask. L. R. 41; 2 W. W. R. 1071. **CAN.**

2623 ii. ——.]—A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, & without reasonable or probable cause, is not an act amounting at law to cruelty.—AUGUSTIN *v.* AUGUSTIN (1882), I. L. R. 4 All. 374.—**IND.**

PART XIII. SECT. 5, SUB-SECT. 2.—B. (j).

2627 i. *Venereal disease — Whether proof of wilful & reckless communication essential.*]—The communication of venereal disease by a husband to his wife is cruelty entitling the wife to separation if he has acted with reckless indifference to his wife's health. He need not be shown to have communicated it wilfully & knowingly.—STRAIN *v.* STRAIN (1885), 13 R. (Ct. of Sess.) 132; 23 Sc. L. R. 90.—**SCOT.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 2, B. (j), (k) & (l), C. & D. (a).]

as warnings (WILLES, J.).—MORPHETT *v.* MORPHETT (1869), L. R. 1 P. & D. 702; 38 L. J. P. & M. 23; 19 L. T. 801; 17 W. R. 471.

Annotations:—As to (1) **N.F.** Browning *v.* Browning, [1911] P. 161. *As to* (2) **Follid.** Browning *v.* Browning, [1911] P. 161.

2634. —— —— —— Onus of proof.]—In order to establish a charge of legal cruelty against a husband for communicating a venereal disease to the wife it is not necessary to allege or prove that he knowingly, wilfully or recklessly communicated the disease: it is sufficient for the wife to allege & to prove that she was infected by the husband with a venereal disease; & the burden is upon him to prove that the disease was communicated in such circumstances as not to amount to legal cruelty.—BROWNING *v.* BROWNING, [1911] P. 161; 80 L. J. P. 74; 104 L. T. 750; 27 T. L. R. 404; *sub nom.* B. *v.* B., 55 Sol. Jo. 462.

2635. —— Exposure to risk of communication—Onus of proof as to knowledge.]—POPKIN *v.* POPKIN, No. 2544, *ante*.

2636. —— —— No actual communication.]—Charge of cruelty in wilfully marrying while infected with the venereal disease, & communicating the same, not sustained:—*Held:* the wilful risk without the actual communication of the disease, is not legal cruelty.—CIOCCI *v.* CIOCCI (1854), 1 Ecc. & Ad. 121; 18 Jur. 194; 164 E. R. 70.

Annotations:—**Consd.** Boardman *v.* Boardman (1866), L. R. 1 P. & D. 233; Browning *v.* Browning, [1911] P. 161. **Overd.** Foster *v.* Foster, [1921] P. 438. **Refd.** Jones *v.* Jones (1860), Sea. & Sm. 138.

2637. —— —— ——.]—A successful attempt by a husband, who knows that he is suffering from venereal disease, to have connection, against her will, with his wife, who also knows that he is so suffering, may, in some circumstances, be legal cruelty, although in fact the disease is not communicated.

I think that the case must go down [to the lower ct.] to be investigated, because in my opinion the actual facts of the matter need more investigation than they have received (LORD STERNDALE, M.R.).—FOSTER *v.* FOSTER, [1921] P. 438; 90 L. J. P. 363; 126 L. T. 50; 37 T. L. R. 942; 66 Sol. Jo. (W. R.) 1, C. A.

2638. —— Evidence of communication—Whether admitted under general charge of cruelty.]—A petition alleged that resp. had, by neglecting petitioner, by violently pushing her, by striking her with his fist, by depriving her of food, & otherwise, treated her with great cruelty. There was no appearance. The ct. refused to admit evidence under this allegation, in support of the charge of cruelty, that resp. had infected petitioner with venereal disease.

I quite agree that words such as these are inserted in petitions for the purpose of allowing a certain flexibility in the admission of evidence as to small details which cannot be expected to be found in the petition & cannot reasonably be supposed to have been present to the mind of the person who drew the petition, at the time when it was prepared. But this is a plain & distinct act of cruelty, which must have been known to petitioner when the petition was drawn. If this was admissible, any evidence would be admissible under a general charge (*per* CUR.).—SQUIRES *v.* SQUIRES (1864), 3 Sw. & Tr. 541; 33 L. J. P. M. & A. 172; 10 Jur. N. S. 756; 12 W. R. 1028; 164 E. R. 1385.

2639. Skin disease.]—CHESNUTT *v.* CHESNUTT No. 2534, *ante*.

(k) Cruelty to or Neglect of Children.

2640. Refusal to see sick child.]—DYSART *v.* DYSART, No. 2547, *ante*.

2641. Cruelty in mother's presence.]—In a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged; all pleadings should be as short as is consistent with alleging a legal ground for the prayer. Resp. may apply for further specification if necessary. Acts of cruelty towards children in the presence of the mother may be alleged as cruelty towards her; but the ct. will not receive evidence as to misconduct to children generally for the purposes of a future application for their permanent custody in a suit for separation, etc.; for, until it is in a position to decree the separation, it has no jurisdiction as to permanent custody of children. If necessary, the misconduct towards children may be proved after the main petition has been heard.—SUGGATE *v.* SUGGATE (1859), 1 Sw. & Tr. 489; 28 L. J. P. & M. 7; 32 L. T. O. S. 285; 23 J. P. 121; 5 Jur. N. S. 127; 7 W. R. 296; 164 E. R. 827.

Annotation:—**Refd.** Sant Francesco *v.* Sant Generoso (1874), 43 L. J. P. C. 73.

2642. ——.]—BIRCH *v.* BIRCH, No. 2608, *ante*.

(l) Other Cases.

2643. Spitting on wife.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post*.

2644. Attempts to debauch servants.]—POPKIN *v.* POPKIN, No. 2544, *ante*.

2645. Prohibition of intercourse with relatives.]—NEELD *v.* NEELD, No. 2529, *ante*.

2646. Blasphemy.]—CHESNUTT *v.* CHESNUTT, No. 2534, *ante*.

2647. Nervous shock by reason of husband's conviction—Under Criminal Law Amendment Act, 1885 (c. 69).]—BOSWORTHICK *v.* BOSWORTHICK, No. 2836, *post*.

2648. —— For rape.]—If the conduct of the husband is such as to cause a breakdown of the health of the wife, by reason of the disgrace & shock arising out of a conviction of the husband under Criminal Law Amendment Act, 1885 (c. 69), the ct. will hold this to constitute legal cruelty on the part of the husband, & will grant a decree *nisi* to the wife, the adultery having been also proved.—THOMPSON *v.* THOMPSON (1901), 85 L. T. 172; 17 T. L. R. 572.

Annotation:—**Follid.** Bosworthick *v.* Bosworthick (1901), 86 L. T. 121.

C. Cruelty on Part of Wife.

2649. Distinguished from cruelty by husband.]—(1) Generally speaking, that would be cruelty if practised by a wife towards her husband, which would be held to be cruelty if done by him towards her. . . . There must be some distinctions, necessarily founded on the great difference between the sexes, & the power of the husband, in ordinary circumstances, to protect himself from his wife's violence (DR. LUSHINGTON).

(2) The same great rule, of danger to life or limb,

PART XIII. SECT. 5, SUB-SECT. 2.—B. (l).

r. *High-handed treatment—Forcible ejectment of wife from home.*]—A husband commits acts of cruelty, sufficient to justify a decree of judicial separation in favour of his wife, where, having reasonable ground for believing her to be guilty of adultery, & on that ground, he acts towards her in a high-handed & arbitrary manner, such as breaking up the home & leaving her homeless & penniless, & assaulting her to the extent of forcibly putting her out of the house & informing her that she must not return.—W. *v.* W., [1924] 3 W. W. R. 73.—**CAN.**

must prevail : in these as in other cases of the same genus, necessary protection is the foundation of all separation (DR. LUSHINGTON).

(3) It would be difficult for me to say that the locking her husband out of the house on two or three or four occasions can be invested with the character of personal cruelty (DR. LUSHINGTON).—FURLONGER *v.* FURLONGER (1847), 5 Notes of Cases, 422.

Annotations :—As to (1) & (2) **Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Goodden *v.* Goodden, [1892] P. 1.

2650. Object of relief—Necessary protection.]—FURLONGER *v.* FURLONGER, No. 2649, *ante*.

2651. —— ——.]—Drunkenness, even when accompanied by acts of considerable violence, is not a substantial ground for a decree of judicial separation.

I cannot avoid seeing that the real ground of this application is, that the husband wishes to get rid of a drunken wife ; & I must be cautious about opening the ct. to cases of that description ; the wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *savitia* as would justify me in decreeing a judicial separation (*per* CUR.).—SCOTT *v.* SCOTT (1860), Sea. & Sm. 133 ; 29 L. J. P. M. & A. 64.

2652. Matters for consideration of court—Safety of both parties.]— (1) Though the physical effects of the wife's violence may not generally be so serious to the personal safety of the husband as the effects of his violence towards her, yet the moral result of the wife's violence to all the proper relations of married life is so serious that the ct. will interfere, & not drive the husband to the necessity of meeting force by force.

(2) Where a judicial separation is granted on the ground of the wife's cruelty, the ct. has power to order the husband to make a provision for her.—PRICHARD *v.* PRICHARD (1864), 3 Sw. & Tr. 523 ; 10 L. T. 789 ; 10 Jur. N. S. 830 ; 164 E. R. 1378 ; *sub nom.* PICKARD *v.* PICKARD, 33 L. J. P. M. & A. 158 ; 13 W. R. 188.

Annotations :—As to (1) **Consd.** Forth *v.* Forth (1867), 36 L. J. P. & M. 122 ; Russell *v.* Russell, [1897] A. C. 395. *As to* (2) **Folld.** Forth *v.* Forth (1867), 36 L. J. P. & M. 122. **Consd.** Goodden *v.* Goodden, [1892] P. 1. **Apld.** Leslie *v.* Leslie, [1911] P. 203.

2653. —— ——.]—FORTH *v.* FORTH, No. 5274, *post*.

2654. Violence—Abuse.]—KIRKMAN *v.* KIRKMAN, No. 2579, *ante*.

2655. —— ——.]—SCOTT *v.* SCOTT, No. 2651, *ante*.

2656. —— **Though no actual serious injury inflicted.**]—(1) The husband will be entitled to the protection of the ct., where the wife's passions, from whatever cause [drunkenness, etc.], are so little under control that she is in the habit of using personal violence to the husband, from which habit he may be in danger of bodily injury, though no actual serious injury has been inflicted.

(2) In a decree of judicial separation by reason of the cruelty of the wife, the judge ordinary has no authority to insert an order upon the husband to pay an allowance, by way of permanent alimony, to his wife.—WHITE *v.* WHITE (1859), Sea. & Sm. 77 ; 1 Sw. & Tr. 591 ; 1 L. T. 197 ; 6 Jur. N. S. 28 ; 164 E. R. 874.

Annotations :—As to (1) **Consd.** Hall *v.* Hall (1864), 3 Sw. & Tr. 347. *As to* (2) **Consd.** Goodden *v.* Goodden, [1892] P. 1. *Generally*, **Mentd.** Sopwith *v.* Sopwith (1860), 6 Jur. N. S. 404.

2657. Locking husband out of home.]—KIRKMAN *v.* KIRKMAN (1807), 1 Hag. Con. 409 ; 161 E. R. 598.

Annotations :—**Consd.** Furlonger *v.* Furlonger (1847), 5 Notes of Cases, 422. **Refd.** White *v.* White (1859), Sea. & Sm. 77 ; Goodden *v.* Goodden, [1892] P. 1.

2658. ——.]—FURLONGER *v.* FURLONGER, No. 2649, *ante*.

2659. Drunkenness.]—WHITE *v.* WHITE, No. 2656, *ante*.

2660. ——.]—SCOTT *v.* SCOTT, No. 2651, *ante*.

2661. False charge of unnatural offence.]—A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world & persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation.

It is to my mind obvious why no judge has ever yet attempted to propound an exhaustive definition of cruelty. If, as I have said, the Spiritual Ct. regarded married life as a whole, it would be absolutely impossible to lay down in the iron framework of a definition that which would constitute such cruelty as would necessarily justify separation ; the questions of fact & degree would qualify almost any proposition that could be formulated ; for example, a slight blow under great provocation & on a single occasion during a long life could hardly be suggested as a ground for separation, though upon that hypothesis personal violence existed (LORD HALSBURY, C.).—RUSSELL *v.* RUSSELL, [1897] A. C. 395 ; 66 L. J. P. 122 ; 77 L. T. 249 ; 61 J. P. 771 ; 13 T. L. R. 516 ; 41 Sol. Jo. 660, H. L.

Annotations :—**Consd.** Walker *v.* Walker (1898), 77 L. T. 715 ; Beer *v.* Beer (1906), 94 L. T. 704 ; Foster *v.* Foster, [1921] P. 438. **Refd.** Jeapes *v.* Jeapes (1903), 89 L. T. 71 ; Baron *v.* Baron (1908), 24 T. L. R. 273 ; Greene *v.* Greene, [1916] P. 188 ; Moss *v.* Moss, [1916] P. 155 ; Fisk *v.* Fisk (1920), 122 L. T. 803. **Mentd.** Oldroyd *v.* Oldroyd, [1896] P. 175 ; Armytage *v.* Armytage (1898), 78 L. T. 689 ; Synge *v.* Synge, [1900] P. 180 ; Frowd *v.* Frowd, [1904] P. 177 ; Harriman *v.* Harriman, [1909] P. 123 ; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80 ; Butland *v.* Butland (1913), 29 T. L. R. 729 ; Walter *v.* Walter, [1921] P. 302 ; Harnett *v.* Harnett, [1924] P. 126 ; Thomas *v.* Thomas, [1924] P. 194.

D. Evidence of Cruelty.

(*a*) *In General.*

2662. Admissibility—Admissions in other proceedings.]—In a suit for separation by reason of cruelty brought by the wife, an acquittal of her witnesses (for a conspiracy in counselling her to institute this suit) upon an indictment, laid by the husband, & his evidence thereon, in which he admitted & repeated certain accusations originally alleged in the libel as acts of cruelty, may be pleaded as a continuation & admission on oath of that cruelty.—BRAY *v.* BRAY (1828), 1 Hag. Ecc. 163 ; 162 E. R. 543.

Annotation :—**Consd.** Russell *v.* Russell, [1897] A. C. 395.

2663. —— **Letters of husband—Extent of admissibility.**]—NEELD *v.* NEELD, No. 2529, *ante*.

2664. —— **Declarations of husband—Expression of desire to get rid of wife.**]—DILLON *v.* DILLON, No. 4008, *post*.

2665. —— **Acts not pleaded—Explanatory of matter pleaded.**]—The libel, in a cause of separation by reason of cruelty, pleaded the marriage in Scotland, & the session clerk's certificate of the registration of the marriage. The libel also pleaded several matters in the conduct of the husband which did not *per se* come up to actual cruelty :—*Held :* the certificate of the session clerk could not

PART XIII. SECT. 5, SUB-SECT. 2.—D. (a).

s. *Failure to provide necessaries.*]—Slight evidence is sufficient to convict on a charge of neglecting to provide necessaries for a wife whereby her health was likely to be permanently injured.—R. *v.* MCINTYRE (1898), 31 N. S. R. 422.—**CAN.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 2, D. (a), (b) & (c), E. & F.; sub-sect. 3, A.]

be received as evidence of the marriage, & facts showing alienation of affection, though not amounting to actual cruelty, were admissible as laying a foundation for subsequent cruelty.—SAUNDERS *v.* SAUNDERS (1846), 10 Jur. 143.

2666. —— —— ——.]—(1) Evidence to prove a species of cruelty not pleaded in the petition is not admissible.

(2) Evidence of violent demeanour & language not pleaded, but leading up to & making probable acts of violence pleaded, may be admissible.—JEWELL *v.* JEWELL (1862), 2 Sw. & Tr. 573; 6 L. T. 369; 10 W. R. 672; 164 E. R. 1119.

2667. —— —— **Not if tending to prove particular species of cruelty.**]—JEWELL *v.* JEWELL, No. 2666, *ante*.

2668. —— —— —— **General charge of cruelty.**—SQUIRES *v.* SQUIRES, No. 2638, *ante*.

2669. —— —— —— **Adjournment for particulars.**]—Evidence of an act of actual violence is not admissible where only a general allegation of cruelty has been made in a petition. Where evidence was offered that the husband had struck his wife a blow, & no such specific charge had been made in the petition, the ct. allowed the hearing to be adjourned in order that particulars might be furnished.—BROOK *v.* BROOK (1886), 12 P. D. 19; 56 L. J. P. 108; 57 L. T. 425; 35 W. R. 351.

2670. —— **Evidence tending to prove wife's adultery.**]—JONES *v.* JONES (1860), Sea. & Sm. 138.

Annotations:—**Refd.** Boardman *v.* Boardman (1866), L. R. 1 P. & D. 233; B. *v.* B. (1911), 55 Sol. Jo. 462; Browning *v.* Browning, [1911] P. 161.

2671. —— **Previous decree for judicial separation—In subsequent suit for dissolution.**]—Wife petitioned for judicial separation by reason of cruelty & desertion, & a decree was made in her favour on a verdict finding cruelty & desertion against the husband. The husband subsequently petitioned for dissolution of marriage by reason of the wife's adultery who answered, charging (*inter alia*) cruelty & desertion, as in her original petition. Issue joined, & at the trial the counsel tendered as evidence a certified copy, under seal, of the decree of judicial separation, in proof of the cruelty & desertion; but the judge ordinary refused to let it go to the jury, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present trial.—STOATE *v.* STOATE (1861), 2 Sw. & Tr. 223; 30 L. J. P. M. & A. 102; 3 L. T. 756; 164 E. R. 980.

Annotation:—**Refd.** Bancroft *v.* Bancroft & Rumney (1864), 3 Sw. & Tr. 597.

2672. —— —— ——.]—Where a wife had obtained a decree of judicial separation on the ground of the husband's cruelty, & continued to live separate from him, & the husband subsequently committed adultery, upon proof of such adultery & of the decree for judicial separation, the ct. made a decree *nisi* for the dissolution of the marriage.—BLAND *v.* BLAND (1866), L. R. 1 P. & D. 237; 35 L. J. P. & M. 104; 15 W. R. 9.

Annotation:—**Consd.** Harriman *v.* Harriman, [1909] P. 123.

2673. After hearing completed—Application to give evidence of further acts of cruelty.]—After the cause had been heard, & the ct. taken time to consider its decision, petitioner, the wife, applied to be allowed to give evidence of further acts of cruelty, which she alleged took place at a date later than that to which she deposed at the trial. The ct. refused the application, petitioner having repeatedly stated, in the course of her examination, that the last act of cruelty took place at Easter, 1863, & that also being the latest date given in the petition.—TOPPER *v.* TOPPER (1869), 38 L. J. P. & M. 36; 20 L. T. 279.

2674. —— **Statement to third persons—Complaint of wife.**]—A witness called to prove a husband's cruelty may be asked whether the wife made a complaint about the husband on a certain occasion.—BERRY *v.* BERRY & CARPENTER (1898), 78 L. T. 688.

2675. Competency—Petition for dissolution on ground of adultery—Evidence of respondent on countercharge of cruelty.]—In answer to a petition for dissolution of marriage, on the ground of adultery, the wife pleaded countercharges of cruelty & desertion, & prayed for a judicial separation:—*Held:* the wife's evidence was inadmissible to prove cruelty & desertion.—WHITTAL *v.* WHITTAL & HUNT (1860), 30 L. J. P. M. & A. 43.

Annotations:—**Refd.** B. *v.* B. (1911), 55 Sol. Jo. 162; Browning *v.* Browning, [1911] P. 161.

2676. ——.]—An answer to a petition for dissolution of marriage on the ground of adultery contained a charge of cruelty & a prayer for a judicial separation. The evidence of resp. was held to be inadmissible to prove the cruelty. 29 & 30 Vict. c. 32, s. 2, empowering the ct. to grant relief upon a prayer contained in an answer, does not make any alteration in the law of evidence.—BLAND *v.* BLAND & STORMONT (1868), L. R. 1 P. & D. 513; 37 L. J. P. & M. 74; 18 L. T. 535; 16 W. R. 893.

2677. —— **Wife's petition alleging cruelty & adultery—Whether petitioner competent to prove cruelty.**]—HUDSON *v.* HUDSON, No. 2598, *ante*.

(*b*) *Corroboration.*

2678. Magistrate's separation order—Whether sufficient corroboration—Practice of court.]—It is the practice of the ct. to require corroboration of petitioner's evidence as to cruelty, & the mere production of a certified copy of a separation order previously made between the husband & wife by a ct. of summary jurisdiction on the ground of his persistent cruelty is not, as a general rule, to be considered a sufficient corroboration.

(2) The ct. may, however, in an exceptional case, relax this rule of practice where the evidence of petitioner accounting for the absence of the witnesses who corroborated her when before the magistrate, & the general circumstances of the particular case, coupled with the production of a certified copy of the conviction, commend themselves to the ct. as satisfactory & sufficient.—JUDD *v.* JUDD, [1907] P. 241; 76 L. J. P. 120; 98 L. T. 59; 23 T. L. R. 538; 51 Sol. Jo. 500.

Annotation:—**Refd.** Harriman *v.* Harriman, [1909] P. 123.

2679. Decree of foreign court.]—WARWICK *v.* WARWICK & GIOVANNI (1907), *Times*, July 25.

PART XIII. SECT. 5, SUB-SECT. 2.—D. (b).

t. *Corroboration unnecessary — If judge satisfied with petitioner's evidence.*]—On the hearing of pltf.'s petition for divorce the learned trial judge was of opinion that the evidence given by petitioner disclosed legal cruelty entitling her to the divorce claimed but felt obliged to dismiss the petition for want of corroboration:—*Held:* the whole case was for the trial judge & if, taking the evidence of petitioner, the fact that resp. did not appear, & other facts & circumstances into consideration, he believed the evidence of petitioner he had the right to act upon that opinion.—CESALE *v.* CESALE (1921), 54 N. S. R. 91; 57 D. L. R. 435.—**CAN.**

a. *Admissions of defender alone insufficient.*]—In an action of separation *a mensâ et thoro* on the ground of ill usage:—*Held:* it was incompetent to pronounce judgment in favour of the pursuer upon the admissions of defender.—MUIRHEAD *v.* MUIRHEAD (1846), 8 Dunl. (Ct. of Sess.) 786; 18 Sc. Jur. 410.—**SCOT.**

(c) Medical Evidence.

2680. Accepted if uncontradicted.]—COLLETT *v.* COLLETT, No. 2554, *ante.*

2681. Questions to be put to medical witness.]—ANON. (1919), *Times*, Nov. 1.

2682. As to venereal disease—Privilege of medical witness.]—A medical man, who in the course of treating a patient under the national scheme for dealing with venereal disease ascertains that the patient is suffering from such a disease, may be compelled to give evidence to that effect, although the statutory regulations applying to the scheme enjoin absolute secrecy on the medical man.—GARNER *v.* GARNER (1920), 36 T. L. R. 196.

Privilege of medical advisers generally, *see* EVIDENCE, Vol. XXII., p. 419.

As to when communication of venereal disease amounts to cruelty.]—*See* Sub-sect. 2, B. (*j*), *ante.*

E. Defences to Charges of Cruelty.

2683. Provocation.]—Suits for separation for cruelty are usually brought by the wife, as the more infirm party, though they may be also brought on the part of the husband, & have been so brought, with effect, in cases before this ct. When the wife is the complainant, presumptions of injury may be derived from the comparative weakness of her constitution. It is not, however, impossible, that she may have been the aggressor, &, by provocations, have brought upon herself the ill-treatment complained of; when that appears, she is not entitled to demand relief from the ct. (SIR WILLIAM SCOTT). —WARING *v.* WARING (1813), 2 Hag. Con. 153; 2 Phillim. 132; 161 E. R. 699.

Annotations:—**Mentd.** Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192; Kelly *v.* Kelly (1870), L. R. 2 P. & D. 59; Goodden *v.* Goodden, [1892] P. 1; Russell *v.* Russell, [1897] A. C. 395.

2684. —— .]—In a suit for divorce by reason of cruelty & adultery an allegation, on the part of the husband, responsive to the libel brought in by the wife, pleaded: First, habits of provocation & exaggeration. Secondly, the conduct of the husband as to the children of the marriage, in order to explain some charges in the libel. Thirdly, it was objected that the allegation did not counterplead several of the articles in the libel:—*Held:* (1) habits might be pleaded in general terms; (2) the conduct of the husband towards the children might be pleaded to explain away the charges of cruelty towards the wife; (3) it was not necessary to contradict all the charges laid in the libel.—WALLSCOURT *v.* WALLSCOURT (1847), 5 Notes of Cases, 121; 8 L. T. O. S. 478; 11 Jur. 134.

Annotation:—*As to* (2) **Refd.** Sant Francesco *v.* Sant Generoso (1874), 43 L. J. P. C. 73.

2685. ——.]—LOWE *v.* LOWE, No. 2693, *post.*

2686. ——.]—ALLEN *v.* ALLEN & D'ARCY, No. 2532, *ante.*

2687. —— **Wife's bad temper.**]—A wife is not entitled to a divorce by reason of the cruelty of her husband, unless she is a person of good temper, & has always behaved well & dutifully towards him.—TAYLOR *v.* TAYLOR (1755), 2 Lee, 172; 161 E. R. 303.

2688. —— **No defence if cruelty out of proportion.**]—DYSART *v.* DYSART, No. 2547, *ante.*

2689. —— **Proof—Documentary evidence—Supported by oral testimony.**]—WALKER *v.* WALKER, No. 2606, *ante.*

2690. Insanity of husband.]—When the violence complained of was such as to lead to a suspicion of insanity, the ct. would not entertain the question of sanity or insanity, but looked only to the acts done. The innocent party has a *primâ facie* right to the custody of the children; when, however, under peculiar circumstances, there had been no acts of violence towards the children, the ct. gave up one of them to the father, the party complained of.—MARTIN *v.* MARTIN (1860), 29 L. J. P. M. & A. 106; 2 L. T. 118; 8 W. R. 367.

2691. —— ——.]—HANBURY *v.* HANBURY, No. 3024, *post.*

2692. ——.]—Where a husband had twice attempted to commit suicide, & was in consequence confined in an asylum for a few months, & on other occasions made threats against his wife, so that her health became impaired, the ct. came to the conclusion upon the facts that the wife required protection against violence on the part of her husband, & granted her a judicial separation.—BARON *v.* BARON (1908), 24 T. L. R. 273; 52 Sol. Jo. 282.

2693. Collusion between petitioner & witness.] — You have a right to say that the wife & her servant were acting in collusion; but you should not go on to say that the wife adopted a systematic course of provocation, because if you state in answer anything which you can prove & do not prove it, the statement in the answer goes for nothing. You may however answer that you believe the conviction [of the husband for assault] was obtained by false swearing, & that the magistrates were not unanimous (DR. LUSHINGTON).—LOWE *v.* LOWE (1855), Dea. & Sw. 130; 4 W. R. 92; 164 E. R. 525.

2694. Where husband convicted for assault—Conviction obtained by false swearing—Magistrates not unanimous.]—LOWE *v.* LOWE, No. 2693, *ante.*

See, also, Sect. 7, sub-sect. 2, *post.*

F. Remedies.

NOTE.—*It is no longer necessary for a wife to prove cruelty & adultery; adultery of the husband alone being a sufficient ground for divorce.—See Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 176.

Judicial separation.]—*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 185 (1).

Divorce.] — *See* Note above.

SUB-SECT. 3.—ADULTERY.

A. In General.

2695. Whether a crime—View of Ecclesiastical Courts.]—NORFOLK'S (DUCHESS) CASE (1692), 12 State Tr. 884.

Annotation:—**Consd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109.

2696. —— **In Divorce Court.**]—MORDAUNT *v.* MONCREIFFE, No. 3770, *post.*

2697. Absence of consummation of marriage immaterial.]—The absence of consummation of the

PART XIII. SECT. 5, SUB-SECT. 2.—E.

2683 i. *Provocation.*] — PAYNE *v.* PAYNE (1905), 10 O. L. R. 742; 6 O. W. R. 428.—**CAN.**

2683 ii. ——.]—Deft. had assaulted his wife on one occasion, & had been convicted & fined therefor; but it also appeared that she had provoked him unreasonably:—*Held:* he had not so conducted himself as to render future cohabitation dangerous to her life or health, & she was not justified in leaving him.—LLOYD *v.* LLOYD (1914), 26 W. L. R. 722; 5 W. W. R. 1173; 15 D. L. R. 892; 7 Alta. L. R. 307.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 3.—A.

b. *Whether a crime—Subject to summary jurisdiction.*]—A person charged with adultery cannot be tried by a police magistrate even with consent of accused.—*Ex p.* BELYEA (1918), 45 N. B. R. 308; 39 D. L. R. 24.—**CAN.**

c. —— *Married man with unmar-*

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 3, A. & B. (a) & (b).]

marriage no bar to a divorce.—PATRICK *v.* PATRICK (1810), 3 Phillim. 496; 161 E. R. 1396.

Annotation :—**Distd.** Dixon *v.* Dixon (1892), 67 L. T. 394.

2698. ——.]—In a suit for separation by reason of adultery, the wife's libel pleaded that the marriage was never consummated, that neither party was resident in the parish where the banns were published, & that she was falsely stated to have been of full age by the husband in giving the particulars for registration. The libel also pleaded & set out at length the Lord Chancellor's order & the imprisonment of the husband for contempt, & the record of conviction of imprisonment of the husband under Births & Deaths Registration Act, 1836 (c. 86), ss. 40, 41 :—*Held :* (1) non-consummation could not be pleaded in a suit for separation by reason of adultery; (2) non-residence & want of age were immaterial to the issue, & should not be pleaded; (3) the fact of the husband being in prison, where the adultery was alleged to have been committed, was sufficient, & the cause of his imprisonment need not be pleaded.—BROWN *v.* BROWN (1848), 13 Jur. 370.

Annotation :—As to (1) **Dbtd.** Dixon *v.* Dixon (1892), 67 L. T. 394.

2699. ——.]—In a suit for divorce by reason of adultery by the wife against the husband *in pœnam*, a plea of non-consummation excluded. It is sufficient in such a case to plead non-cohabitation.—HALL *v.* HALL (1849), 7 Notes of Cases, 56.

2700. ——.]—OUSEY *v.* OUSEY & ATKINSON, No. 3004, *post*.

2701. ——.]—In a suit for dissolution, though the parties had gone through a ceremony of marriage in the district registry ten years before the adultery of the wife, there had been no cohabitation. The ct., on being satisfied that the husband had done all in his power to induce his wife to cohabit with him, granted a decree *nisi*.

Semble : if the husband had refused to cohabit, the ct. would have dismissed his petition.—WATERS *v.* WATERS & GENTEL (1875), 33 L. T. 579.

2702. Husband's conduct towards wife—Necessity for evidence of.]—BODDINGTON *v.* BODDINGTON & NOSSITER, No. 5009, *post*.

2703. Renewed adultery with same person—Not fresh act of adultery—Further evidence of original adultery.]—GIPPS *v.* GIPPS & HUME, No. 3064, *post*.

2704. Where wife charged with adultery—Consent must be shown.]—In a petition by the husband for dissolution of the marriage on the ground of adultery, resp. filed no answer & did not appear. The jury found a verdict against co-resp. & assessed the damages against him at £50. The ct., not being satisfied with the evidence against the wife, directed her to be summoned, & having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, & dismissed the petition as against her, but gave judgment against the co-resp. for the damages with costs.—LONG *v.* LONG & JOHNSON (1890), 15 P. D. 218; 60 L. J. P. 27.

Annotation :—**Consd.** Hyman *v.* Hyman & Goldman, [1904] P. 403.

2705. Respondent may be found guilty—Though co-respondent dismissed from suit.]—ROBINSON *v.* ROBINSON & LANE, No. 2777, *post*.

2706. —— ——.]—CRAWFORD *v.* CRAWFORD & DILKE (1886), *Times*, Feb. 13; *subsequent proceedings*, 11 P. D. 150.

2707. —— ——.]—MILLER *v.* MILLER (1907), *Times*, July 23.

Annotation :—**Refd.** Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260.

B. Proof of Adultery.

(*a*) *In General.*

Whether direct fact need be proved.]—*See* Sub-sect. 3, C. (*b*), *post*.

2708. Must be of things probable—Not merely possible.]—In support of a petition by a wife for a judicial separation, direct evidence was given of several acts of adultery committed by the husband; but, in consequence of the improbability of that evidence, of the discrepancies in the statements of the witnesses, & of the improper manner in which it had been got up by the private detectives employed by petitioner, the ct. refused to act upon it, & dismissed the petition.

The character of a decent man would be in much peril if on such testimony as this & contrary to all probability, the ct. could arrive at the conclusion of his guilt (*per* CUR.).—SOPWITH *v.* SOPWITH (1859), Sea. & Sm. 118; 4 Sw. & Tr. 243; 164 E. R. 1509.

2709. Married woman resorting to single man.]—RICKETTS *v.* TAYLOR (1798), cited 1 Hag. Con. 303; 161 E. R. 561.

Annotation :—**Refd.** Williams *v.* Williams (1798), 1 Hag. Con. 299.

2710. ——.]—DEANE *v.* DEANE, No. 2769, *post*.

2711. Duration of adultery—Period of cohabitation.]—(1) Where a criminal connection is once shown its continuance is presumed so long as the parties live under the same roof.

(2) Condonation & connivance are essentially different. Condonation may take place without the slightest degree of blame especially in the case of the wife whose conduct might be more meritorious from her forgiveness of injury. To found a legal condonation there must be complete knowledge & condonation subsequent to such knowledge.

(3) Connivance necessarily involves criminality, & as the blame is more serious so ought the evidence in support of such a charge to be more grave & conclusive.—TURTON *v.* TURTON (1830), 3 Hag. Ecc. 338; 162 E. R. 1178.

Annotations :—As to (2) **Consd.** Dempster *v.* Dempster (1861), 2 Sw. & Tr. 438. **Refd.** Bernstein *v.* Bernstein, [1893] P. 292. *As to* (3) **Refd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523; Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665.

2712. Single act.]—(1) Where a single act of adultery is pleaded, unaccompanied with circumstances leading up to the probability of its commission, the ct. will view the case with jealousy, & examine the evidence with great vigilance.

Evidence in prove & in disproof of adultery being equally balanced, the ct. examined the following incidents of the case: the fact of the

ried woman.]—A married man may be convicted of adultery under Revised Statutes, c. 145, though the offence is committed with an unmarried woman.—R. *v.* EGRE (1877), 1 P. & B. 189.—**CAN.**

d. *What amounts to.*]—The essence of adultery consists in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person, & any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of adultery.—ORFORD *v.* ORFORD (1921), 49 O. L. R. 15; 19 O. W. N. 398; 58 D. L. R. 251.—**CAN.**

e. ——.]—BABINEAU *v.* BABINEAU, [1921] 4 D. L. R. 951.—**CAN.**

PART XIII. SECT. 5, SUB-SECT. 3.—B. (a).

f. *Evidence must be worthy of credit.*]—Though two witnesses deposed expressly to their having committed an act of adultery with defender, the ct. considering their testimony to be entirely unworthy of credit, assoilzied

wife having, previous to the marriage, been seduced by the husband; the fact of warnings, direct & indirect, given to the husband, calculated to excite his vigilance for his wife's honour, & no steps taken by him in consequence thereof (the absence of due precaution may amount to criminal negligence); the fact of cohabitation continued after *probabilis scientia* of the alleged adultery; the citation in the cause served on the wife, whilst in company with her husband; two interviews, of some duration, between the husband & wife, after the commencement of the proceedings, their object & effect being unexplained (*semble*, on the part of the wife, the fact of such interviews should, immediately on their occurrence, have been brought to the notice of the ct.); the absence of an action at law, & of any attempt to discover the *particeps criminis*, & no evidence, accounting for the omission (although in cases of separation, by reason of adultery, proceedings at law are, generally speaking, unnecessary, they are of great importance when the proof in this ct. depends on identity).

(2) If the party accused shall have alleged & proved that the party proceeding had knowledge *saltem probabilem criminis commissi*, & continued to cohabit, that is condonation (DR. LUSHINGTON).

(3) An innkeeper may not be the best witness to speak to the identity of a guest whom he sees but once; an innkeeper must be in the habit of seeing a great number of strangers, & unless there be some circumstances attracting his attention, he is not likely to take very accurate notice of his guests. But these observations do not apply on the present occasion where there was the peculiar fact that the lady had lost an eye, & the fact of the gentleman coming again to their inn, & speaking of bringing the lady there again, & where the chambermaid waited on the parties, & assisted the lady to dress (DR. LUSHINGTON).—DILLON *v.* DILLON (1842), 3 Curt. 86, 96; 1 Notes of Cases, 415; 6 Jur. 422; 163 E. R. 667.

Annotations:—*As to* (1) **Consd.** Graves *v.* Graves (1842), 3 Curt. 235. *As to* (2) **Consd.** Lempriere *v.* Lempriere (1868), L. R. 1 P. & D. 569; Otway *v.* Otway (1888), 13 P. D. 141. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Hodgson *v.* Hodgson & Turner, [1905] P. 233.

2713. Whether time & place of adultery need be proved.]—MOORE *v.* MOORE, No. 3562, *post*.

2714. ——.]—TUCKER *v.* TUCKER, No. 2786, *post*.

2715. ——.]—CATON *v.* CATON, No. 2741, *post*.

2716. ——.]—DAVIDSON *v.* DAVIDSON, No. 2739, *post*.

2717. Contraction of venereal disease.]—Suit for divorce by reason of cruelty & adultery commenced by the wife against the husband met by a plea of adultery charged against the wife; the wife's charges not sustained; the husband's sustained & a sentence of separation pronounced for.

Where the adultery of the wife is established, & the husband is proved to have had venereal disease at the time when the wife's paramour is likewise infected, the presumption of the law against the husband shifts, & the wife is bound to show that he contracted the disorder from another person than herself.—KING *v.* KING (1847), 5 Notes of Cases, 244.

2718. ——.]—A husband petitioned for a divorce on the ground of his wife's adultery. The wife made a cross-charge of adultery against her husband, alleging that he had contracted a venereal disease which he had communicated to her. In his reply the husband admitted that he had suffered from a venereal disease, but alleged that it had been communicated to him by his wife:—*Held:* the wife could not rely alone upon the fact that her husband had had a venereal disease to establish the charge of adultery against him.—GLIKSTEN *v.* GLIKSTEN & DEANE (1917), 116 L. T. 543; 33 T. L. R. 203.

2719. Evidence of private detectives.]—SOPWITH *v.* SOPWITH, No. 2708, *ante*.

2720. Necessity for strict proof—Respondent's long married life of propriety.]—(1) Where a wife had been deterred from putting in an appearance to a petition filed by her husband charging her with adultery, in consequence of a threat made by her husband's agent, the ct. (the case having been adjourned) gave her leave to appear & file an answer.

(2) Where a wife has conducted herself during a married life of twenty years with propriety, the ct. will not conclude that she has been guilty of adultery charged to have been committed without the slightest regard for decency or fear of detection, unless established by cogent evidence.—ALEXANDER *v.* ALEXANDER & AMOS (1860), 2 Sw. & Tr. 95; Sea. & Sm. 153; 29 L. J. P. M. & A. 56; 6 Jur. N. S. 56; 8 W. R. 452; 164 E. R. 928.

2721. Inference from allegation of bigamy.]—BONAPARTE *v.* BONAPARTE, No. 3657, *post*.

2722. Adultery at hotels—How proved.]—ANON. (1919), *Times*, Nov. 28.

2723. Evidence that respondent virgo intacta—Partial intercourse possible—Admission of adultery with co-respondent.]—A decree of divorce found on adultery may be made although on the medical evidence there can only have been partial intercourse.—JOLLY *v.* JOLLY & FRYER (1919), 63 Sol. Jo. 777.

2724. Miscarriage—Proof by husband of non-access.]—FOSDIKE *v.* FOSDIKE & HILLIER (1925), 132 L. T. 672.

Annotation:—**Refd.** Holland *v.* Holland, [1925] P. 101.

Confessions & admissions, *see* Sub-sect. 3, C. (*f*), *post*.

(*b*) *Circumstantial Evidence.*

2725. Whether necessary to prove direct fact—Inference from circumstances.]—RUTTON *v.* RUTTON (1796), 2 Hag. Con. 6, n.; 161 E. R. 649.

Annotations:—**Apld.** Loveden *v.* Loveden (1810), 2 Hag. Con. 1. **Refd.** Cadogan *v.* Cadogan (1796), 2 Hag. Con. 4, n.; Chambers *v.* Chambers (1810), 1 Hag. Con. 439.

from an action of divorce.—SIM *v.* MILES (1834), 12 Sh. (Ct. of Sess.) 6 —**SCOT.**

PART XIII. SECT. 5, SUB-SECT. 3.—B. (b).

2725 i. *Whether necessary to prove direct fact—Inference from circumstances.*]—It is not necessary that direct evidence of adultery should be given; it is sufficient to prove proximate acts & circumstances.—FRANK *v.* CARSON (1864), 15 C. P. 135.—**CAN.**

2725 ii. ——.]—WOOD *v.* WOOD (1911), 10 E. L. R. 275.—**CAN.**

2725 iii. ——.]—Direct evidence is seldom obtainable & not necessary.—C. *v.* C., [1919] 1 W. W. R. 982.—**CAN.**

2725 iv. .]—In an action of divorce at the instance of a husband against his wife on the ground of adultery:—*Held* a visit to Ireland by the wife, accompanied by her sister, but unknown to her husband, for the purpose of meeting the alleged paramour at an hotel, where they spent a day in company, did not infer adultery, although the wife was for a considerable time in the alleged paramour's bedroom along with him, her conduct not being inconsistent with innocence.—M'IVER *v.* M'IVER (1859), 21 Dunl. (Ct. of Sess.) 655; 31 Sc. Jur. 353.—**SCOT.**

2725 v. ——.]—In an action of divorce adultery may be inferred from facts & circumstances without direct proof of any specific act of adultery.—WALKER *v.* WALKER (1871), 9 Macph. (Ct. of Sess.) 1091; 43 Sc. Jur. 477.—**SCOT.**

2725 vi. ——.]—Circumstances which coupled with evidence of extra judicial acknowledgment of the illegitimacy of a child:—*Held:* sufficient to infer adultery on the part of a wife & to entitle a husband to decree of divorce.—FULLERTON *v.* FULLERTON (1873), 11 Macph. (Ct. of Sess.) 720; 45 Sc. Jur. 445.—**SCOT.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 3, B. (b) & (c).]

2726. ——Undoubtedly the libel must plead the conclusion of adultery, because unless it is pleaded, *non constat* that it may not be an action for mere solicitation of chastity. But if the party does aver it, & he proves only proximate acts, he proves unquestionably the whole of his averment in the libel. If a witness stops short, & declines or omits to state his belief of the ultimate consummation of the act, it is very true that the ct. is put upon its guard to see whether there is any ground for a scepticism of that nature, but if the ct. sees that the facts are of such a nature, as will justifiably, & almost necessarily, lead to the conclusion; the scepticism of the witness, even if it really exists, signifies nothing. The ct., representing the law, draws that inference which the proximate acts unavoidably lead to; & therefore if the witnesses, even in this case, hesitated & paused about drawing that conclusion, I should not conceive myself in any degree limited by their hesitation upon that subject. There is no ground, in point of law, to object to the sufficiency of evidence. These witnesses depose with satisfactory precision as to time; they depose with sufficient harmony with respect to circumstances, & the effect of their testimony is complete. Unless there are objections to the sufficiency of the witnesses themselves, the evidence cannot be pronounced to be, in any view of it, deficient (SIR WILLIAM SCOTT).—ELWES *v.* ELWES (1794), 1 Hag. Con. 269; 161 E. R. 549.

Annotations:—**Consd.** Astley *v.* Astley (1828), 1 Hag. Ecc. 714. **Refd.** Dillon *v.* Dillon (1842), 3 Curt. 86; Fraser *v.* Fraser (1846), 5 Notes of Cases, 11. **Mentd.** The Clarence (1853), 1 Ecc. & Ad. 206.

2727. ——.]—CADOGAN (LORD) *v.* CADOGAN (LADY) (1796), 2 Hag. Con. 4, n.; 161 E. R. 649.

Annotations:—**Apld.** Loveden *v.* Loveden (1810), 2 Hag. Con. 1. **Refd.** Chambers *v.* Chambers (1810), 1 Hag. Con. 439; Keats *v.* Keats & Montezuma (1859), 28 L. J. P. & M. 57.

2728. ——.]—WILLIAMS *v.* WILLIAMS, No. 2780, *post*.

2729. ——.]—CHAMBERS *v.* CHAMBERS (1810), 1 Hag. Con. 439; 161 E. R. 610.

Annotations:—**Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Dillon *v.* Dillon (1842), 3 Curt. 86; Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90; Otway *v.* Otway (1888), 13 P. D. 141; Hodgson *v.* Hodgson & Turner (1905), 53 W. R. 623; Everett *v.* Everett & McCullum, [1919] P. 298.

2730. ——.]—Principles of evidence in cases of divorce by reason of adultery, etc.

It is a fundamental rule, that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which that proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; & unless this were the case, & unless this were so held, no protection whatever could be given to marital rights. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable & just man to the conclusion (SIR WILLIAM SCOTT).—LOVEDEN *v.* LOVEDEN (1810), 2 Hag. Con. 1; 161 E. R. 648.

Annotations:—**Refd.** Dillon *v.* Dillon (1842), 1 Notes of Cases, 415; Allen *v.* Allen, [1894] P. 248; Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206.

2731. Locked doors.]—ANON. (1792), 3 Hag. Ecc. 82, n.; 162 E. R. 1088.

2732. ——.]—(1) If parties fasten the door of an evening & so remain with it fastened & for no assignable reason, such circumstances lead strongly to the conviction of an adulterous intercourse between them (DR. LUSHINGTON).

(2) Declaration of A. to B. touching the guilt of the wife not pleaded to have come from the wife inadmissible as evidence against the wife.

(3) A verdict in an action of crim. con. is no proof & not to be received as proof of adultery. It only shows that the husband was not afraid to expose his witnesses to a *vivâ voce* examination; the effect of a verdict at common law is *res inter alios acta* (DR. LUSHINGTON).

(4) Where there are ample opportunities for the commission of adultery if the parties are so disposed & great & most undue familiarity totally incapable of being justifiably accounted for, is established by evidence, the ct. will pronounce for a divorce (DR. LUSHINGTON).

(5) The fact of the illegitimacy of a child born to the wife, deft. in the suit was communicated to another by direction of the wife:—*Held:* inadmissible as evidence in a suit for separation, by reason of the wife's adultery.—FAUSSETT *v.* FAUSSETT (1849), 7 Notes of Cases, 72; 13 L. T. O. S. 450; 13 Jur. 688.

2733. —— **Presumption rebuttable.**]—A. & B. were married in 1845, & lived together till 1853. In a suit brought by A. against B. for adultery, B. pleaded her virginity, & recriminated. A. admitted that he had not consummated the marriage, & the medical evidence proved the virginity:—*Held:* B. was not guilty of adultery, & was entitled to a separation from A. on the ground of his adultery, which was proved.

When a young married woman goes with a young man to an inn, & the blinds are pulled down, the room is in confusion, the door is locked, & they are there for a considerable time, these circumstances offer a case of very strong suspicion; they do not amount to more than presumption (*per* CUR.).—HUNT *v.* HUNT (1856), Dea. & Sw. 121; 2 Jur. N. S. 239; 4 W. R. 356; 164 E. R. 522.

2734. —— **Presumption from conduct—Letters.**]—Where no indecent familiarity, proximate act, or personal freedom (except two kisses), & no circumstances inferring adultery are proved, letters from the alleged paramour, found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery; but if the evidence raises a suspicion that an adulterous intercourse is carrying on between the parties accused, the ct. may, upon affidavits, rescind the conclusion, & allow the husband to give in an allegation.—HAMERTON *v.* HAMERTON (1828), 2 Hag. Ecc. 8; 162 E. R. 767; *on appeal* (1829), 2 Hag. Ecc. 618; *subsequent proceedings*, 3 Hag. Ecc. 1.

Annotations:—**Consd.** Grover *v.* Grover (1836), 5 Notes of Cases, 463; Tucker *v.* Tucker (1847), 5 Notes of Cases, 458; Caton *v.* Caton (1849), 7 Notes of Cases, 9; Davidson *v.* Davidson (1856), Dea. & Sw. 132. **Refd.** Grant *v.* Grant (1839), 2 Curt. 16.

2735. ——No direct proof, but proof inferred from the conduct of the wife & the person with whom the adultery was alleged to have taken place, & from the letters of the wife to him found in his repositories.—GRANT *v.* GRANT (1839), 2 Curt. 16; 163 E. R. 322.

Annotation:—**Apld.** Tucker *v.* Tucker (1847), 5 Notes of Cases, 458.

2736. —— **When opportunity shown to exist.**]—It is right & fit that all the circumstances shall be taken together, & that, when facts are established in the cause calculated to fix upon the conduct of the parties a criminal character, to view their

conduct with reference to those facts. But though calculated to give a colour to facts, any combination of minor circumstances will not supply the place of proof of facts. It is my duty not to act upon suspicion only ; I must look at the facts, & see if there be a sufficiency of facts proved. It would be contrary to all principles of law, as well as of justice, merely on the ground of suspicious circumstances, to infer actual guilt, unless it be proved that the parties met together, & so met that they had a convenient opportunity to carry into effect criminal intentions. If it should appear that they did so meet, & had such opportunity, I should concur in the conclusion that it could not be for any other purpose than for the gratification of their criminal desires. . . . Nothing can be more unjust than to infer guilt from an interview between the parties, which might be accidental, in a place of public resort, without any proof of indecent familiarities. . . . In the entire absence of proof of any criminal familiarities, of any indecent or improper familiarities, it is impossible to arrive at the conclusion of the party's guilt (DR. LUSHINGTON).—GROVER *v.* GROVER (1836), 5 Notes of Cases, 463.

2737. —— ——.]—The ct. is not bound to infer adultery from evidence of opportunity, & will only do so if satisfied that adultery has in fact been committed.—FARNHAM *v.* FARNHAM (1925), 133 L. T. 320 ; 41 T. L. R. 543.

2738. —— —— **Attachment & familiarity proved.**]—FAUSSETT *v.* FAUSSETT, No. 2732, *ante*.

2739. —— —— — —.]—(1) Where there is proof of attachment, criminal intention, & opportunity, the presumption is, that adultery has been committed.

With regard to the proof of adultery, it is not necessary to prove, that the adultery with which a party is charged should have occurred at any particular time or place. Ocular proof is very seldom to be procured ; almost every case is a case of presumptive proof, though such proof varies in every possible shape & degree (DR. LUSHINGTON).

(2) Statements made in interrogatory are generally to be taken as admissions ; & though a witness be in part discredited, yet where such witness is corroborated by circumstances or statements in interrogatory, the witness is to be relied on.—DAVIDSON *v.* DAVIDSON (1856), Dea. & Sw. 132 ; 27 L. T. O. S. 176 ; 2 Jur. N. S. 547 ; 4 W. R. 590 ; 164 E. R. 526.

2740. —— —— **Proof of indecent familiarities.**] Proof of indecent familiarities between a wife & a medical attendant in the family of the husband: —*Held:* to afford a presumption of adultery, & a sufficient ground for a divorce.—BOYES *v.* BAILLIE (1821), 3 Bli. 491 ; 4 E. R. 682, H. L.

2741. —— —— **Indecent familiarity not proved.**] —(1) In a suit for divorce by reason of adultery, where the adultery is to be proved by the non-access of the husband & the birth of a child, the absence of the husband should be specially pleaded, & the usual articles pleading non-cohabitation are not sufficient, though circumstances coming out in evidence may enable the ct. to pronounce for the separation by reason of the adultery pleaded.

(2) It is not necessary to prove adultery at any particular time & place ; but it is generally speaking necessary to prove that the parties were in some place together where adultery might probably have been committed, otherwise, it might happen that guilty intention would be mistaken for actual guilt, & this would be contrary to all principles of justice, as well as to known rules of jurisprudence. Where no improper familiarity is proved, no access established by any witness at a time when adultery could have been committed, that is insufficient to establish adultery. The maxim of these cts. is to decide *secundum allegata et probata*. There must be both charge & evidence ; the party charged is entitled to know the specific charge for the purpose of defence. Suppose A. to be charged with the commission of adultery with B. & the evidence should show that it was committed with C., the ct. could decree according to the evidence : I apprehend, certainly not. Although there is absence of all proof of indecent familiarities, absence of all proximate acts which might reasonably have been expected during a long intimacy, if there is a long-continued intimacy exciting the suspicions of the husband, & under circumstances inconsistent with innocence, for example the co-resp. going into the wife's bedroom, the wife nursing a young child in his presence & he playing with the child, & there is on the wife's part no attempt at defence, no attempt to examine her mother or the servants & a child is born during the intimacy, the ct. is judicially warranted in pronouncing that adultery has been proved (DR. LUSHINGTON).—CATON *v.* CATON (1849), 7 Notes of Cases, 9 ; 13 Jur. 431.

2742. —— **Meetings only in public places—Entire absence of indecent familiarity.**]—GROVER *v.* GROVER, No. 2736, *ante*.

(c) *Birth of Children.*

Presumption of legitimacy.]—*See* BASTARDY, Vol. III., pp. 358 *et seq.*, Nos. 1 *et seq.*

—— **How presumption rebutted.**]—*See* BASTARDY, Vol. III., pp. 360 *et seq.*, Nos. 24 *et seq.*

—— **Evidence as to rebuttal of presumption—Evidence of spouses to prove non-access.**]—*See* BASTARDY, Vol. III., pp. 364 *et seq.*, Nos. 56 *et seq.*

2743. Proof of non-access—Evidence of either spouse—Effect of Evidence Further Amendment Act, 1869 (c. 68), s. 3.]—The rule of law that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock applies to proceedings instituted in consequence of adultery & is not affected by above sect., which makes the parties to such proceedings, & the husbands & wives of such parties, competent witnesses.

I have only now to consider whether sect. 3 of the Act of 1869 has affected the validity of the doctrine. . . . It makes indeed the parties to any proceeding instituted in consequence of adultery, & the husbands & wives of such parties competent to give evidence in such proceeding. What in effect does it make such persons competent to do ? Plainly & only, I should have thought, to give such testimony as the law of evidence allowed at that date or, as afterwards modified, that law may allow. It did not, & it did not purport to, alter any existing rule of evidence except that which dealt with the actual competency to give evidence at all (LORD BIRKENHEAD).—RUSSELL *v.* RUSSELL, [1924] A. C. 687 ; 93 L. J. P. 97 ; 131 L. T. 482 ; 40 T. L. R. 713 ; 68 Sol. Jo. 682, H. L.

Annotations :—**Distd.** Andrews *v.* Andrews & Chalmers (1924), 132 L. T. 400. **Apld.** Brown *v.* Leech (1924), 94 L. J. K. B. 48 ; Farman *v.* Farman (1924), 40 T. L. R. 823. **Distd.** Holland *v.* Holland, [1925] P. 101 ; Warren *v.* Warren, [1925] P. 107.

2744. —— —— **In any court.**]—A complaint was preferred by L., resp., a married woman living at all material times in London apart from her husband, F., alleging that B., applt., was the father of her bastard child. Evidence was given

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 3, B. (c), (d) & (e).]

by two witnesses that F. had been living from Nov. 1922, to July, 1923, covering the material period, at 116, Albany Road, Cardiff, & had been employed by a firm in Cardiff on every working day during that period. Resp. produced three letters in her husband's handwriting written from 116, Albany Road, Cardiff, & was recalled to prove that her husband lived & worked at the addresses given in Cardiff, thus supplying the necessary identification of the F. spoken of by the other witnesses with F., her husband:—*Held:* (1) the evidence of the other witnesses as to F. living & working in Cardiff was beside the point until complainant herself completed the chain by identifying that person as her husband; (2) *Russell* v. *Russell*, No. 2743, *ante*, forbids a spouse to give evidence of non-access in any ct., & since apart from complainant's evidence there was no evidence of non-access by her husband, the order made was bad.—BROWN *v.* LEECH (1924), 94 L. J. K. B. 48; 132 L. T. 205; 88 J. P. 208; 41 T. L. R. 89; 27 Cox, C. C. 686, D. C.

2745. —— —— Evidence aliunde.]—Although, as decided in *Russell* v. *Russell*, No. 2743, *ante*, neither husband nor wife can give evidence of non-access, with a view of showing that a child born in wedlock was not a child of the marriage, yet the fact of non-access can be proved by evidence *aliunde*.—FARMAN *v.* FARMAN (1924), 40 T. L. R. 823.

2746. Birth of child conceived while parties separated—Separation order.]—The old rule of the Ecclesiastical Cts., which assumed that husband & wife have no access during the existence of a divorce *a mensâ et thoro*, applies to the case of a magistrates' separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), which contains the usual clause that the wife shall not be bound to cohabit with her husband. If, therefore, a child is born which must have been conceived during the existence of such an order, the rule laid down in *Russell* v. *Russell*, No. 2743, *ante*, does not apply, & the husband may obtain a divorce without other evidence than the wife's admission.—ANDREWS *v.* ANDREWS & CHALMERS, [1924] P. 255; 93 L. J. P. 137; 132 L. T. 400; 40 T. L. R. 873.

2747. —— —— —— Separation deed.]—In the absence of evidence to the contrary the presumption of legitimacy does not arise in the case of a child born to a resp. more than nine months after she has entered into a deed of separation, under the terms of which she & her husband are living apart.—MART *v.* MART (1925), 42 T. L. R. 253.

2748. —— —— Still-born child.]—The rule laid down by the House of Lords in *Russell* v. *Russell*, No. 2743, *ante*, that evidence of non-access by the husband or wife cannot be admitted where the result may be to bastardise a child, does not include a still-born child.—HOLLAND *v.* HOLLAND, [1925] P. 101; 94 L. J. P. 64; 133 L. T. 318; 41 T. L. R. 431.

2749. —— —— Confession of adultery by wife.]—A wife's admission that she had committed adultery, even if accompanied by a statement of her belief that a child, subsequently born, was the result of the adultery, cannot bastardise the child without evidence of the non-access of the husband.

The confession of the wife, therefore, that she has committed adultery is admissible as evidence in a suit for divorce so long as she does not assert that the husband could have had no access at the time of conception.—WARREN *v.* WARREN, [1925] P. 107; 94 L. J. P. 68; 133 L. T. 352; 41 T. L. R. 599; 69 Sol. Jo. 725.

2750. —— —— Admission in former trial.]—On the hearing of a petition by the husband for dissolution on the ground of wife's adultery as evidenced by her having become pregnant after the husband had access to her. *Semble:* the ct. would exclude proof of an admission by the wife at a former trial to the effect that she had ceased to cohabit with her husband at such a time as to render it impossible that he could be the father on the principle that such admissions are contrary to public decency, & tending to bastardise children.—INGLIS *v.* INGLIS & ALLEN (1867), 16 L. T. 775; 15 W. R. 1093.

As to confessions & admissions, *see* Part XIII., Sect. 5, sub-sect. 3, B. (*f*), *post*.

2751. —— —— Evidence by affidavit—Birth of child proved aliunde.]—After an order to read affidavit evidence, excluding that of adultery, affidavit evidence was admitted of non-access by the husband to establish adultery, the birth of a child being proved *aliunde*.—BOULTON *v.* BOULTON (1918), 87 L. J. P. 112; 34 T. L. R. 389; 62 Sol. Jo. 606.

—— On rebuttal of presumption as to legitimacy.]—*See* BASTARDY, Vol. III., pp. 364–367, Nos. 56–77.

2752. —— —— Absence of husband must be specially pleaded.]—CATON *v.* CATON, No. 2741, *ante*.

2753. —— Must be strong & distinct—When adultery inferred from length of gestation merely.]—When adultery is to be inferred solely from the length of gestation of a child *in utero*, & evidence adverse to the wife, its mother, as regards her conduct, is absent, the same considerations apply as in a case of legitimacy & the presumption thereof. In such a case the evidence to negative lawful access as the cause of pregnancy must be strong, distinct, satisfactory, & conclusive, & must not consist of a mere balance of probability. If on medical evidence there is no distinct & inherent impossibility of access by the husband which could account for the birth of a child, the wife cannot be found guilty of adultery.—GASKILL *v.* GASKILL, [1921] P. 425; 90 L. J. P. 339; 126 L. T. 115; 37 T. L. R. 977; 38 T. L. R. 1.

Proof of birth of child—By entry in register.]—*See* EVIDENCE, Vol. XXII., p. 322, Nos. 3159, 3160.

2754. Child born more than nine months after last intercourse—No evidence of wife's adultery.]—The husband left the wife on Dec. 20, 1915, & had not had intercourse with her since that date. She gave birth to a child on Oct. 22, 1916, three hundred & seven days afterwards. There was no evidence of the wife's adultery:—*Held:* on the particular facts of the case, the wife had not committed adultery, & the petition was dis-

PART XIII. SECT. 5, SUB-SECT. 3.—B. (c).

2753 i. *Proof of non-access—Must be strong & distinct—When adultery inferred from length of gestation merely.*]—Where a husband after a long absence did not rejoin his wife till Nov. 24, 1849, & where she, nevertheless, produced to him a full-grown child on May 18, 1850:—*Held:* he could not have been the father, & she was guilty of adultery.

Strict proof of non-access required in such cases.—HEATHCOTE'S DIVORCE BILL (1851), 1 Macq. 277.—**SCOT.**

g. *Declaration in birth certificate—As to illegitimacy of child—Corroboration of allegation of non-access.*]—Where the parties had lived separate but had continued to reside in the same town for eighteen months, & up to within five months of the time when resp. gave birth to a child elsewhere, a declaration by resp. in the certificate

missed.—BOWDEN *v.* BOWDEN (1917), 62 Sol. Jo. 105.

Annotations :—**Refd.** Gaskill *v.* Gaskill, [1921] P. 425; Russell *v.* Russell, [1924] A. C. 687.

2755. Statement by wife communicated to third party—As to illegitimacy of child—Inadmissible against wife.]—FAUSSETT *v.* FAUSSETT, No. 2732, *ante*.

(d) Visits to Houses of Ill Repute.

2756. By wife.]—WOOD *v.* WOOD (1789), 4 Hag. Ecc. 138, n.; 162 E. R. 1398.

Annotation :—**Refd.** Kenrick *v.* Kenrick (1831), 4 Hag. Ecc. 114.

2757. ——.]—ELIOT *v.* ELIOT (1776), cited in 1 Hag. Con. at p. 302.

Annotations :—**Consd.** Williams *v.* Williams (1798), 1 Hag. Con. 299. **Refd.** Kenrick *v.* Kenrick (1831), 4 Hag. Ecc. 114.

2758. ——.]—(1) A recriminatory charge of adultery against a wife held proved by the evidence of one witness only to any undue familiarity, proximate act, or fact of adultery, which evidence, though confused, was corroborated by the evidence of the conduct of the wife.

(2) The wife's going to a brothel with another man is evidence of adultery.

(3) The ct. will not delay the hearing of a cause on an affidavit that a true bill has been found against a material witness for perjury in her evidence in such cause. *Qu.:* whether a conviction for such perjury would be evidence.—KENRICK *v.* KENRICK (1831), 4 Hag. Ecc. 114; 162 E. R. 1389.

Annotation :—*As to* (1) **Consd.** Simmons *v.* Simmons (1847), 1 Rob. Eccl. 566.

2759. By husband—Presumption only rebutted by strong evidence.]—*Semble:* going to a brothel, & remaining alone for a considerable time in a room with a common prostitute, is sufficient evidence from which to infer adultery.

A married man going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery necessary to be rebutted by the very best evidence.—ASTLEY *v.* ASTLEY (1828), 1 Hag. Ecc. 714; 162 E. R. 728.

Annotations :—**Mentd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Hope *v.* Hope (1858), 1 Sw. & Tr. 94.

(e) Decrees and Admissions in Previous Proceedings.

2760. Decree nisi in previous suit—Between same parties.]—The verdict of the jury at the trial of a petition for a divorce by a wife against her husband finding that the husband had been guilty of adultery & cruelty, & a decree *nisi* in accordance with such verdict, are conclusive evidence of such adultery & cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against his wife; & the mere fact that such decree *nisi* has been set aside by the ct. upon the intervention of the Queen's Proctor, the grounds upon which it was set aside not affecting the propriety of the verdict, does not prevent the findings of the jury from being conclusive evidence in the second suit.—BUTLER *v.* BUTLER, [1894] P. 25; 63 L. J. P. 1; 69 L. T. 545; 42 W. R. 49; 10 T. L. R. 26; 38 Sol. Jo. 24; 1 R. 535, C. A.

2761. —— **Not between same parties—Insufficient finding of jury.**]—On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion, the decree in a previous suit in which her husband had been co-resp. was produced. This decree stated that the jury found that resp. had been guilty of adultery with co-resp., & that he had been condemned in costs, but contained no finding by the jury that co-resp. had been guilty of adultery with resp.:—*Held:* the decree was not by itself sufficient evidence of adultery against the husband.—RUCK *v.* RUCK, [1896] P. 152; 65 L. J. P. 87.

Annotations :—**Distd.** Eskell *v.* Eskell (1919), 63 Sol. Jo. 777. **Consd.** Partington *v.* Partington & Atkinson, [1925] P. 34.

2762. —— ——.]—SWAN *v.* SWAN (1903), *Times*, Mar. 24.

2763. —— —— **Identity established.**]—A decree in a previous suit, finding as a fact the adultery of a party to that suit, will, on identity being established, be admissible as evidence of adultery against the same person as a party to a subsequent suit.—ESKELL *v.* ESKELL (1919), 88 L. J. P. 128; 63 Sol. Jo. 777.

Annotation :—**Expld.** Partington *v.* Partington & Atkinson, [1925] P. 34.

2764. Finding as to petitioner's adultery.]—(1) Petitioner established his wife's adultery in a suit for dissolution of marriage, but co-resp. established petitioner's adultery, & on that ground his petition was dismissed. He afterwards presented a fresh petition, alleging subsequent adultery with other co-resps. The Queen's Proctor intervened, & alleged the judgment against petitioner in the previous suit, & further alleged the fact of petitioner's adultery. The jury found that petitioner was not guilty of the adultery charged. But the ct. held that the judgment in the former suit was conclusive evidence of the fact of such adultery having been committed. The ct., in the exercise of the discretion conferred on it by Matrimonial Causes Act, 1857 (c. 85), s. 31, granted a decree *nisi*, notwithstanding the judgment against petitioner in the former suit, the act of adultery, if committed, being an isolated one & unconnected with resp.'s adultery & the finding of the jury in the second suit, acquitting the petitioner, having thrown doubt upon his guilt.

(2) In a suit for dissolution where resp. did not appear, the ct. allowed petitioner to be examined, under Matrimonial Causes Act, 1857 (c. 85), s. 43, & to give evidence upon the issue of his own adultery, raised by the Queen's Proctor.

(3) In a suit for dissolution no issue was raised as to resp.'s adultery, but the Queen's Proctor, intervening, pleaded various pleas, & after petitioner's case was closed, called evidence to prove them. Evidence having been called on behalf of petitioner, it was held that, although petitioner had begun, the A.-G. on behalf of the Queen's Proctor had the right of reply.—CONRADI *v.* CONRADI, WORRALL & WAY (1868), L. R. 1 P. & D. 514; 37 L. J. P. & M. 55; 18 L. T. 659; 16 W. R. 1023.

Annotations :—*As to* (1) **Expld.** Butler *v.* Butler, [1894] P. 25; Yates *v.* Kyffin-Taylor & Wark, [1899] W. N. 141; Partington *v.* Partington & Atkinson, [1925] P. 34 **Refd.** Butler *v.* Butler, [1893] P. 185; Gooch *v.* Gooch, [1893] P. 99.

2765. Verdict by default against adulterer.]—A verdict by default against an adulterer is not

of birth that the child is illegitimate is admissible in evidence to prove the adultery in order to corroborate petitioner's allegation of non-access from the time the parties lived apart.—BUSH *v.* BUSH (1893), 12 N. Z. L. R.

PART XIII. SECT. 5, SUB-SECT. 3.—B. (d).

h. *By Husband.*]—The fact of a married man entering a brothel & remaining there for half an hour is sufficient evidence of adultery by him.—WATTS *v.* WATTS (1920), 22 W. A. L. R. 50.—**AUS.**

PART XIII. SECT. 5, SUB-SECT. 3.—B. (e).

k. *Decree in previous suit — Must state adultery.*]—*Re* CAMPBELL (1878), 25 Gr. 480.—**CAN.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 3, B. (e) & (f) i., ii. & iii.]

evidence against the wife but may be relevant as a circumstance merely of the case.—BEST *v.* BEST (1823), 1 Add. 411 ; 162 E. R. 145.

Annotations :—**Mentd.** Eldred *v.* Eldred (1840), 2 Curt. 376 ; Clowes *v.* Jones (1843), 3 Curt. 185 ; Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665 ; Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470 ; Geils *v.* Geils (1852), 20 L. T. O. S. 145 ; Anon. (1857), Dea. & Sw. 295.

(f) *Confessions and Admissions.*

i. *In General.*

2766. Requisites of a confession.]—NOVERRE *v.* NOVERRE, No. 2783, *post.*

2767. Nature of admissions.]—Where, in a suit by the husband for dissolution of the marriage, it appeared that the wife had become pregnant while living away from her husband in the service of co-resp., & after her confinement had sent to co-resp. for money, claiming it from him on the ground that he was the father of the child, & he sent the money, though denying that he was the father :—*Held :* this admission of the wife, coupled with the circumstances in which it was made, was, in the absence of explanation or denial, sufficient evidence of her having committed adultery with co-resp.

Admissions are of many degrees. First, there are admissions which are made casually, in the course of an ordinary conversation & without any special importance being attached to the words. Again, there are admissions which are made under circumstances which render them more important & weighty ; &, thirdly, there are admissions which are connected with facts, & which are the most important. The admission in the present case belongs to the latter class (WILDE, J. O.).—TIPPET *v.* TIPPET & MEREDITH (1866), 14 W. R. 410.

2768. Confession in articulo mortis.]—MORTIMER *v.* MORTIMER (1820), 2 Hag. Con. 310 ; 161 E. R. [illegible]

[illegible] s :—**Consd.** Tucker *v.* Tucker (1847), 5 Notes of Cases, 458. **Refd.** Noverre *v.* Noverre (1846), 1 Rob. Eccl. 428 ; Hope *v.* Hope (1858), 1 Sw. & Tr. 94. **Mentd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665 ; Hunt *v.* Hunt (1862), 4 De G. F. & J. 221 ; Boulting *v.* Boulting (1864), 3 Sw. & Tr. 329 ; Williams *v.* Williams, [1921] P. 131.

2769. Self-derogatory expressions in letter.]—(1) A young married woman, leaving the protection of her relations & resorting to a cornet of dragoons living by himself is proof of adultery.

(2) A letter from a wife addressed to her husband : "I think of all your love, your invariable kindness to me, & the base, the horrible return that I have made to you, till I am almost mad," means that nothing but the violation of her marriage vow could have induced her to use expressions so extremely derogatory to herself, & is a confession & evidence of adultery.—DEANE *v.* DEANE (1847), 5 Notes of Cases, 626 ; 12 Jur. 63.

2770. Admission of adultery by wife—Sufficiency of.]—TIPPET *v.* TIPPET & MEREDITH, No. 2767, *ante.*

2771. Admission in other proceedings.]—On a husband's petition for divorce, evidence was given that the wife had confessed to adultery with co-resp., &, on the trial of her husband for attempting to murder her, had admitted in cross-examination that she had been living with co-resp. :—*Held :* this admission was more than a mere confession & justified the ct. in granting a decree *nisi.*—HARTLEY *v.* HARTLEY & FLEMING (1919), 35 T. L. R. 298.

ii. *Statements to Third Parties.*

Necessity for corroboration, *see* Sub-sect. 3, B. (f) iii., *post.*

2772. By co-respondent—Not made in presence of respondent.]—A conversation of a paramour not made in the presence of the wife, resp. :—*Held :* no evidence against the wife.—DONELLAN *v.* DONELLAN (1795), 2 Hag. Ecc. Supp. 144 ; 162 E. R. 1042.

Annotation :—**Refd.** Evans *v.* Evans (1844), 1 Rob. Eccl. 165.

2773. By respondent—After confession by co-respondent.]—HARRIS *v.* HARRIS, No. 3574, *post.*

2774. —— Confession of misconduct with co-respondent—Charge of collusion between petitioner & respondent.]—FARULLI *v.* FARULLI & PEDERZOLI, No. 3132, *post.*

2775. —— Not made in presence of petitioner—Intervention by King's Proctor.]—On the trial of an issue of collusion, arising on the Queen's Proctor's intervention, in a petition to which the husband had not appeared :—*Held :* the statements made by the husband, not in the presence of the wife, were inadmissible as evidence on the issue before the jury.—GRAY *v.* GRAY (1862), 2 Sw. & Tr. 554 ; 6 L. T. 336 ; 10 W. R. 863 ; 161 E. R. 1112.

2776. Letters to third parties.]—OWEN *v.* OWEN, No. 2785, *post.*

iii. *Corroboration.*

Corroboration of evidence of adultery generally, *see* Sub-sect. 3, C., *post.*

2777. General rule.]—(1) The admissions or confessions of resp. are not admissible evidence against co-resp.

The admissions of a wife charged with adultery, unsupported by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce, provided the ct. is satisfied that the evidence is trustworthy, & that it amounts to a clear, distinct, & unequivocal admission of adultery ; but, where, on a consideration of the whole diary, the wife appeared to indulge in unfounded imaginations & exaggerated statements as regarded her intercourse with the other sex, the ct. refused to add anything by way of inference, as it would have done if similar facts had been proved by independent evidence, to the actual statements of the diary, &, as these fell short of a direct confession of the act of adultery, dismissed the petition, but without condemning the husband in costs, on the understanding that the wife had a separate income.

If this ct. had been a ct. of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole & unsupported testimony of the wife, would have precluded us from acting on this evidence. But as this ct. is not a ct. of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, & bound to act, on any evidence legally admissible by which the fact of adultery is established ; &, therefore, if there is evidence, not open to exception, of admissions of adultery by the principal resp., it would be the duty of the ct. to act on such admissions, although there

PART XIII. SECT. 5, SUB-SECT. 3.—B. (f) iii.

2777 i. *General rule.*]—In a suit for dissolution of marriage, in the absence of collusion, an admission of guilt by one of the parties is cogent evidence which the ct. will act on, especially if the admission is corroborated by other evidence.—ARNOLD *v.* ARNOLD (1911), I. L. R. 38 Calc. 907.—**IND.**

might be a total absence of all other evidence to support them. No doubt, the admissions of a wife, unsupported by corroborative proof, should be received with the utmost circumspection & caution. Not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the ct. to proceed with the utmost caution in giving effect to statements of this kind ; the more so, as it must always be borne in mind that co-resp., though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially & morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust & vigilance with which it ought to be regarded, the ct. should come to the conclusion, first, that the evidence is trustworthy ; secondly, that it amounts to a clear, distinct, & unequivocal admission of adultery, we have no hesitation in saying that the ct. ought to act upon such evidence & afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act has at all times, & in all systems of jurisprudence, been considered as most cogent & conclusive proof ; &, if all doubt of its genuineness & sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present (COCKBURN, C.J.).

(2) The counsel for resp. is entitled to address the ct. before the counsel for co-resp., but this may be varied by arrangement between the counsel.

Where by such arrangement co-resp.'s counsel first addressed the ct. & examined the witnesses, the counsel for resp. was not allowed to cross-examine such witnesses.

(3) Where petitioner's case depended on alleged confessions contained in the wife's diary, uncorroborated by independent evidence, the ct. exercised its discretion under Matrimonial Causes Act, 1858 (c. 108), & dismissed co-resp., who was thereupon examined for resp.

(4) On the acquittal of co-resp., the alleged adulterer, the suit against the wife need not of necessity fail.—ROBINSON *v.* ROBINSON & LANE (1859), 1 Sw. & Tr. 362 ; 29 L. J. P. M. & A. 178 ; 31 L. T. O. S. 268 ; 33 L. T. O. S. 96 ; 5 Jur. N. S. 392 ; 164 E. R. 767.

Annotations :—As to (1) **Consd.** Williams *v.* Williams & Padfield (1865), L. R. 1 P. & D. 29. **Refd.** *Re* Forster *v.* Forster & Berridge (1863), 4 B. & S. 187 ; Warren *v.* Warren, [1925] P. 107. *As to* (3) **Consd.** Codrington *v.* Codrington & Anderson (1864), 33 L. J. P. M. & A. 62 ; Wilson *v.* Wilson (1872), L. R. 2 P. & D. 353. **Refd.** *Re* Forster *v.* Forster & Berridge (1863), 4 B. & S. 187 ; R. *v.* Manning (1883), 12 Q. B. D. 241 ; Crawford *v.* Crawford (1886), 11 P. D. 150. *As to* (4) **Refd.** Crawford *v.* Crawford (1886), 11 P. D. 150 ; R. *v.* Plummer, [1902] 2 K. B. 339.

2778. —— Inference from surrounding circumstances.]—Although it is the general practice in matrimonial cases not to act & grant relief upon uncorroborated confessions of adultery, there is no absolute rule of practice & no rule of law precluding the ct. from acting upon such uncorroborated evidence. The true test seems to be whether the ct. is satisfied from the surrounding circumstances in any particular & exceptional case that the confession is true. If so satisfied, it is open to the ct. to grant relief, notwithstanding the absence of independent corroborative testimony.

Semble : a solr. who has acted for resp. is a compellable witness ; & his evidence as to statements made by resp. may be accepted by the ct. in coming to a conclusion as to the truth of a confession of adultery made by resp.—GETTY *v.* GETTY, [1907] P. 334 ; 76 L. J. P. 158 ; 98 L. T. 60.

Annotation :—**Folld.** Weinberg *v* Weinberg (1910), 27 T. L. R. 9.

2779. —— ——.]—The ct. acted upon an uncorroborated confession of adultery, & pronounced a decree of divorce.

The true test seems to be whether the ct. is satisfied from the surrounding circumstances in any particular & exceptional case that the confession is true (EVANS, P.).—WEINBERG *v.* WEINBERG (1910), 27 T. L. R. 9.

2780. Whether essential.]—This is a proceeding to obtain divorce on a charge of adultery. It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable ; but I take the rule to be that there must be such proximate circumstances proved, as by former decisions, or on their own nature & tendency, satisfy the legal conviction of the ct. that the criminal act has been committed (SIR WILLIAM SCOTT).

Confession is a species of evidence which, though not inadmissible, is to be regarded with great distrust. There is a canon particularly pointed against it, which says, "*nec partium confessioni fides habeatur*" ; & though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed (SIR WILLIAM SCOTT).—WILLIAMS *v.* WILLIAMS (1798), 1 Hag. Con. 299 ; 161 E. R. 559.

2781. ——.]—CREWE *v.* CREWE, No. 3133, *post.*

2782. ——.]—BURGESS *v.* BURGESS (1817), 2 Hag. Con. 223 ; 161 E. R. 723.

Annotation :—**Distd.** Grover *v.* Grover (1836), 5 Notes of Cases, 463.

2783. ——.]—(1) In a suit for divorce by reason of the adultery of the wife, where there was no evidence, even from the female servants in the family, of indecent familiarities, or improprieties, between her & the paramour, a sentence of separation was founded upon her confession to two witnesses, coupled with proof of extreme familiar intimacy between the parties, of which they availed themselves to an extent inconsistent with their relative duties, & of ample opportunities.

I am forbidden by the 105th Canon to pro-

2780 i. *Whether essential.*] — Where there is an admission of adultery, corroboration will be required unless the admission is entirely free from suspicion. — EDMONDS *v.* EDMONDS (1912), 20 W. L. R. 541 ; 1 D. L. R. 550 ; 17 B. C. R. 28.—**CAN.**

2780 ii. ——.]—The ct. in cases of divorce seldom acts on admissions alone, but requires evidence to support the probability of the facts admitted. —C. *v.* C., [1919] 1 W. W. R. 982.—**CAN.**

2780 iii. ——.]—In proceedings for divorce, where the ct. is satisfied there is no collusion, it should act on evidence of admissions of adultery made to petitioner's solr., though it is undesirable that the proceedings should depend on such evidence.—S. *v.* S. (1920), 2 W. W. R. 295.—**CAN.**

2780 iv. ——.]—Where there is unexceptional evidence of admissions of adultery by the principal resp. it is the duty of the ct. to act upon such admissions even in the absence of any corroborative evidence of the same. Such evidence of admissions by a wife, however, should in the absence of corroboration, be regarded with the utmost suspicion, & should it appear that they were made solely with the intention of setting free a guilty party, no decree of divorce can be granted.—ESTEN *v.* ESTEN (1922), 66 D. L. R. 121.—**CAN.**

2780 v. ——.]—MORROW *v.* MORROW, [1914] 2 I. R. 183.—**IR.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 3, B. (f) iii., & C., D. & E (a).]

nounce a separation on confession alone; & the reason obviously is this—no tribunal is to be trusted with the power to determine that which is impossible, namely, whether such a confession be genuine or false. Still it is evidence of the highest character. . . . There must be other evidence then, though I am not aware of any case in which the *quantum* or description, as auxiliary to a confession, has been the subject of discussion (DR. LUSHINGTON).

(2) There are two requisites to a confession: one, that a witness truly states that which purports to be a confession; the other, that the party making the confession speaks the truth (DR. LUSHINGTON).

(3) Letters of the wife withheld from the ct.

A letter said to have been written by her [the wife], & which is said to admit the offence of adultery . . . is withheld. . . . If the ct. had been applied to, I entertain not any shadow of doubt of its power to enforce the production of the letter, or any other document essential to the due administration of justice & the investigation of the truth (DR. LUSHINGTON).—NOVERRE *v.* NOVERRE (1846), 1 Rob. Eccl. 428; 4 Notes of Cases, 652; 10 Jur. 622; 163 E. R. 1090.

Annotation:—As to (1) **Expld.** Tucker *v.* Tucker (1847), 5 Notes of Cases, 458.

2784. ——.]—Decree *nisi* granted on admissions made by resp. & not repeated in presence of the ct. itself, corroborative evidence of the specific acts being dispensed with.—DEEBLE *v.* DEEBLE (1887), 3 T. L. R. 353.

2785. —— **Safeguard against collusion—Letters to third parties.**]—The rule of the ct. against acting in a suit for separation on a mere confession of guilt, being based on a fear of collusion between husband & wife, may perhaps be extended to a confession by unsuspected letters to third parties but does not apply to confessions in perfectly genuine letters when there is not the slightest idea of collusion.—OWEN *v.* OWEN (1831), 4 Hag. Ecc. 261; 162 E. R. 1441.

2786. —— ——.]—(1) Divorce by reason of adultery, at the suit of the husband, pronounced for on the confession of the wife, aided by supplemental evidence not in itself amounting to proof of adultery. With regard to separations both *a mensâ et thoro* & *pro dirimendo matrimonii vinculo*, the ct. is bound not to pronounce a sentence of separation, on a charge of adultery, upon the confession of the wife or the husband alone, to guard against the possibility of imposition by confessions which may be collusive, with the consent of both parties, to obtain that separation.

(2) No one shall be bound to prove the precise time & place where the adultery occurred.—TUCKER *v.* TUCKER (1847), 5 Notes of Cases, 458; 11 Jur. 893.

2787. —— **Petitioner examined.**]—TATHAM *v.* TATHAM & NUTT, No. 4424, *post.*

2788. —— **Respondent giving evidence against co-respondent.**]—MILLER *v.* MILLER & FOWLER (1905), *Times*, Mar. 8, 9, 10.

2789. —— **Court satisfied of truth of confessions.**]—S. C. petitioned for dissolution of marriage, alleging that his wife, D. C., had committed adultery with D. The only evidence in support of the allegation were confessions made by the wife to petitioner & his sister. The ct. granted a decree *nisi*, being satisfied that the confessions were true & had not been made for the purpose of bringing about a dissolution of the marriage tie, but solely in order to obtain the husband's forgiveness.—COLLINS *v.* COLLINS & DEAL (1916), 115 L. T. 936; 33 T. L. R. 123; 61 Sol. Jo. 184.

2790. Sufficiency of—Admission by co-respondent.]—In a suit for a dissolution of marriage, the only evidence of adultery consisted of written & verbal admissions by resp., & of a verbal admission by co-resp. The ct. being satisfied, from the circumstances under which these admissions were made, & the conduct of resp. at the time when they were made & subsequently, that they were genuine, & that there was no reasonable ground to suspect collusion, pronounced a decree *nisi*, with costs against co-resp.—WILLIAMS *v.* WILLIAMS & PADFIELD (1865), L. R. 1 P. & D. 29; 35 L. J. P. & M. 8; 13 L. T. 610.

Annotations:—**Apld.** Le Marchant *v.* Le Marchant & Radcliff (1876), 45 L. J. P. 43. **Refd.** Warren *v.* Warren, [1925] P. 107.

2791. —— ——.]—In a suit for dissolution of marriage promoted by the husband, the evidence adduced at the hearing of the case in proof of the adultery charged against resp. & co-resp. consisted exclusively of confessions by the wife, but on a subsequent day the counsel for co-resp. stated that he was instructed to admit the adultery charged against him. The ct. being satisfied that both the confession of the wife & the admission of co-resp., which was against interest, were *bonâ fide*, acted upon them, & pronounced a decree for the dissolution of the marriage.—LE MARCHANT *v.* LE MARCHANT & RADCLIFF (1876), 45 L. J. P. 43; 34 L. T. 367; 24 W. R. 374.

2792. Co-respondent charged in presence of witnesses—No reply to charge.]—A husband, who petitioned for the dissolution of his marriage on the ground of his wife's adultery with co-resp., produced evidence at the hearing to show that he & a sergeant of police traced resp. & co-resp. to the house of the latter's sister, & that in the presence of all five persons questions were put to resp., & admissions were made by her, that incriminating allegations were made against her & co-resp. by the landlady, & that co-resp. said nothing in reply:—*Held:* this was not sufficient legal proof that adultery had, in fact, been committed at that house, & the case must stand over for direct evidence to be given by the landlady.—WHITE *v.* WHITE & JEROME (1890), 62 L. T. 663.

C. Corroboration of Testimony.

As to corroboration of confessions, *see* Sub-sect. 3, B. (f) iii., *ante.*

2793. Whether essential—Uncorroborated evidence of petitioner.]—As a general rule of practice the ct. will not act upon the uncorroborated evidence of a petitioner; but there is no rule of law which prohibits it from acting on such evidence if it is satisfied that the story put forward is a true one & that there is no collusion.—CURTIS *v.* CURTIS (1905), 21 T. L. R. 676.

Annotation:—**Refd.** Warren *v.* Warren, [1925] P. 107.

PART XIII. SECT. 5, SUB-SECT. 3.—C.

2793 i. *Whether essential—Uncorroborated evidence of petitioner.*]—BELL *v.* BELL (1899), 34 N. B. R. 615.—**CAN.**

■ **2793 ii.** —— ——.]—The uncorroborated testimony of a husband of an admission to him by his wife of her adultery with co-resp. is not sufficient evidence upon which to found a petition for divorce.—COURTNEY *v.* COURTNEY (1895), 13 N. Z. L. R. 405.—**N.Z.**

2793 iii. —— ——.]—It is unusual to grant a decree for dissolution of marriage upon the unsupported evidence of petitioner, although this may be done if the ct. is of opinion that it can be safely done in a particular case.—ALLOM *v.* ALLOM (No. 2) (1909), 28 N. Z. L. R. 771.—**N.Z.**

2794. —— ——.]—In a husband's suit for dissolution of his marriage with resp. on the ground of her adultery with co-resp., petitioner gave evidence that he had found co-resp. in bed with resp., but his evidence was substantially uncorroborated:—*Held:* there being no statutory bar, the ct. was entitled to act on the uncorroborated evidence.—RICHES *v.* RICHES & CLINCH (1918), 35 T. L. R. 141; 63 Sol. Jo. 230.

2795. —— **Where only one witness to adultery.**]—The proof of adultery, in a suit for divorce, depending upon the evidence of one witness alone, is insufficient to entitle the promoter to his prayer.—EVANS *v.* EVANS (1844), 1 Rob. Eccl. 165; 3 Notes of Cases, 416; 2 L. T. O. S. 427; 3 L. T. O. S. 41; 8 Jur. 1055; 163 E. R. 1000.

Annotations:—**Distd.** Curtis *v.* Curtis (1846), 5 Moo. P. C. C. 252. **Folld.** Simmons *v.* Simmons (1848), 6 Notes of Cases, 578. **Consd.** Taylor *v.* Taylor (1848), 6 Notes of Cases, 558. **Refd.** Davidson *v.* Davidson (1856), Dea. & Sw. 132; Jenkyn *v.* Jenkyn (1856), Dea. & Sw. 268; Burder *v.* O'Neill (1863), 2 New Rep. 551.

2796. Woman of loose character.]—A charge of adultery in a suit by a wife for judicial separation rested upon the evidence of one witness, who was a woman of loose character. The ct., without deciding affirmatively whether or not the adultery charged had been committed, declined to pronounce a decree upon her uncorroborated testimony, & dismissed the petition.—GINGER *v.* GINGER (1865), L. R. 1 P. & D. 37; 35 L. J. P. & M. 9.

2797. Evidence in corroboration—Must relate to transaction sought to be proved—Not of mere probability.]—(1) An allegation, responsive to a libel for the restitution of conjugal rights, pleaded cruelty & adultery, which were held not to be proved. The charge of adultery rested on the testimony of the woman alone, with whom the husband had, previously to his marriage, cohabited. Evidence of mere probability of a transaction is not evidence to corroborate a single witness. To constitute evidence corroborative, the evidence must have relation to the transaction itself.

It is upon this principle [the necessity for corroboration of the evidence of an accomplice as to *res gestæ*] I conceive that the fact of petitioner having cohabited with P. prior to his marriage, is not in law corroborative of the evidence of P. to a connection afterwards. Certainly the existence of a former connection renders a renewal more probable than the commencement of an entirely new connection, but the existence of the former is a totally separate fact, & may be true without affording any proof of a subsequent connection (DR. LUSHINGTON).

(2) It is not the motives of suitors which the ct. sits to scan, its judgment must be founded on the acts done by them (DR. LUSHINGTON).

(3) If this fact [the putting in of a fictitious execution] be proved, it is one, no doubt, of great moral iniquity, & of gross & unjustifiable oppression, but I do not apprehend that I could found any judgment upon it as a substantive act of legal cruelty. . . . Such conduct, however censurable, does not import danger to life, limb, or health, the boundaries within which I am confined by the law (DR. LUSHINGTON).

(4) If a wife willingly cohabits with her husband after an act of cruelty such cohabitation operates as a condonation. The wife can never, after such cohabitation, found on that act of cruelty a matrimonial suit unless the cruelty be revived (DR. LUSHINGTON).—SIMMONS *v.* SIMMONS (1847), 1 Rob. Eccl. 566; 5 Notes of Cases, 324; 11 Jur. 830; 163 E. R. 1137; *affd.* (1848), 6 Notes of Cases, 578.

Annotations:—*As to* (1) **Consd.** Davidson *v.* Davidson (1856), Dea. & Sw. 132. **Refd.** Weatherley *v.* Weatherley (1854), 1 Ecc. & Ad. 193; Burder *v.* O'Neill (1863), 9 L. T. 232; Norwich (Bp.) *v.* Berney (1866), 36 L. J. Eccl. 8. *As to* (2) **Refd.** Russell *v.* Russell, [1895] P. 315.

2798. —— **Conduct of wife.**]—KENRICK *v.* KENRICK, No. 2758, *ante*.

2799. ——.]—Divorce by reason of adultery by the husband against the wife sustained on direct proof by one witness of an act of adultery with one person, & proof by other witnesses of loose conduct & solicitation of chastity towards other persons.—TAYLOR *v.* TAYLOR (1848), 6 Notes of Cases, 558.

Annotation:—**Refd.** Simmons *v.* Simmons (1848), 6 Notes of Cases, 578.

2800. —— —— **Letter of co-respondent in respondent's possession.**]—A divorce *a mensâ et thoro*, on the ground of adultery, pronounced for, upon the evidence of a single witness, as to the cohabitation of the wife, after her elopement, there being corroborating circumstances.

In this case there are corroborating circumstances: the fact of the elopement; H.'s [co-resp.'s] letter, which was found in C.'s [resp.'s] wardrobe, which is proved to be in his handwriting. . . . These are such corroborating circumstances as take the case out of the rule (LORD BROUGHHAM).—CURTIS *v.* CURTIS (1846), 5 Moo. P. C. C. 252; 10 Jur. 165; 13 E. R. 487, P. C.

Annotation:—**Mentd.** Cavendish *v.* Cavendish & Rochefoucauld (1866), 15 W. R. 182.

2801. —— **Of co-respondent's testimony—Previous statement of co-respondent.**]—Co-resp., having given evidence that he had not committed adultery with resp., a letter written by him to resp., at a date subsequent to that on which adultery was now alleged to have taken place, but previous to any charge having been made, in which he referred to the fact that he had not "held her in his arms" since her marriage, was relied on to prove the truth of the fact stated in corroboration of the testimony of co-resp. in the box.—O'GORMAN *v.* O'GORMAN, PHILLIPS, GOLDBERG, & VON BORIS (1912), 56 Sol. Jo. 634.

D. Competency of Witnesses.

See Sect. 11, sub-sect. 3, A., *post*.

E. Admissibility of Evidence.

(*a*) *In General.*

2802. Acts other than those charged in petition—Subsequent acts of adultery—Showing character of previous familiarity.]—Evidence of acts of adultery, subsequent to the date of the latest act charged in

2795 i. —— *Where only one witness to adultery.*]—The rule of practice prevailing in contested cases is that the entirely uncorroborated evidence of one person is not taken to be sufficient to establish adultery. Adultery can, however, be established by the entirely uncorroborated evidence of one witness as to the particular act, provided that there is evidence of a similar character in regard to other offences which can be & are treated as corroboration.—COLLARD *v.* COLLARD (1921), I. L. R. 44 All. 254.—**IND.**

2795 ii. —— ——.]—It is not necessary that each act of criminal intercourse should be proved by two witnesses.—MURRAY *v.* MURRAY (1847), 9 Dunl. (Ct. of Sess.) 1556.—**SCOT.**

1. *indecent conduct-*

With women other than alleged paramour.]—In a wife's action of divorce the evidence of a witness that defender had committed adultery with her was held to be completely corroborated by evidence of defender's indecent conduct to other women with whom adultery was not libelled.—WHYTE *v.* WHYTE (1884), 11 R. (Ct. of Sess.) 710.—**SCOT.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect 3, E. (a) & (b), F. (a) & (b).]

the petition, is admissible, for the purpose of showing the character & quality of previous acts of improper familiarity.—BODDY *v.* BODDY & GROVER (1860), 30 L. J. P. M. & A. 23.

Annotations :—**Consd.** R. *v.* Ball & Ball (1910), 5 Cr. App. Rep. 238. **Refd.** Stevenson *v.* Stevenson, [1911] P. 191.

2803. —— —— ——.]—Evidence of acts of adultery subsequent to the date of the petition may be admitted for the purpose of showing what inference the ct. ought to draw from evidence of previous acts of familiarity.—WALES *v.* WALES, [1900] P. 63 ; 69 L. J. P. 34.

2804. ——.]—HOWARD *v.* HOWARD (1904), *Times*, July 14.

2805. Venereal disease—Proof by official document—Army medical sheet.]—To prove that resp., a soldier in the army, had committed adultery, an army form medical sheet under rule 208 of the Royal Army Medical Service Rules, showing that resp. had been admitted to hospital suffering from a certain illness, was put in evidence :—*Held :* this being an official document properly produced was evidence of adultery.—GLEEN *v.* GLEEN (1900), 17 T. L. R. 62.

(*b*) *Incontinence before Marriage.*

2806. General rule.]—The wife's incontinence in her single state not pleadable in the first instance by the husband, in a suit for a separation *a mensâ et thoro*, by reason of adultery, against the wife.

If indeed the wife should set up a case of desertion by the husband, without any provocation on her part, her ante-nuptial misconduct might be fairly pleaded in his justification. It might, possibly, too, be fairly pleaded by the husband, responsively to the wife's libel, in a suit for restitution of conjugal rights. But, in this stage, at least, of the present cause, I am of opinion that its allegation is improper (SIR JOHN NICHOLL).—PERRIN *v.* PERRIN (1822), 1 Add. 1 ; 162 E. R. 1.

Annotation :—**Refd.** Weatherley *v.* Weatherley (1854), 24 L. T. O. S. 35.

2807. ——.]—(1) In a cause of separation by reason of adultery, it is not competent for a husband in an initiatory libel, to plead ante-nuptial incontinence of the wife ; marriage is a condonation of such error ; but such fact may be pleaded in reply to a defensive charge by the wife of neglect or connivance.

(2) On the part of the wife, her seduction by the husband, cannot be pleaded ; it involves an issue which this ct. cannot try : but she may plead the fact of her cohabitation, when single, with the husband, in order to show a want of proper vigilance on his part over her subsequent moral conduct.

(3) It is competent to a wife to plead, that the husband introduced her to an improper acquaintance ; more especially when the husband is countercharged with having committed adultery with that party.

(4) Minute specification in pleading acts of adultery depends on the opportunities afforded for the commission of the offence ; if they have been frequent, *e.g.* during a period of four months, it is not necessary to allege particular dates & times. *Secus*, if such opportunities have been of rare occurrence.—GRAVES *v.* GRAVES (1842), 3 Curt. 235 ; 7 Jur. 181 ; 163 E. R. 714.

Annotations :—*As to* (1) **Refd.** Weatherley *v.* Weatherley (1854), 1 Ecc. & Ad. 193. *Generally*, **Mentd.** Salisbury *v.* Nugent (1883), 53 L. J. P. 23.

2808. ——.]—(1) General rule that marriage operates as an oblivion of the past, & that ante-nuptial incontinence cannot be pleaded.

(2) There may be exceptions to the rule, particularly when the person with whom ante-nuptial connection is charged is continued in the service of the husband after marriage ; & is, moreover, the person with whom he is charged with committing adultery.

In a suit for divorce, on the ground of adultery, it is allowable to plead undue familiarity & illicit intercourse antecedent to marriage, when the adultery is charged to have been committed with the same person as the ante-nuptial incontinence.—WEATHERLEY *v.* WEATHERLEY (1854), 1 Ecc. & Ad. 193 ; 24 L. T. O. S. 35 ; 18 Jur. 882 ; 164 E. R. 112.

Annotation :—*As to* (2) **N.F.** Fitzgerald *v.* Fitzgerald (1862), 32 L. J. P. M. & A. 12.

2809. Whether corroboration of evidence of adultery.]—SIMMONS *v.* SIMMONS, No. 2797, *ante*.

2810. When adultery charged with same person.] WEATHERLEY *v.* WEATHERLEY, No. 2808, *ante*.

2811. ——.]—In a petition for divorce on the ground of adultery, it is not competent to plead the ante-nuptial incontinence of resp., even though it & the adultery be charged to have been committed with the same person.—FITZGERALD *v.* FITZGERALD (1862), 32 L. J. P. M. & A. 12 ; 11 W. R. 85.

2812. ——.]—CANTELLO *v.* CANTELLO (1896), *Times*, Feb. 1.

2813. ——.]—KING *v.* KING & MILLER, KING *v.* KING (1901), 45 Sol. Jo. 240.

F. Remedies.

NOTE.—*Either spouse may now found a petition for divorce on the ground of the adultery of the other.—See Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 176.

(*a*) *In General.*

Judicial separation.]—*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 185 (1).

Divorce.]—*See* Note above.

(*b*) *Petition for Damages only.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189.

Assessment of damages, *see* Sect. 16, sub-sect. 5, *post*.

2814. General rule.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *post*.

2815. ——.]—A petition by a husband claiming damages only presented under Matrimonial Causes Act, 1857 (c. 85), s. 33, is subject to the same

PART XIII. SECT. 5, SUB-SECT. 3. F. (a).

m. *Judicial separation.*]—Adultery was committed by a husband, with his wife's knowledge, in the house where the husband & wife were at the time, although the wife had a separate residence ; the fact of adultery did not impair the wife's health :—*Held :* not to amount to such cruelty as, together with adultery, would entitle her to a divorce, but a decree of judicial separation was granted.—DORSETT *v.* DORSETT, [1921] 1 W. W. R. 708 ; 57 D. L. R. 636.—**CAN.**

n. ——.]—*Held :* judicial separation was a competent remedy to a wife whose husband had committed adultery.—WILSON *v.* WILSON (1866), 4 Macph. (Ct. of Sess.) 732 ; 38 Sc. Jur. 387.—**SCOT.**

PART XIII. SECT. 5, SUB-SECT. 3.—F. (b).

2814 i. *General rule.*]—A husband has a right to claim damages from a co-respondent, either by his petition for dissolution of marriage or by a separate petition.—MORT *v.* BRADLEY, [1916] S. A. L. R. 129.—**AUS.**

2814 ii. ——.]—Crim. con. is a cause of action distinct from enticing & improperly harbouring.—MARSON *v.* COULTER (1910), 16 W. L. R. 157 ; 3 Sask. L. R. 485.—**CAN.**

2814 iii. ——.]—A husband may insist in an action of damages against the adulterer.—PATERSON *v.* BONE (1803), 13 Fac. Coll. 283.—**SCOT.**

provisions as other petitions presented under the same Act.

Where, therefore, a husband presents a petition for damages only & has himself been guilty of a matrimonial offence, which, in the exercise of the discretion vested in the ct. would lead the ct. to refuse to grant him a decree in a suit if a dissolution of the marriage were claimed by him, he is, on the like ground, debarred from recovering damages from the adulterer.—COX *v.* COX & WARDE, [1906] P. 267; 75 L. J. P. 75; 95 L. T. 546; 22 T. L. R. 557.

Annotations:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Kent *v.* Atkinson, [1923] P. 142.

2816. Whether maintainable—Where parties separated.]—A husband separated from his wife cannot maintain an action for *crim. con.* after the separation.—BARTELOT *v.* HAWKER (1790), Peake, 10, N. P.

2817. — — ——.]—No action for *crim. con.* can be brought for any act of adultery, after a separation between husband & wife.—WEEDON *v.* TIMBRELL (1793), 5 Term Rep. 357; 1 Esp. 15; 101 E. R. 199.

Annotations:—**Distd.** Chambers *v.* Caulfield (1805), 6 East, 244. **Folld.** Harvey *v.* Watson (1844), 7 Man. & G. 644; Malcolmson *v.* Givins (1873), *Times*, Feb. 27. **Mentd.** Hall *v.* Hollander (1825), 4 B. & C. 660; Wilson *v.* Wilson (1854), 5 H. L. Cas. 40; Lynch *v.* Knight (1861), 5 L. T. 291.

2818. — — ——.]—(1) Where a husband & wife entered into a deed with a provision that in a certain event, & upon the consent of trustees, the wife should be permitted to live separate, & she did live separate from her husband, but without the consent of the trustees, & then committed adultery:—*Held:* the husband might bring an action for crim. con. against the adulterer.

(2) The ct. is not restrained from granting a new trial in a case of crim. con. for excessive damages, if it is satisfied that the jury acted under the influence of undue motives, or of gross error or misconception on the subject.—CHAMBERS *v.* CAULFIELD (1805), 6 East, 244; 2 Smith, K. B. 356; 102 E. R. 1280.

Annotations:—*As to* (2) **Refd.** Narracott *v.* Narracott & Hesketh (1864), 3 Sw. & Tr. 408. *Generally*, **Mentd.** Wilson *v.* Wilson (1854), 5 H. L. Cas. 40; Hunt *v.* Hunt (1861), 31 Beav. 89.

2819. — — ——.]—In trespass for crim. con. the ct. permitted deft. to plead not guilty, & also, *valeat quantum*, that, before & at the time of the committing of the trespass pltf. had relinquished & renounced the comfort & fellowship of his wife, & had finally separated himself by deed from her, & was living apart from her.—HARVEY *v.* WATSON (1844), 7 Man. & G. 644; 8 Scott, N. R. 379; 13 L. J. C. P. 218; 135 E. R. 259; *sub nom.* HARDY *v.* WATSON, 3 L. T. O. S. 221; *sub nom.* WATSON *v.* HARDY, 8 Jur. 605.

2820. — — ——.]—MALCOLMSON *v.* GIVINS (1873), *Times*, Feb. 27.

2821. — **Petitioner party to own dishonour.**]—HODGES *v.* WINDHAM, No. 3052, *post*.

2822. — — ——.]—(1) In an action for crim. con., pltf. will be entitled to a verdict, unless he has been in some degree a party to his own dishonour, either by giving a general licence to his wife, to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with deft., or by having totally & permanently given up all the advantage to be derived from her society.

(2) With respect to damages, if you are of opinion that pltf.'s wife would be of no service, but, on the contrary, a disservice to himself & his children, in that case, a small amount of damages will be sufficient. . . . It does not seem that pltf. has misconducted himself, & it does not appear to me, that any amount of damages, however small, will be any reflection upon him; because, though he has conducted himself with the utmost propriety, yet he may have lost a wife who was worth nothing (ALDERSON, J.).—WINTER *v.* HENN (1831), 4 C. & P. 494, N. P.

Annotations:—*As to* (2) **Apld.** Malcolmson *v.* Givins (1873), *Times*, Feb. 27. **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Bernstein *v.* Bernstein (1893), 69 L. T. 513. *Generally*, **Refd.** Harvey *v.* Watson (1844), 13 L. J. C. P. 218.

2823. — — ——.]—BERNSTEIN *v.* BERNSTEIN TURNER & SAMPSON, No. 3213, *post*.

2824. Petitioner guilty of matrimonial offence. —COX *v.* COX & WARDE, No. 2815, *ante*.

2825. — **Death of wife before proceedings instituted.**]—WILTON *v.* WEBSTER, No. 4720, *post*.

2826. — — ——.]—The true construction of Matrimonial Causes Act, 1857 (c. 85), s. 33, is that the principles & practice which governed the old common law action for crim. con. are to apply to the remedy thereby substituted of a husband's petition for damages, except so far as they are contrary to overriding provisions of the Matrimonial Causes Act.

The petition for damages is independent of, & not ancillary to, a petition for divorce. The death of the wife pending suit did not destroy the cause of action at common law which arose when the

2824 i. *Whether maintainable—Petitioner guilty of matrimonial offence.*]—PATTERSON *v.* MCGREGOR (1869), 28 U. C. R. 280.—**CAN.**

o. —— *Wife forgiven.*]—Where a husband brought action for divorce on the ground of adultery & claimed damages against co-resp. & subsequently condoned the alleged adultery & discontinued the action against his wife he was allowed to continue the action against co-resp. but was required to amend his statement of claim to accord with his claim against the remaining deft. solely & eliminating matters irrelevant thereto.—WINFREY *v.* CLUTE, [1921] 2 W. W. R. 428; 57 D. L. R. 706; 16 Alta. L. R. 422; 59 D. L. R. 248.—**CAN.**

p. —— *By married woman—Against husband's paramour.*]—Neither at common law, nor under Married Woman's Property Act, R. S. O. 1887, c. 132, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, & for committing adultery with him.—LELLIS *v.* LAMBERT (1897), 24 A. R. 653.—**CAN.**

q. — — — —.]—LAWRY *v.* TUCKETT-LAWRY (1901), 2 O. L. R. 162.—**CAN.**

r. — — — — ——.]—WESTON *v.* PERRY (1909), 14 O. W. R. 956; 1 O. W. N. 155.—**CAN.**

s. *Action for criminal conversation—Marriage must be strictly proved.*]—Pltf. must give strict proof of his marriage. Mere casual conversations of deft., in which he has spoken of the woman as pltf.'s wife, or letters from him directed to her as such, are not sufficient.—CAMPBELL *v.* CARR (1843), 6 O. S. 482.—**CAN.**

t. —— ——.]—In actions of crim. con. it is necessary to prove the fact of marriage strictly.—ZIRAHAL *v.* SHATNEY (1912), 22 W. L. R. 336; 22 Man. L. R. 521; 20 Can. Crim. Cas. 205; 7 D. L. R. 554.—**CAN.**

a. — — — — PEPIN LAREUX, [1917] 3 W. W. R. 217.—**CAN.**

b. — — — — .]—ROBSON *v.* THORP, [1920] 3 W. W. R. 828.—**CAN.**

c. —— *Wife a competent witness.*]—In an action for seduction of a married woman the non-access of her husband, & her seduction by deft. may be proved by her own evidence.—MULLIGAN *v.* THOMPSON (1892), 23 O. R. 54.—**CAN.**

d. —— *Statute of Limitations—No bar where adultery continues.*]—Stat. Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between deft. & pltf.'s wife has continued to a period within six years from the time the action is brought.—KING *v.* BAILEY (1901), 31 S. C. R. 338.—**CAN.**

e. — — — — *Six years.*]—An action for crim. con. is an action upon the case within Limitations Act, R. S. O. 1914, c. 75, s. 49 (1) (*g*), & the period of limitation is six years.—

Sect. 5.—*Matrimonial offences and remedies therefor: Sub-sect.* 3, *F.* (*b*); *sub-sects.* 4, 5, 6, 7 & 8, *A. & B.* (*a*).]

wrong was done; & there is no reason why her death before action should have any different effect. The death of the wife does not therefore prevent the husband filing a petition for damages, unless there are overriding provisions to be found in the Act. The clauses in s. 33 which require that the petition must be brought by a husband & must be served on the wife, & give the ct. control of the application of damages, cannot be regarded as such overriding provisions. A petition for damages may therefore be presented after the death of the wife.—KENT *v.* ATKINSON, [1923] P. 142; 92 L. J. P. 54; 129 L. T. 473; 39 T. L. R. 404.

2827. By whom maintainable—"Husband"—Capable of filing petition for dissolution or judicial separation.]—The words "any husband" in Matrimonial Causes Act, 1857 (c. 85), s. 33, mean "any husband who can file a petition for dissolution of judicial separation" (for which domicil or residence is necessary) & not "any husband irrespective of domicil."—HARRIS *v.* TAYLOR (1914), 111 L. T. 564; *on appeal*, [1915] 2 K. B. 580, C. A.

Annotation:—**Mentd.** Moreland *v.* Eley, Eley *v.* Moreland, [1916] 1 K. B. 85.

2828. Not affected by result of petition for dissolution—Petition against one co-respondent—Decree on ground of adultery with co-respondent added subsequently—Cause of action against first co-respondent not abated.]—STOCKER *v.* STOCKER, BRICE & PATTERSON, No. 3228, *post*.

Petition for dissolution—Claim for damages against co-respondent.]—*See* Sect. 8, sub-sect. 1, F. (*b*), *post*.

SUB-SECT. 4.—INCESTUOUS ADULTERY.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176.

Consanguinity & affinity.]—*See* Part II., Sect. 5, *ante*.

SUB-SECT. 5.—BIGAMY AND ADULTERY.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176.

SUB-SECT. 6.—COMMISSION OF UNNATURAL OFFENCES.

2829. With wife—Against her consent.]—Sodomy committed by a husband with his wife against her consent is a matrimonial offence within Matrimonial Causes Act, 1857 (c. 85), s. 27.—C. *v.* C. (1905), 22 T. L. R. 26.

2830. Proof of—Necessity for corroborative evidence.]—Weight given by the ct. to the wife's evidence of unnatural connection had, or attempted to be had, with her by the husband, & to evidence tending to prove the existence of gonorrhoea, & of its wilful communication by husband to wife.

The crime here imputed is so heinous & so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge (*per* CUR.).—N—— *v.* N—— (1862), 3 Sw. & Tr. 234; 9 L. T. 265; 9 Jur. N. S. 1203; 164 E. R. 1264.

Annotation:—**Refd.** Browning *v.* Browning, [1911] P. 161.

2831. —— Conviction of husband.]—BROMLEY *v.* BROMLEY (1794), 1 Hag. Con. 141, n.; 161 E. R. 504.

Annotation:—**Mentd.** Burder *v.* —— (1844), 3 Curt. 822.

2832. —— ——.]—The wife's libel in a divorce cause, charging cruelty & unnatural practices, on the husband admitted to proof; the case charged, at least taken as a whole, being held to be one *per quod consortium amittitur*.—MOGG *v.* MOGG (1824), 2 Add. 292; 162 E. R. 301.

Annotation:—**Mentd.** Burder *v.* —— (1844), 3 Curt. 822.

2833. —— Insufficient evidence.]—GEILS *v.* GEILS, No. 2464, *ante*.

Remedy—Divorce.]—*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176 (*b*).

SUB-SECT. 7.—RAPE.

See, generally, CRIMINAL LAW, Vol. XV., pp. 842 *et seq.*, Nos. 9258 *et seq.*

2834. Proof—Independence of verdict on criminal charge.]—Upon a wife's petition, charging resp. with incestuous adultery with his own child, a girl of thirteen years of age, it appeared that a jury in a criminal ct. had acquitted resp. of the more serious charge, but convicted him of an attempt to carnally know the child. The ct., notwithstanding the certificate of conviction, allowed evidence to be given to prove that incestuous adultery had, in fact, taken place, &, finding this as a fact, pronounced a decree *nisi* dissolving resp.'s marriage with petitioner.—VIRGO *v.* VIRGO (1893), 69 L. T. 460.

2835. —— ——.]—A wife may obtain a divorce from her husband for rape, though he has only been prosecuted & convicted under Criminal Law Amendment Act, 1885 (c. 69), s. 4, of an attempt to have unlawful carnal knowledge of a girl under the age of thirteen years.—COFFEY *v.* COFFEY, [1898] P. 169; 67 L. J. P. 86; 78 L. T. 796.

Annotation:—**Folld.** Bosworthick *v.* Bosworthick (1901), 86 L. T. 121.

2836. —— ——.]—(1) A wife may obtain a divorce from her husband for rape, though he has been prosecuted & convicted for indecent assault only [under Criminal Law Amendment Act, 1885 (c. 69)].

(2) Alternatively, a wife will be entitled to a decree of judicial separation on the ground of cruelty if the conduct of the husband has been such as to cause a breakdown of her health, by reason of the disgrace & shock arising out of his conviction.—BOSWORTHICK *v.* BOSWORTHICK (1901), 86 L. T. 121; 50 W. R. 217; 18 T. L. R. 104.

Remedy—Divorce.]—*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176 (*b*).

SUB-SECT. 8.—DESERTION.

A. In General.

2837. May exist without previous cohabitation.]—There may be desertion without previous cohabitation.

GRAY *v.* QUINN (1921), 64 D. L. R. 719; 51 O. L. R. 128.—**CAN.**

f. —— *Admissibility of evidence of defendant's wealth.*]—In actions for crim. con. evidence may be given of deft.'s wealth if deft. made use of his superior financial position to corrupt the wife. This evidence is admissible, not in order to ascertain what damages deft. should be made to pay, but to show that the value of the wife to the husband must have been all the greater if it required special inducements of this sort on the part of deft. to bring about the seduction.—HANSELMAN *v.* GEZY, [1921] 2 W. W. R. 979; 14 Sask. L. R. 382.—**CAN.**

A husband & wife were married at a registry office in Edinburgh. From there they drove immediately in a carriage alone together to the Roman Catholic cathedral, where the religious ceremony was performed, after which they walked arm in arm to the church door. There they parted, & never met again except at a railway station for a few minutes. They never cohabited together &, except as above, where never alone together after the ceremony. The marriage was never consummated. The wife's father refused to consent to any cohabitation between them until the husband was in a position to keep his wife. The husband made no attempt to cohabit with his wife, & was not heard of for some years, when it was discovered that he was living in adultery with another woman. During all this time the wife was always ready & willing to cohabit with her husband, until she discovered his adultery. On the wife's petition for a dissolution of her marriage on the ground of her husband's adultery & desertion: —*Held:* resp. had been guilty of desertion, although there had been no previous cohabitation between the parties.—DE LAUBENQUE *v.* DE LAUBENQUE, [1899] P. 42; 68 L. J. P. 20; 79 L. T. 708.

2838. May exist though marriage not consummated.]—The fact that the marriage has not been consummated is no bar to a divorce being granted on the grounds of desertion & adultery.—LEE SHIRES *v.* LEE SHIRES (1910), 54 Sol. Jo. 874.

2839. A continuing offence.]—BOWRON *v.* BOWRON, No. 6168, *post.*

Whether withdrawal from existing cohabitation essential.]—*See* Sub-sect. 9, B. (*b*), *post.*

B. What is Desertion.

(*a*) *In General.*

2840. Question of fact.]—The facts which constitute desertion, as ground for a decree, vary with the circumstances & mode of life of the married persons. So long as a husband treats his wife as a wife, by maintaining such degree & manner of intercourse as might naturally be expected from a husband of his calling & means, he cannot be said to have deserted her.

To neglect opportunities of consorting with a wife is not necessarily to desert her.—WILLIAMS *v.* WILLIAMS (1864), 3 Sw. & Tr. 547; 33 L. J. P. M. & A. 172; 10 L. T. 846; 10 Jur. N. S. 870; 164 E. R. 1388.

Annotation:—**Refd.** Fitzgerald *v.* Fitzgerald (1869), L. R. 1 P. & D. 694.

2841. ——.]—R. *v.* DAVIDSON, ETC., DURHAM JJ. (1889), 5 T. L. R. 199, D. C.

Annotation:—**Refd.** Forster *v.* Forster (1910), 54 Sol. Jo. 403.

2842. ——.]—R. *v.* BIRWISTLE, ETC. JJ., No. 6096, *post.*

2843. ——.]—R. *v.* LERESCHE, No. 2910, *post.*

2844. Defined generally.]—YEATMAN *v.* YEATMAN, No. 3001, *post.*

2845. ——.]—(1) No one can desert who does not actually & wilfully bring to an end an existing state of cohabitation.

(2) If the state of cohabitation has ceased to exist, whether by the adverse act of husband & wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life & home has been resumed.

(3) The refusal by either of the request of the other, to resume conjugal relations, does not constitute the offence of desertion.

(4) A wife having reason to believe that her husband had been guilty of adultery, separated from him, & instituted a suit for divorce in which she failed. They never afterwards resumed cohabitation, & neither of them took any step for the purpose of bringing about a reconciliation:—*Held:* the conduct of the husband in holding aloof from the wife, & making no demand for cohabitation, did not constitute desertion.

(5) Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, & in execution of a design to cease cohabitation would constitute desertion (*per* CUR.).—FITZGERALD *v.* FITZGERALD (1869), L. R. 1 P. & D. 694; 38 L. J. P. & M. 14; 19 L. T. 575; 17 W. R. 264; *subsequent proceedings* (1874), L. R. 3 P. & D. 136.

Annotations:—*As to* (1) **Consd.** Mahoney *v.* M'Carthy, [1892] P. 21; Chudley *v.* Chudley (1893), 62 L. J. M. C. 97. **Distd.** Cowley *v.* Cowley (1897), *Times*, Feb. 3. **Consd.** Huxtable *v.* Huxtable (1899), 68 L. J. P. 83; Kay *v.* Kay, [1904] P. 382; Pulford *v.* Pulford, [1923] P. 18. **Refd.** R. *v.* Leresche, [1891] 2 Q. B. 418; Chudley *v.* Chudley (1893), 69 L. T. 617; Wilkinson *v.* Wilkinson (1894), 58 J. P. 415; Synge *v.* Synge, [1901] P. 317. *As to* (2) **Consd.** Mahoney *v.* M'Carthy, [1892] P. 21; Chudley *v.* Chudley (1893), 69 L. T. 617; Bradshaw *v.* Bradshaw, [1897] P. 24. **Refd.** R. *v.* Leresche, [1891] 2 Q. B. 418; Cowley *v.* Cowley (1897), *Times*, Feb. 3; Kay *v.* Kay, [1904] P. 382. *As to* (3) **Distd.** R. *v.* Davidson, etc., Durham JJ. (1889), 5 T. L. R. 199. **Consd.** Synge *v.* Synge, [1901] P. 317. *As to* (4) **Consd.** Garcia *v.* Garcia (1888), 13 P. D. 216; Bradshaw *v.* Bradshaw, [1897] P. 24; De Laubenque *v.* De Laubenque, [1899] P. 42. *As to* (5) **Consd.** Kay *v.* Kay, [1904] P. 382. **Refd.** Mahoney *v.* M'Carthy, [1892] P. 21; Wassell *v.* Wassell (1899), 68 L. J. P. 127; Synge *v.* Synge, [1901] P. 317; Harriman *v.* Harriman, [1909] P. 123.

2846. ——.]—(1) The statement of LORD PENZANCE [in *Fitzgerald* v. *Fitzgerald*, No. 2845, *ante*] that "Desertion means abandonment, & implies an active withdrawal from a cohabitation that exists," is not an exhaustive definition of desertion. The conduct of the party charged must be looked at. If he or she has not recognised the duty of cohabitation in the married state, desertion has arisen. There may be a complete renunciation of that conjugal duty & an intention to put an end to cohabitation, though there is no matrimonial home, & cohabitation as an existing state of things has been suspended by circumstances not under the control of the party.

Desertion is not withdrawal from a place, but from a state of things. Though cohabitation be suspended by the removal of his wife to an asylum, the husband's duty has not ceased, & his refusal to resume cohabitation on her recovery may constitute desertion.

(2) The fact that a summons under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), does not give the date of the commencement of the desertion is not a material objection to the order.—PULFORD *v.* PULFORD, [1923] P. 18; 92 L. J. P.

cohabitation.]—After the ceremony of marriage was performed, but before cohabitation took place, a husband wilfully abandoned his wife, without her consent, & did not return. The wife petitioned for a dissolution of the marriage, on the ground of desertion: —*Held:* to constitute desertion previous cohabitation was unnecessary.—JOHNSTON *v.* JOHNSTON (1895), 21 V. L. R. 416.—**AUS.**

PART XIII. SECT. 5, SUB-SECT. 8.—B. (a).

2844 i. *Defined generally.*]—Desertion under Indian Divorce Act implies "an abandonment against the wish of the person charging it," & although the word "abandonment" is undefined, the effect of the clause is to introduce into the Indian Statute the view adopted by the cts. in England in construing the English Act. A wife is bound, when seeking to prove desertion, to give evidence of conduct on her part, showing unmistakably that such desertion was against her will.—FOWLE *v.* FOWLE (1878), I. L. R. 4 Calc. 260; 3 C. L. R. 484.—**IND.**

g. —— *Malicious desertion.*]—

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 8, B. (a), (b) & (c).]

14; 128 L. T. 256; 39 T. L. R. 35; 67 Sol. Jo. 170, D. C.

Annotations:—As to (1) **Expld.** Jackson *v.* Jackson, [1924] P. 19. **Refd.** Bowron *v.* Bowron, [1925] P. 187.

2847. Whether absence of husband—In ordinary occupation as mariner.]—(1) *Qu.:* whether, under Matrimonial Causes Act, 1857 (c. 85), s. 21, a woman, resident within the City of London can obtain an order for protection of her property.

(2) The absence of a husband in his ordinary occupation as mariner does not constitute desertion; & the ct. cannot take into consideration an actual desertion in past years, which has been terminated by a return to cohabitation.

The former desertion was entirely put an end to by the return to cohabitation. I cannot connect the present absence with the former. Revival of condoned cruelty by a slight act of cruelty goes on the principle that, taken altogether, the husband's conduct shows such an animus as renders it unsafe for the wife to live with him; but desertion under this sect. is quite a different matter (*per* CUR.).—*Ex p.* ALDRIDGE (1858), 1 Sw. & Tr. 88; 31 L. T. O. S. 40; 6 W. R. 507; 164 E. R. 641.

2848. Mere neglect of opportunities of consorting—Insufficient.]—WILLIAMS *v.* WILLIAMS, No. 2840, *ante*.

2849. Wilful separation—Without consent—For no specified period.]—R. *v.* LERESCHE, No. 2910, *post*.

2850. —— —— Or reasonable cause.] (1) Cohabitation of husband & wife does not necessarily mean that they should be under one roof, but in order to maintain cohabitation no suspension must have taken place of such conjugal relations as have normally existed; whichever of them brings these to an end cannot afterwards complain of desertion by the other of them.

Desertion is a wilful separation by resp. from petitioner without either consent or reasonable cause (GORELL BARNES, J.).

(2) A finding by a jury of desertion as having commenced under such circumstances subsequent to the separation is irrelevant, & a judicial separation will not be granted. The available remedy is by restitution of conjugal rights. The party complaining of desertion must have so acted towards the other party as to permit his or her return during the statutory period of two years. The filing, prosecution, & maintaining of a petition for dissolution of marriage are proceedings which prevent such return by showing an unwillingness to receive back, & a party resorting to them cannot subsequently complain of desertion.

In order that desertion may continue for two years, it is necessary that the same state of things may be maintained throughout the whole of that period; & if a wife wishes her husband to return & put an end to the desertion & yet meanwhile files a petition for divorce, charging him with cruelty & adultery, which charges in the present case have turned out to be utterly unfounded, she has by her action placed it out of the power of her husband to do anything. By her own action the wife has shown that she was unwilling that her husband should return to her, & it is impossible to treat her as a woman willing to receive him back, as she has put it out of his power to return (GORELL BARNES, J.).

(3) To entitle an unsuccessful wife to secured costs it is essential that they should be the costs arising from the making of substantial allegations & reasonably incurred costs of allegations which have no prospect of success are incurred at the risk of the party making them, & not that of the party giving security.—KAY *v.* KAY, [1904] P. 382; 73 L. J. P. 108; 91 L. T. 360; 20 T. L. R. 521; 53 W. R. Digest, 49.

Annotations:—As to (2) **Expld.** Dodd *v.* Dodd, [1906] P. 189. **Refd.** Stevenson *v.* Stevenson, [1911] P. 191. *As to* (3) **Refd.** Huntly-Gordon *v.* Huntly-Gordon (1908), 24 T. L. R. 806.

2851. —— —— ——.]—FROWD *v.* FROWD, No. 6106, *post*.

2852. Abandonment by one spouse of other - Or causing other spouse to live apart. Desertion in matrimonial law must include the abandonment by one spouse of the other, or causing her or him to live apart. The mere refusal or abandonment of sexual intercourse while the parties continue to abide under the same roof is not desertion.

If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate & apart, that is desertion. I am not going to attempt an exhaustive definition of desertion. No judge, so far as I am aware has sought to do so, & certainly there is no prospect of its being successfully done (DUKE, P.).—JACKSON *v.* JACKSON, [1924] P. 19; 40 T. L. R. 45.

Annotations:—**Refd.** Bowron *v.* Bowron, [1925] P. 187.

2853. Order in which parties leave matrimonial home immaterial.]—SICKERT *v.* SICKERT, No. 2930,

Constructive desertion.]—*See* Sub-sect. 8, B. (*f*), *post*.

2854. Desertion under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4—Same as under Matrimonial Causes Act, 1857 (c. 85).] FROWD *v.* FROWD, No. 6106, *post*.

See Sect. 27, sub-sect. 2, B., *post*.

(b) Withdrawal from Existing State of Cohabitation.

2855. What amounts to cohabitation - Intermittent cohabitation.] FARMER *v.* FARMER, No. 2914, *post*.

2856. —— ——.]—A husband & wife, who were married in 1866, separated in 1870 by mutual consent, owing to the husband's pecuniary embarrassments. The wife set up in business, adopting an assumed name to prevent the husband's creditors becoming aware of that fact. The husband visited her clandestinely from time to time, & sometimes passed the night with her, & this state of things continued down to Aug. 1885, after which date no marital intercourse took place. The husband's visits continued, however, & friendly letters passed between him & his wife, down to the institution of these proceedings. The husband

Malicious desertion is the wilful absenting of himself or herself by one spouse from the society of the other against the desire of the latter with the deliberate intention of abandoning conjugal relations.—BOYER *v.* BOYER (1894), 15 N. L. R. 124.—**S. AF.**

2849 i. *Wilful separation—Without consent—For no specified period.*]—A husband went to live with his parents:—*Held:* desertion for the husband had no right to take up his own residence in a place where his wife could not go, & then tell her to maintain herself.—GOODFRIEND *v.* GOODFRIEND (1912), 21 O. W. R. 637; 3 O. W. N. 784; 1 D. L. R. 368.—**CAN.**

2849 ii. —— —— ——.]—HILL *v.* HILL (1923), I. L. R. 47 Bom. 657.—**IND.**

2849 iii. —— —— ——.]—MULHERRON *v.* MULHERRON, [1923] S. C. 461.—**SCOT.**

PART XIII. SECT. 5, SUB-SECT. 8.—B. (b).

h. *Whether necessary at time of alleged desertion.*]—To constitute malicious desertion the deserter must actually & wilfully bring to an end the

made his wife an allowance for the support of herself & the only child of the marriage, a daughter, who always had lived with her mother from the time of the separation, & had passed under the assumed name adopted by her mother, down to the beginning of the year 1888, when, on being married in her right name, questions were raised as to her legitimacy, & a notice of the marriage was inserted, giving the full name & address of her father. It then appeared that the husband had for some years been living in adultery with a woman who passed as his wife. Some of the wife's letters to her husband showed that she had for years had at least very strong suspicions of his adultery, but she took no steps to ascertain the truth, nor did she request him to return to cohabitation with her or to give up the woman:—*Held:* there was cohabitation, albeit intermittent in its nature, which was capable of being broken off; such cohabitation was, in fact, brought to an end in Aug. 1885, upon the wife becoming almost certain that her husband had committed adultery; desertion thereupon commenced; & the wife was entitled to have her marriage dissolved on the ground of such desertion coupled with adultery.

v. GARCIA (1888), 13 P. D. 216; 57 L. J. P. 101; 59 L. T. 524; 52 J. P. 581; 4 T. L. R. 702.

2857. —— Temporary separation for mutual convenience.]—CHUDLEY *v.* CHUDLEY, No. 2900,

2858. —— Daily & nightly residence together not essential.]—Cohabitation does not necessarily imply the daily & nightly residence together of a husband & wife under the same roof. Circumstances of life, such as business duties, domestic service, & other things, may separate husband & wife, & yet notwithstanding there may be an existing state of cohabitation.

A husband & wife married in 1890 & cohabited together, in common service, till 1892, when they parted by mutual agreement, to find work, until such time as they should be able to save money for the purpose of getting together a home. The husband obtained work & made his wife an allowance up to Nov. 1898. He visited her occasionally up to some time in 1897. In 1899 he wrote, "I am not going to have any more to do with you as man & wife." The wife took out a summons against him under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), on the ground of desertion. He counter-charged adultery against her. The justices found that as they were already living apart by mutual consent there was no desertion, & dismissed the summons without going into the question of the wife's alleged adultery:—*Held:* the husband had deserted his wife, & the case must be remitted to the justices for further hearing on the question of the wife's adultery. The wife was allowed her costs of the appeal.—HUXTABLE *v.* HUXTABLE (1899), 68 L. J. P. 83, D. C.

2859. —— —— Married domestic servants employed in different houses.]—BRADSHAW *v.* BRADSHAW, No. 6086, *post.*

2860. —— Parties living under same roof—In self-contained parts of same house.]—The occupation of a separate dwelling-house is not a necessary ingredient in the matrimonial offence of desertion of a wife. That desertion for two years may be constituted by the refusal for that period of matrimonial cohabitation. The forsaking the wife's bed, avoiding her society, & seclusion of himself from her in a separate part of a common residence may amount to such refusal by the husband.—POWELL *v.* POWELL, [1922] P. 278; 92 L. J. P. 6; 128 L. T. 26; 38 T. L. R. 844.

Annotation:—**Consd.** Jackson *v.* Jackson, [1924] P. 19.

2861. —— —— Refusal of intercourse.]—JACKSON *v.* JACKSON, No. 2852, *ante.*

2862. Withdrawal for nine years—No contribution to wife's support.]—WEAVER *v.* WEAVER (1892), 8 T. L. R. 565.

2863. Whether necessary at time of alleged desertion—Wife living apart without good reason.]—FITZGERALD *v.* FITZGERALD, No. 2845, *ante.*

2864. —— Cohabitation ended by deed of separation.]—R. *v.* LERESCHE, No. 2910, *post.*

2865. —— Separation immediately after marriage.]—DE LAUBENQUE *v.* DE LAUBENQUE, No. 2837, *ante.*

2866. —— Effect of filing of petition.]—KAY *v.* KAY, No. 2850, *ante.*

2867. —— Removal of wife to lunatic asylum.]—PULFORD *v.* PULFORD, No. 2846, *ante.*

(c) *Intention to Desert.*

2868. Necessity for.]—FITZGERALD *v.* FITZGERALD, No. 2845, *ante.*

2869. ——.]—TOWNSEND *v.* TOWNSEND, No. 2892, *post.*

2870. SICKERT *v.* SICKERT, No. 2930, *post.*

2871. Evidence of—Wilful absence against wishes of wife—Not if absence necessitated by employment.]—To entitle a wife to a judicial separation, on the ground of desertion without cause for two years & upwards, the husband must have wilfully absented himself from her in spite of her wish.

In 1812, A., having failed in business at Leeds, sent his wife & children to her father, who lived there, & went to London for the purpose of obtaining employment. In the course of that year he wrote several letters in affectionate terms, expressing a hope that they might soon be able to live together again, & in the latter ones complaining that she did not answer his letters. She answered none of them; & no communication took place until 1850, when he went to Leeds & saw his wife, & said that he should come the next day, but did not do so. They never afterwards met or communicated with each other. From the time A. first left Leeds he never contributed to the support of his wife or children, nor had his wife expressed to him a desire to live with him again. The wife having presented a petition for judicial separation, on the ground of desertion without cause for two years & upwards:—*Held:* refusing a grant of judicial separation, there was no desertion in the first instance, the husband not having wilfully absented himself, but of

existing state of cohabitation with the deliberate purpose of abandoning conjugal society.—JAMES *v.* JAMES (1901), 22 N. L. R. 265.—**S. AF.**

PART XIII. SECT. 5, SUB-SECT. 8.—B. (c).

2868 i. *Necessity for.*]—In order to constitute desertion there must be a cessation of cohabitation & an intention on the part of the accused party to desert the other.—Gow *v.* Gow, [1921] N. Z. L. R. 695.—**N.Z.**

k. *Evidence of—Wilful absence against wishes of wife.*]—Where a separation was begun by the wife leaving home owing to the conduct on the part of her husband which justified her in withdrawing herself temporarily from his society, & the husband afterwards, when the wife desired to return to him, absconded & held no further communication with her:—*Held:* that the husband was guilty of desertion.—WHITE *v.* WHITE (1908), 7 C. L. R. 477.—**AUS.**

l. —— *Wilful absence against wishes of husband.*]—A wife had remained in England without her husband's consent & had expressed her unwillingness to return. A formal request had not been made to her to return prior to the institution of

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 8, B. (c) & (d).]

necessity; & the continuance of his absence, considering the conduct of the wife, did not constitute desertion.—THOMPSON *v.* THOMPSON (1858), 1 Sw. & Tr. 231; 27 L. J. P. & M. 65; 31 L. T. O. S. 302; 4 Jur. N. S. 717; 6 W. R. 867; 164 E. R. 706.

Annotations:—**Consd.** R. *v.* Cookham Union (1882), 9 Q. B. D. 522. **Refd.** French-Brewster *v.* French-Brewster, French-Brewster *v.* French-Brewster & Gore (1889), 62 L. T. 609; Synge *v.* Synge, [1901] P. 317; Southwark Union *v.* City of London Union (1906), 94 L. T. 763.

2872. —— Persistence in course of adultery—Causing wife to leave home.]—GRAVES *v.* GRAVES, No. 2913, *post.*

2873. —— —— ——.]—SICKERT *v.* SICKERT, No. 2930, *post.*

2874. —— Forming adulterous intercourse—Ceasing to correspond.]—STICKLAND *v.* STICKLAND, No. 2967, *post.*

2875. —— Resuming & continuing adulterous intercourse.]—A husband serving in the army spent a leave with his wife, left her on Mar. 15, 1918, & had not since returned to her. He wrote to her for about a month, after which his letters ceased. He was shown to have lived with another woman from Apr. 20, 1918, passing her off as his wife, & stating that they had been married for five years:—*Held:* this admission should be taken against resp. to its full extent; & warranted a finding that he left his wife in Mar. 1918, with the intention of resuming & continuing an adulterous intercourse, & had therefore, when his wife's petition was filed on Apr. 1, 1920, been guilty of desertion without reasonable excuse for two years or upwards.—DAVIS *v.* DAVIS (1920), 124 L. T. 795; 37 T. L. R. 109.

2876. —— Letters showing intention not to return.]—B. & C. married in 1851, & cohabited in England till 1856, when (but under what circumstances did not fully appear) B., the husband, went to China, holding an office in the Commissariat. C. & the only child of the marriage remained in England. By letters written from B. to C. between Feb. & Dec. 1859, it appeared that B. had led a most extravagant life in China, & had been found guilty by a court-martial of embezzling moneys; that C. & her family had treated B. liberally in respect of money, & in the course of 1859 provided him with considerable sums, on his representation of amendment, & ntention of going to Australia. These letters expressed affection for his wife & child, but no desire to join them, or to be joined by them. B. came through Paris to London, instead of going to Australia, & on Dec. 10, 1859, wrote to his wife saying that he had spent all his money, & incurred divers liabilities by borrowing & otherwise. He addressed a few lines to her on Dec. 13, which were the last he wrote, but made no attempt to see her. In Nov. 1859, he made the acquaintance of the woman with whom the adultery was proved, & in a letter to her, dated Aug. 10, 1860, wrote:—"I was forced into marriage some years ago with one who is very rich, & for whom I had no love. . . . I was miserable in my home, & took a staff appointment abroad about three years ago. I have not seen my wife for more than three years." By her petition, dated Nov. 7, 1861, C. prayed for a dissolution of her marriage by reason of B.'s adultery & desertion:—*Held:* construing B.'s letters by his acts rather than by their words, his conduct amounted to desertion.—LAWRENCE *v.* LAWRENCE (1862), 2 Sw. & Tr. 575; 31 L. J. P. M. & A. 145; 6 L. T. 550; 8 Jur. N. S. 972; 164 E. R. 1120.

Annotations:—**Consd.** Townsend *v.* Townsend (1873), L. R. 3 P. & D. 129. **Refd.** Fitzgerald *v.* Fitzgerald (1869), L. R. 1 P. & D. 694; Pulford *v.* Pulford, [1923] P. 18.

2877. —— Ceasing to correspond.]—The husband, resp., having fallen into difficulties, enlisted & went with his regiment to India. He was afterwards discharged, ceased to correspond with his wife in this country, & contributed nothing to her support:—*Held:* resp. had been guilty of desertion.—HENTY *v.* HENTY (1875), 33 L. T. 263.

Annotations:—**Expld.** Chudley *v.* Chudley (1893), 62 L. J. M. C. 97. **Refd.** Pulford *v.* Pulford, [1923] P. 18.

See, also, No. 2967, *post.*

2878. —— Where apparent consent of wife to separation—Departure to avoid criminal proceedings.]—DREW *v.* DREW, No. 2975, *post.*

2879. —— —— ——.]—A husband left his wife in 1895 after divorce proceedings in which he had appeared as co-resp. (the jury disagreeing). At the last interview, he left her under the impression that this was the cause of his departure, & that he would return in a few months. He was in financial embarrassment, his firm immediately became bkpt., & ultimately the official receiver applied for a warrant against him. He had carried on an intrigue with an actress in 1893 & 1894 unknown to his wife. He sent one letter to his wife begging for money, but with no address; but otherwise he did not communicate with or see her:—*Held:* at the time he left his wife he intended to desert her, & adultery being proved, the ct. granted a decree *nisi* for dissolution of marriage.—WYNNE *v.* WYNNE, [1898] P. 18; 67 L. J. P. 5; 46 W. R. 560; *subsequent proceedings*, 78 L. T. 796.

Annotation:—**Mentd.** Walpole *v.* Walpole, [1901] P. 196.

2880. —— Repudiation of separation deed.]—The facts that the original separation of the parties was voluntary, & that they had subsequently agreed by deed to live apart, do not prevent the husband being guilty of desertion if he has by his conduct [failure to pay allowance secured by deed] shown an intention of repudiating the deed & of deserting his wife.

Desertion begins from the time that the intention to desert is formed (SHEARMAN, J.).—WALSH *v.* WALSH (1919), 122 L. T. 463.

(d) *Consent of Petitioner to Separation.*

Deeds of separation.]—*See* Sub-sect. 8, B. (*g*), *post.*

2881. General rule—Acts must be against will of petitioner.]—Where, on the evidence in support of an undefended petition for dissolution of marriage by reason of the husband's adultery, cruelty, & desertion, a doubt arose whether the parties had not voluntarily separated, the ct. ordered

---

PART XIII. SECT. 5, SUB-SECT. 8.—B. (d).

2881 i. *General rule—Acts must be against will of petitioner.*]—Desertion of a wife petitioning for divorce by a husband involves an actual & wilful bringing to an end of an existing state of cohabitation by the husband without the wife's consent, & consent involves more than mere acquiescence in an existing separation or non-

proceedings, but the evidence showed that she would not have complied with such request if it had been made:—*Held:* the conduct of the wife amounted to malicious desertion.—WEBBER *v.* WEBBER (1915), App. D. 239.—**S. AF.**

2876 i. —— *Letters showing intention not to return.*]—Deft. left his wife, with only a small sum of money, but with no expressed intention of deserting her. Later he wrote & said that the marriage was invalid & he was taking proceedings to get it annulled:—*Held:* the marriage was valid & the husband had deserted the wife.—ANCELLE *v.* ANCELLE, [1919] 1 W. W. R. 620.—**CAN.**

2876 ii. —— ——.]—BEAUMONT *v.* BEAUMONT (1904), 25 N. Z. L. R. 143.—**N.Z.**

the case to be adjourned under Matrimonial Causes Act, 1857 (c. 85), s. 44, to have further evidence produced.

To constitute desertion, the acts relied on must have been done against the will of the person setting up desertion; evidence of separation only tends to prove desertion.—WARD *v.* WARD (1858), 1 Sw. & Tr. 185; 27 L. J. P. & M. 63; 31 L. T. O. S. 238; 6 W. R. 867; 164 E. R. 685.

Annotations:—**Apprvd.** Harriman *v.* Harriman, [1909] P. 123. **Refd.** French-Brewster *v.* French-Brewster, French-Brewster *v.* French-Brewster & Gore (1889), 62 L. T. 609.

2882. ·.]—THOMPSON *v.* THOMPSON, No. 2871, *ante*.

2883. ·.]—Where the wife asks for a dissolution of marriage on the ground of desertion & adultery, she must prove affirmatively that the absence of her husband commenced & continued against her consent; in absence of such proof the ct. refused to decree the dissolution prayed, but the adultery being clearly proved, decreed a judicial separation.—SMITH *v.* SMITH (1859), 1 Sw. & Tr. 359; 28 L. J. P. & M. 27; 32 L. T. O. S. 394; 7 W. R. 382; 164 E. R. 765.

2884. —— ——.]—Where the wife's conduct showed that her separation from her husband was voluntary:—*Held:* he had not failed in his duty towards her, although he had no knowledge of her whereabouts for five years, & apparently made no effort to find her.—CUFLEY *v.* CUFLEY & LOVECK (1865), 13 L. T. 610.

2885. —— ——.]—To constitute desertion of a wife by the husband it is not sufficient to show simple separation; it must be shown that it was against the consent of the wife, & that she has been ready to return to cohabitation if requested.

A husband & wife were cohabiting in Jamaica, where the husband held an appointment, when the wife was obliged to come to England in consequence of ill-health. The husband afterwards, in 1851, asked her to return, & provided funds for her passage, but her health was not sufficiently re-established to enable her to accept his offer. She had no further communication with him, but in 1856 he made her an allowance, which he continued to pay until 1860:—*Held:* as she had never made any offer to return to him after refusing his offer in 1851, he had not deserted her.—KEECH *v.* KEECH (1868), L. R. 1 P. & D. 641; 38 L. J. P. & M. 7; 19 L. T. 462.

Annotation:—**Distd.** R. *v.* Davidson, etc., Durham JJ. (1889), 5 T. L. R. 199.

2886. —— ——.]—ROE *v.* ROE, No. 2940, *post*.

2887. Where original separation by mutual consent—Necessity for resumption of cohabitation.]—FITZGERALD *v.* FITZGERALD, No. 2845, *ante*.

2888. —— ——.]—A husband having refused to cohabit with his wife, or to provide a home for her, offered her £100 on condition that she would not molest him in future by insisting on her conjugal rights. She agreed to the condition, & received the money, & they never afterwards cohabited:—*Held:* these facts did not constitute desertion on the part of the husband.—BUCKMASTER *v.* BUCKMASTER (1869), L. R. 1 P. & D. 713; 38 L. J. P. & M. 73; 21 L. T. 231; 17 W. R. 1114.

Annotations:—**Refd.** Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306; De Laubenque *v.* De Laubenque, [1899] P. 42.

2889. —— —— **Separation for temporary reason only.**]—MAHONEY *v.* M'CARTHY, No. 6247, *post*.

Withdrawal from existing cohabitation, *see* Sect. 5, sub-sect. 8, B. (*b*), *ante*.

2890. —— **Petitioner's refusal to offer to return —No offer by petitioner.**]—KEECH *v.* KEECH, No. 2885, *ante*.

2891. —— —— **Suspicion of offer.**] — The parties separated by mutual consent at the instance of the wife. The husband, six years afterwards, made an offer to return to cohabitation which the wife believed to be not *bonâ fide*, & refused. There was no change in the circumstances which had originally led the wife to desire a separation:—*Held:* there was no desertion.

The husband's offer to resume cohabitation was not *bonâ fide;* but his conduct, however bad, could not alter the original character of the separation & convert it into desertion (SIR J. HANNEN).—COOPER *v.* COOPER (1875), 33 L. T. 264.

2892. —— **Subsequent separation involuntary—Husband in prison.**]—A husband having committed several thefts, separated from his wife with her knowledge & consent, for the purpose of avoiding arrest. He was afterwards arrested & imprisoned, & having committed other thefts after his release, he was on subsequent occasions again imprisoned. Whilst he was in prison, & also in the intervals between his imprisonments, he kept up a correspondence with his wife & made repeated endeavours to induce her to return to cohabitation. She refused, & the cohabitation was never resumed. The wife having presented a petition for dissolution on the ground of adultery coupled with desertion:—*Held:* there was no desertion, the separation being involuntary on the part of the husband.—TOWNSEND *v.* TOWNSEND (1873), L. R. 3 P. & D. 129; 42 L. J. P. & M. 71; 29 L. T. 254; 21 W. R. 934.

Annotation:—**Distd.** Drew *v.* Drew (1888), 58 L. T. 923.

2893. —— **Parties not cohabiting at all—Inability to maintain wife.**]—DE LAUBENQUE *v.* DE LAUBENQUE, No. 2837, *ante*.

2894. —— **Refusal to maintain wife away from home.**]—CHARTER *v.* CHARTER, No. 2931, *post*.

—— **Commencement of desertion.**]—*See* Subsect. 8, D. (*b*), *post*.

2895. Whether parties separated by mutual consent—Evidenced by conduct.]—BOWEN *v.* BOWEN, No. 2902, *post*.

2896. —— **Permitting respondent to indulge in adultery.**]—A husband when reproached by his wife with an adulterous connection he had formed with A. said he wished to go & would rather be with A. than with his wife. His wife said, "Go if you like, & when you are sick of A. return to me," & she made him promise to return to her. He then left her, & never returned:—*Held:* that the conduct of the wife at the last interview did

resistance to a proposed abandonment: it involves a communication of the acquiescence or non-resistance to the other, either by express words or conduct. A mere state of mind, not disclosed, to the other is not sufficient to constitute consent.—BRADFORD *v.* BRADFORD (1908), 7 C. L. R. 470.—**AUS.**

2887 i. *Where original separation by mutual consent—Necessity for resumption of cohabitation.*] — Separation having originally been by mutual consent, desertion cannot take place until cohabitation has been resumed.—WOOD *v.* WOOD (1878), 1. L. R. 3 Calc. 485; 1 C. L. R. 552.—**IND.**

2887 ii. —— ——.]—Where a husband, by arrangement with his wife, left her to take up his abode in another country, & then wrote to her ordering her to return to her relatives, which order she obeyed within two years of the time she received it, the separation was by mutual consent, &, there having been no resumption of cohabitation after their voluntary separation, the husband was not guilty of desertion.—KELLY *v.* KELLY (1888), 6 N. Z. L. R. 387.—**N.Z.**

2887 iii. —— ——.]—Separation took place with the mutual consent of both husband & wife, &, as the parties had not since returned to cohabitation, & when they separated they did not contemplate a return to cohabitation at some future date, there had not been desertion.—SOMERVILLE *v.* SOMERVILLE, [1920] N. Z. L. R. 735.—**N.Z.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 8, B. (d) & (e) i., ii. &

not show assent by her to the separation, but the husband had been guilty of desertion.—HAVILAND *v.* HAVILAND (1863), 32 L. J. P. M. & A. 65; 11 W. R. 373.

2897. —— Expressed intention of respondent not to return—Casual expressions of petitioner induced by respondent's conduct.]—The husband was proved to have left his wife, with an expressed intention not to return to cohabitation with her; & for many years he had not provided her with a maintenance or a home. On the two or three occasions on which he saw her during this period, his sole object was to obtain her money:—*Held:* the separation could not be taken to be by mutual consent, because the wife in her letters, written after the desertion, made use of casual expressions, wrung from her by his misconduct, purporting that she did not desire to see him or that he should visit her.—MEARA *v.* MEARA (1866), 35 L. J. P. & M. 33; 14 W. R. 349.

2898. —— Respondent leaving house with petitioner's assent—Subsequent visits to children by arrangement.]—A husband having left his wife in full possession of the family home, subsequently & with her assent visited his children there, but did not remain or return to cohabitation with his wife or hold any communication with her:—*Held:* this was not evidence of desertion, but rather of separation by mutual arrangement.—TAYLOR *v.* TAYLOR (1881), 44 L. T. 31.

2899. Verbal agreement to live apart—Connubial intercourse during separation—Agreement repudiated by respondent.]—Husband & wife verbally agreed to live apart from each other, & the husband agreed to pay a weekly sum for the wife's maintenance. Acts of connubial intercourse continued during the time they lived apart. The husband on the ground, as he alleged, that, whilst so living apart, the wife had committed adultery, refused to continue the weekly allowance:—*Held:* there was evidence of desertion.—EDWARDS *v.* EDWARDS (1905), 69 J. P. 344, D. C.

2900. Temporary separation for mutual convenience—Subsequent refusal to receive petitioner.]—During a temporary separation between a husband & wife for mutual convenience cohabitation does not cease & the marital relations are not altered, & the husband, who under such circumstances refuses to take his wife back again or to maintain her, may be guilty of desertion within Married Women (Maintenance in Case of Desertion) Act, 1886 (c. 52), & liable thereunder.—CHUDLEY *v.* CHUDLEY (1893), 69 L. T. 617; 10 T. L. R. 63; 17 Cox, C. C. 697, C. A.

(c) Refusal to resume Conjugal Relations.

i. *In General.*

2901. Mere refusal insufficient.]—FITZGERALD *v.* FITZGERALD, No. 2845, *ante*.

2902. ——.]—(1) A refusal to resume cohabitation does not necessarily constitute desertion.

(2) An agreement between husband & wife to live apart may be evidenced by conduct.—BOWEN *v.* BOWEN (1908), 73 J. P. 87, D. C.

2903. ——.]—JACKSON *v.* JACKSON, No. 2852, *ante*.

ii. *By Respondent.*

2904. Whether desertion constituted—Only one request & refusal—Evidence of matters prior to refusal.]—On a summons against a husband on the ground of desertion under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), evidence was tendered to the effect that the husband & wife had ceased to cohabit together since Sept. 1898, & that on June 23, 1899, the wife, accompanied by a policeman, called at the husband's house & asked him to take her back, which he refused to do. The justices refused to hear any evidence as to anything that had occurred before June 23, 1899, but held that the refusal by the husband to accede to his wife's demand on that day for a return to cohabitation amounted to legal desertion on or since that date:—*Held:* on appeal, the mere facts that the wife had on a certain day asked her husband to take her back & that he had refused to do so did not *per se* amount to legal desertion on or since that date; the justices were wrong in refusing to admit evidence of what had occurred previously to June 23, 1899; & the case must be remitted to them for re-investigation.—WASSELL *v.* WASSELL (1899), 68 L. J. P. 127; 81 L. T. 496, D. C.

Annotation:—**Refd.** Frowd *v.* Frowd, [1904] P. 177.

2905. —— Separation due to money difficulties.]—A. left his home in 1843, & left unanswered letters from his wife telling him that an execution was in the house. She was obliged to go into lodgings, & subsequently supported herself as a governess. In 1844 A. made by letter some vague offer of rejoining her, & in 1848 he wrote, bidding her farewell for ever:—*Held:* there was a wilful desertion of the wife in the winter of 1843–4, & no distinct offer afterwards to find another home.—CUDLIPP *v.* CUDLIPP (1858), 1 Sw. & Tr. 229; 27 L. J. P. & M. 64; 31 L. T. O. S. 318; 164 E. R. 705.

2906. Condition attached by wife to renewal.]—G., in 1851, left his wife, & never afterwards lived with her or contributed to her support. He visited her occasionally, & at an interview in 1854 the wife offered to renew cohabitation, provided he would give up gambling & drinking. He refused to do so, & only twice went to her again, on one occasion asking her to sign a paper undertaking not to trouble him any more. Prior to the wife's conditional offer to renew cohabitation, G. had formed an adulterous connection with another woman, with whom he continued to live, refusing in 1858 to leave her, & stating that he had washed his hands of his wife, & would have no more to do with her:—*Held:* though the wife had annexed a condition to a renewal of cohabitation, the refusal of the husband to abandon his bad habits, when viewed in connection with the other facts of the case, amounted to desertion from that time.—GIBSON *v.* GIBSON (1859), L. J. P. & M. 25; 23 J. P. 535.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (e) i.

2901 i. *Mere refusal insufficient.*]—The persistent refusal of sexual intercourse is not by itself desertion within Marriage Act, 1915 (Vict.), which entitles a married person to a divorce on the grounds of wilful desertion without just cause or excuse for three years & upwards.—MAUD *v.* MAUD (1919), 26 C. L. R. 1.—**AUS.**

2901 ii. ——.]—A wife, living at bed & board with her husband but refusing to permit intercourse, has not "diverted" from his company.—G. *v.* G., [1923] S. C. 175.—**SCOT.**

PART XIII. SECT. 5, SUB-SECT. 8.—B. (e) ii.

m. *Whether desertion constituted.*]—Refusal by a wife of marital intercourse to her husband is wilful desertion without just cause, notwithstanding that such refusal occurred during cohabitation, using that word in the proper sense of living under the same roof.—LEES *v.* LEES (1906), 26 N. Z. L. R. 467.—**N.Z.**

n. ——.]—A wife, deliberately, finally, & without good reason, denied

2907. —— After separation—Of temporary character.]—FITZGERALD *v.* FITZGERALD, No. 2845, *ante*.

2908. —— —— Mutually agreed upon.]—A husband & wife agreed to separate owing to the husband's inability to maintain his wife. They continued to correspond, & numerous letters passed between them, in some of which the husband taunted his wife with not getting a divorce, & said it was cruel of her & her friends to "fetter" him. He also made frequent requests for pecuniary assistance. The wife offered to return to her husband, when he informed her in one of his letters that he was ill; but he wrote & refused her. The husband's letters ceased in July, 1885. The wife wrote four times in answer to the last letter from him, but received no reply. She subsequently made inquiries & discovered that, while the correspondence had been going on & since it ceased, resp. had been residing at various places & keeping up an adulterous connection, & that he was living under his mother's roof with a woman who was not his wife:—*Held:* sufficient to constitute desertion, & coupled with the adultery to entitle the wife to a decree of divorce.—SMITH *v.* SMITH (1888), 58 L. T. 639.

Annotation:—**Refd.** Beauclerk *v.* Beauclerk, [1895] P. 220.

2909. —— —— ——.]—HUXTABLE *v.* HUXTABLE, No. 2858, *ante*.

2910. —— —— ——.]—A husband & wife were living apart under a separation deed, by which the husband covenanted to make weekly payments to the wife. The husband having ceased to make the payments, the wife offered to resume cohabitation; but the husband refused to do so. The wife then applied for an order for maintenance under Married Women's (Maintenance in Case of Desertion) Act, 1886 (c. 52):—*Held:* in order to constitute desertion within the Act, the parties must be living together as man & wife when the desertion takes place; the husband's refusal of the wife's offer to resume cohabitation did not constitute desertion; & there was therefore no evidence of desertion.

A husband deserts his wife, if he wilfully absents himself from the society of his wife in spite of her wish. Desertion may be inferred from certain acts in one case which in another would not justify the same inference. There must be a deliberate purpose of abandoning the conjugal society. Such abandonment need not be for any specified period. If a husband had quite recently left his wife, stating that he did not intend to return, & was found living with another woman, this would be abundant evidence of desertion, upon which the magistrates could act (LOPES L.J.).—R. *v.* LERESCHE, [1891] 2 Q. B. 418; 60 L. J. M. C. 153; 65 L. T. 602; 56 J. P. 37; 40 W. R. 2; 7 T. L. R. 685; 17 Cox, C. C. 384, C. A.

Annotations:—**Distd.** Chudley *v.* Chudley (1893), 69 L. T. 617. **Expld.** Bradshaw *v.* Bradshaw, [1897] P. 24. **Distd.** Cowley *v.* Cowley (1897), *Times*, Feb. 3. **Consd.** Huxtable *v.* Huxtable (1899), 68 L. J. P. 83. **Apld.** Synge *v.* Synge, [1901] P. 317. **Consd.** Jackson *v.* Jackson, [1924] P. 19. **Refd.** Wilkinson *v.* Wilkinson (1894), 58 J. P. 415; Wassell *v.* Wassell (1899), 68 L. J. P. 127; Kay *v.* Kay, [1904] P. 382; Harriman *v.* Harriman, [1909] P. 123.

2911. —— —— ——.]—BRADSHAW *v.* BRADSHAW, No. 6086, *post*.

2912. —— Wife removed to lunatic asylum.]—*v.* PULFORD, No. 2846, *ante*.

iii. *By Petitioner.*

2913. Respondent living in adultery.] —Where the intention of the husband clearly was not to live with the wife (he was, in fact carrying on an adulterous intercourse before & after marriage):—*Held:* it amounted to desertion on his part, though the wife actually left the house in which they last resided together, &, after she was aware of the adulterous connection, refused to return unless she was satisfied that such connection was at an end.—GRAVES *v.* GRAVES (1864), 3 Sw. & Tr. 350; 33 L. J. P. M. & A. 66; 10 L. T. 273; 10 Jur. N. S. 546; 12 W. R. 1016; 164 E. R. 1310.

Annotations:—**Folld.** Pizzala *v.* Pizzala (1896), 12 T. L. R. 451; Koch *v.* Koch, [1899] P. 221. **Consd.** Sickert *v.* Sickert, [1899] P. 278. **Refd.** Bowron *v.* Bowron, [1925] P. 187.

2914. ——.]—A husband in 1880 ceased to reside with his wife on the pretence that his business compelled him to be absent, but he supplied her with necessaries & corresponded with her & visited her occasionally, & a child was born in Feb. 1881. In Jan. 1884, the wife discovered that he had for years been living with another woman:—*Held:* (1) his conduct did not amount to desertion for two years; (2) *Semble:* desertion commenced from the time when his wife discovered the adultery, & after a lapse of two years from that time she would be entitled to a dissolution of her marriage.

I have on other occasions pointed out that if a man is living with another woman the wife is justified in saying, "I shall not return to you, nor shall I allow you to have access to me while you are living in open adultery with another woman (SIR JAMES HANNEN, P.).—FARMER *v.*

her husband marital privileges, though she continued to reside in his house:—*Held:* the husband was entitled to a decree of restitution of conjugal rights on the ground of malicious desertion.—HUSBAND *v.* WIFE (1923), 44 N. L. R. 172.—**S. AF.**

2908 i. —— *After separation—Mutually agreed upon.*]—The parties were married in Dec. 1881, & lived together for a number of years, seven children being born of the marriage. The desertion relied upon was alleged to have commenced in May, 1906. For some years prior to 1906 the parties had not lived happily together, & on Jan. 10, 1905, an agreement of separation was entered into upon the usual terms, & providing for the maintenance of resp. & her children. The actual separation ceased in May, 1905, when the parties resumed cohabitation, which continued till the end of the year. Resp., however, refused to allow petitioner conjugal rights from May, 1906:—*Held:* petitioner had established a case of constructive desertion, & was entitled to a decree for dissolution of marriage.—LORIE *v.* LORIE (1913), 32 N. Z. L. R. 634.—**N.Z.**

2908 ii. —— —— ——.]—While spouses were living apart by mutual consent, formal offers to resume cohabitation were made by the husband by way of defence to actions at the instance of the wife concerning the rate of her aliment. Thereafter the husband brought an action of divorce for desertion in which he founded on the fact that these offers had not been accepted:—*Held:* that the offers made by the husband were not such as to establish that he had used all reasonable means to induce his wife to adhere, &, in the absence of positive evidence to that effect, that he was not entitled to decree of divorce.—FARROW *v.* FARROW, [1920] S. C. 707; 57 Sc. L. R. 656; [1920] 2 S. L. T. 214.—**SCOT.**

o. —— —— —— *Condition attached by wife to renewal.*]—Petitioner married a woman who at the time was pregnant, but not by him. He believed that she was pregnant by him, & married her thinking that it was his duty to do so. As he had not then a home to which to take her she returned to her own people. Some time afterwards, & before the child was born, she wrote to him confessing her fault, telling him that he was not the father of the child & asking him to forgive her. He replied that he was willing to forgive her, & take her to the home he had then made, but that he would not receive or maintain the expected child. Later, & still before the birth of the child, she absolutely refused to return to him unless he agreed to take the child into his home & bring it up. He having refused to comply with the condition, she made no reply & did not return to him:—*Held:* petitioner had not been guilty of any wrongful act which could be regarded as reasonable cause or excuse for his wife's refusal to go to him, & that a case of desertion had been made out.—HALL *v.* HALL (1917), 22 C. L. R. 476.—**AUS.**

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect. 8, B. (e) iii. & (f).]

FARMER (1884), 9 P. D. 245; 53 L. J. P. 113; 33 W. R. 169.

Annotations:—As to (2) **Folld.** Garcia *v.* Garcia (1888), 13 P. D. 216. **Distd.** Kay *v.* Kay (1904), 73 L. J. P. 108. *Generally*, **Refd.** Lapington *v.* Lapington (1888), 14 P. D.

2915. -.]—GARCIA *v.* GARCIA, No. 2856, *ante*.

2916. -.]—A husband may be guilty of desertion even though he is willing to return to cohabitation with his wife, if at the time he is so willing he is actually cohabiting with another woman.—EDWARDS *v.* EDWARDS (1893), 62 L. J. P. 33.

2917. Bona fides of respondent's offer.]—A husband, shortly after deserting his wife, had requested her to resume cohabitation, which request the wife disregarded as not made *bonâ fide*, & had on the few isolated occasions, on which they met casually, disregarded her or made insulting gestures, but not otherwise communicated with her for nine years:—*Held:* the facts constituted such a sufficient desertion as coupled with adultery to give the wife a right to a divorce.—MARTIN *v.* MARTIN (1898), 78 L. T. 568.

2918. ——.]—To negative a charge of desertion it is not sufficient that a man should merely write to his wife "Come back," or that he should say to a third party that he is willing to take her back. The ct. will look to the whole of his conduct, & must be satisfied from it that when he offered to take her back he really intended what he said.

H. married a woman, &, after cohabiting with her at her father's house some weeks, left her. At his request she shortly afterwards went to him & remained with him for two or three days. He then sent her back to her father, saying that he could not support her. After a period of more than eighteen months, during which she did not hear from him, he went to her father's house to see her. Her father refused to allow him to have any communications with her except in the presence of himself & her mother, but this he declined. He then asked if he would be allowed to take her back, but this, also, the father refused on hearing from him that he had no home to which to take her. He then left & never returned, or asked her to return to him:—*Held:* to amount to desertion.—HARRIS *v.* HARRIS (1866), 15 L. T. 448.

2919. ——.]—MALLINSON *v.* MALLINSON, No. 4019, *post*.

2920. ——.]—(1) An order made under Poor Law Amendment Act, 1868 (c. 122), upon a husband whose wife has become chargeable to the parish, though unrevoked, is not a bar to proceedings under Married Women (Maintenance in Case of Desertion) Act, 1886 (c. 52), when the wife has ceased to receive parish relief.

(2) An offer by the husband to resume cohabitation, though made *bonâ fide*, is not such an offer as will purge previous desertion, if made under such circumstance that the wife is not bound to accept it.—KERSHAW *v.* KERSHAW (1887), 51 J. P. 646; 3 T. L. R. 507, D. C.

2921. ——.]—The wife petitioned for a divorce on the grounds of desertion & adultery. As to the desertion, the husband left his wife in Aug. 1886, mainly on account of her reiterated objections to associate with a lady & gentleman of his acquaintance, with whom the wife complained that he spent too much of his time, to the consequent neglect of herself & children. There was no charge of cruelty upon the record, but it was proved at the trial that he had struck her before leaving her, & that she had called him a coward on one occasion. It was also proved that he had stated that he would never live with her again, & that he would do anything, short of crime, to injure her. Shortly after leaving her he wrote to her, saying it was no part of his plan to desert her. The husband in Dec. 1887, told an old friend of his that he had heard his wife intended going in for a separation, but he "should take devilish good care to return home before the two years were up." The husband, all through, made his wife an allowance, & continued to provide a home for her. He did not answer several of her letters, & at Christmas, 1887, she wrote to him, saying she had heard from one of the children, by whom he had sent her a present, that he had said he should return home soon; that she hoped he would do so for the children's sake, but that, for herself, she had long ago given up hope. With that letter she sent a memorandum, written by herself a year before, on which occasion she had taken off her wedding ring & put it away along with the memorandum. In the middle of Aug. 1888, about ten or twelve days before the two years' absence had expired, the husband wrote to his wife, who was then in Scotland, saying he had returned to their London house, & requesting her to join him there with the children. The wife was at that time suffering from the effects of an accident which she had met with before she went to Scotland, but the results of which rendered it unadvisable for her to take another long journey just then. She accordingly wrote to her husband to that effect, offering to send the children if he so desired, & saying that she herself would return home as soon as she was well enough to travel. Her sister, with whom she was staying, also wrote, & invited the husband to see his wife in Scotland. He declined this, & wrote to his wife again, repeating his request that she would return home "at her convenience & as soon as she was sufficiently recovered"; &, not wishing to remain in London, he asked her to write to him at his club a few days before she intended to return, to apprise him of the date of her intended arrival in London. The wife did, in fact, return a few days later, but failed to inform her husband as he had requested. On Aug. 31 he wrote to her from Cowes, saying he "believed" she had arrived at their house in London, & that he regretted she had not advised him of her intention, as, had she done so, he would have met her on her arrival but that he would arrive home on the afternoon of the next day, Sept. 1, 1888. The wife had, in the meantime, consulted her solrs., from whom the husband received a letter on the morning of Sept. 1, just before he would have started for London, intimating that proceedings were about to be commenced for a judicial separation, on the ground of desertion without just cause for two years & upwards. The husband thereupon wrote to his wife, saying that, in consequence of that letter, he should not return home that day as he had intended to so, & that while any proceedings were threatened he must decline further intercourse with her. At the trial, the husband, though present, was not called. At the close of the wife's case, it was submitted, as a point of law, that there was no case to go to the jury:—*Held:* there was a case, & the judge left to the jury the question, whether the conduct of the husband was that of a man honestly intending to resume cohabitation with his wife; whether he was not misrepresenting his real intentions in the letters he wrote in Aug. 1888, & whether the real & only object of those letters was to evade the con-

sequences which might ensue, & to deprive the wife of the remedy which she would be entitled to upon the completion of the two years' absence.—FRENCH-BREWSTER *v.* FRENCH-BREWSTER, FRENCH-BREWSTER *v.* FRENCH-BREWSTER & GORE (1889), 62 L. T. 609.

2922. ——.]—R. *v.* DAVIDSON, ETC., DURHAM JJ. (1889), 5 T. L. R. 199, D. C.

Annotation :—**Mentd.** Forster *v.* Forster (1910), 54 Sol. Jo. 403.

2923. – .]—*Re* DUCKWORTH (1889), 5 T. L. R. 608, D. C.

2924. – .]—In a wife's suit for dissolution on the ground of adultery coupled with desertion, the adultery was proved; & with regard to the desertion, it appeared that after twenty-one years' cohabitation it was in Aug. 1886, agreed between the parties, who were then resident abroad, that the wife & the children of the marriage should come to live in England. They accordingly took lodgings at B., & the wife pressed her husband to return with them, but he refused. She continued willing to receive him & renew cohabitation until Feb. 1887, when she was shown a letter which convinced her that her husband had been carrying on an adulterous intercourse. Upon this she resolved that she never would live with him again. He wrote several letters to her offering to return to cohabitation, to which she did not reply; but her solrs., by her direction, informed him that she would never live with him again :—*Held :* there being no proof that the husband's offers to live again with his wife were not *bonâ fide*, she could not treat the separation on which she insisted as desertion by him, & she was only entitled, therefore, to a judicial separation on the ground of adultery.—LODGE *v.* LODGE (1890), 15 P. D. 159; 59 L. J. P. 84; 63 L. T. 467.

2925. ——.]—A husband who had been guilty of a long series of acts of insult & cruelty towards his wife, ultimately expelled her & some of her children from the matrimonial home. On the following day he apparently repented of his act & endeavoured to get his wife to return to him by repeatedly writing penitent letters to her promising to amend his future conduct towards her. She refused to comply, &, after some months, took out a summons against him for desertion under Summary Jurisdiction (Married Women) Act, 1895 (c. 39). The justices found the desertion proved, & their decision was upheld by the Div. Ct. The husband appealed to the Ct. of Appeal on the ground that the desertion had been terminated by his repentance & desire for his wife's return :—*Held :* the desertion was a continuing offence & could not be obliterated by subsequent offers, as to the genuineness of which his wife might reasonably entertain doubts.—THOMAS *v.* THOMAS, [1924] P. 194; 93 L. J. P. 61; 130 L. T. 716; 40 T. L. R. 250; 68 Sol. Jo. 339; 22 L. G. R. 653, C. A.

Annotation :—**Expld.** Bowron *v.* Bowron, [1925] P. 187.

2926. Groundless refusal.]—In 1880 applt., a labourer, married resp. In the following year a child was born, & the wife went, with her husband's full consent, to her mother's house for her confinement. During her absence applt. broke up their home, & took a room in his father's cottage, where the wife refused to live with him, on the ground that the accommodation there was insufficient. Subsequently the husband refused her requests to take her back to live with him as his wife. The husband was in 1894 convicted on a summons for desertion of his wife :—*Held :* the husband's wish that the wife should live with him at his parents' house was not unreasonable, & there was no evidence of desertion within Married Women (Maintenance in Case of Desertion) Act, 1886 (c. 52), s. 1, to warrant the justices in making an order against him after the lapse of so many years from the time they ceased to live together.—JONES *v.* JONES (1895), 43 W. R. 424; 11 T. L. R. 317; 39 Sol. Jo. 397, D. C.

2927. Offer made after expiration of two years.]—(1) Where the offence of desertion without cause for two years is once completed, the spouse deserted has, at least since Matrimonial Causes Act, 1857 (c. 85), came into operation, a complete right to the relief given by the statute, although the other party may, subsequently to the two years, have made a *bonâ fide* offer to return.

(2) *Semble :* the same rule would apply to the wife's right to a dissolution of marriage by reason of adultery coupled with desertion, under sect. 27 of the Act; but not to the "desertion" mentioned in sect. 21 as the foundation of an order for protection of the wife's property.—CARGILL *v.* CARGILL (1858), 1 Sw. & Tr. 235; 27 L. J. P. & M. 69; 31 L. T. O. S. 332; 4 Jur. N. S. 764; 6 W. R. 870; 164 E. R. 708.

Annotations :—*As to* (1) **Distd.** Brookes *v.* Brookes (1858), 28 L. J. P. & M. 38. **Apld.** Usher *v.* Usher (1922), 128 L. T. 26. *As to* (2) **Consd.** Mahoney *v.* M'Carthy, [1892] P. 21. **Refd.** Heard *v.* Heard, [1896] P. 188; Houghton *v.* Houghton, [1903] P. 150.

2928. .]—Where the husband has been guilty of adultery & desertion for two years & upwards, an offer to return to cohabitation can be no bar to the wife's petition on the ground of adultery & desertion, for she is under no obligation to condone the adultery.—BASING *v.* BASING (1864), 3 Sw. & Tr. 516; 33 L. J. P. M. & A. 150; 10 L. T. 756; 10 Jur. N. S. 806; 164 E. R. 1375.

2929. Former law—Remedy before Matrimonial Causes Act, 1857 (c. 85).]—A husband deserted his wife without cause in 1833. In 1850 he personally proposed to the wife to renew cohabitation, which she refused; in 1858 she petitioned for a judicial separation, under sect. 16 of above Act, by reason of his wilful desertion :—*Held :* no remedy having accrued to the wife in 1850 under the then state of the law, the offer of the husband in that year terminated the desertion, & the petition must be dismissed.—BROOKES *v.* BROOKES (1858), 1 Sw. & Tr. 326; 28 L. J. P. & M. 38; 32 L. T. O. S. 228; 23 J. P. 72; 5 Jur. N. S. 76; 7 W. R. 143; 164 E. R. 750.

(*f*) *Constructive Desertion—Wife forced out of Matrimonial Home.*

2930. General rule.]—In order to constitute desertion, there must be a cessation of cohabitation & an intention on the part of accused party to desert the other.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (f).

2930 i. *General rule.*]—A husband having for some years without foundation, continually accused his wife of impropriety of conduct, & of actual misconduct with other men so as to justify her in leaving him, she threatened to leave him. He then made overtures for a reconciliation which the wife rejected, but for two months afterwards cohabitation between them continued, & during that time the husband continued to make the same charges against the wife. She thereupon left him. After the separation the husband's conduct was such as to render the wife's return to him practically impossible. On a petition by the wife for a dissolution of the marriage on the ground of desertion for three years & upwards :—*Held :* that an intention to drive his wife away from him & to make the separation between them permanent should be imputed to the husband, &, therefore, that the desertion was established.—Moss *v.* Moss (1912), 15 C. L. R. 538.—**AUS.**

2930 ii. ——.]—Where a husband leaves his wife in consequence of

Sect. 5.—Matrimonial offences and remedies therefor: Sub-sect 8, B. (f) & (g)

It is not always, or necessarily, the guilty party who leaves the matrimonial home: the party who intends to bring the cohabitation to an end, & whose conduct in reality causes its termination, commits the act of desertion.

There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation & does so by leaving his wife, & that of a husband who, with the like intent, obliges his wife to separate from him.

In a case where a husband is carrying on an adulterous intercourse with another woman or other women, although he does not bring the adulteress into the matrimonial home & commit adultery with her there, the wife may express her willingness to remain with him on condition that he give up the connection complained of; &, if the husband refuse to do so, & the wife withdraw from cohabitation in consequence of the refusal, the husband is guilty of desertion, as he must be taken to intend the consequences of his action. The situation then produced is just the same as if the guilty husband left his wife. At the end of two years the statutory offence of desertion is complete, & the wife is entitled to relief on that ground.—SICKERT *v.* SICKERT, [1899] P. 278; 68 L. J. P. 114; 81 L. T. 495; 48 W. R. 268; 15 T. L. R. 506.

Annotations:—**Consd.** Harriman *v.* Harriman, [1909] P. 123. **Apld.** Bowron *v.* Bowron, [1925] P. 187. **Refd.** Dodd *v.* Dodd, [1906] P. 189; Eastbourne Grdns. *v.* Croydon Grdns., [1910] 2 K. B. 16; Blackledge *v.* Blackledge, [1913] P. 9; Thomas *v.* Thomas, [1924] P. 194.

2931. .] If a wife leaves her husband in consequence of a mere expression on his part that she can go where she likes & do what she likes, & then refuses to return home at his request, the husband is not guilty of desertion.

To constitute desertion, although it is not actually necessary that the husband should drive his wife away from him, there must be an intention on his part to break off matrimonial relations.

Where a husband treated a wife with persistent cruelty, but such cruelty did not cause the wife to leave him & live apart, the magistrate allowed the summons to be amended, charging the husband with desertion. The husband, in answer to the magistrate, said that he would not maintain his wife away from home. The magistrate then found that the husband had been guilty of desertion:—*Held:* reversing the magistrate's decision, there was no desertion.

It is perfectly good law that it is not necessary for a husband in order to desert his wife, to actually turn his wife out of doors; it was sufficient if, by his conduct, he compelled her to leave the house. It is obvious in this case that the wife left the house of her own free will & not compelled to do so by the husband. The separation was not against the wish of the wife, but was a separation by consent of both parties (JEUNE, P.).—CHARTER *v.* CHARTER (1901), 84 L. T. 272; 65 J. P. 246; 17 T. L. R. 327, D. C.

Annotations:—**Consd.** Bowron *v.* Bowron, [1925] P. 187. **Refd.** Thomas *v.* Thomas, [1924] P. 194.

2932. Wife turned away from home—"For good cause."]—BAKER *v.* BAKER, No. 4417, *post.*

2933. Subsequent discovery of husband's adultery—Unwillingness of wife to return.] GRAVES *v.* GRAVES, No. 2913, *ante.*

2934. Paramour brought to house by husband.]—A wife petitioned for the dissolution of her marriage on the grounds of adultery & desertion. The parties were married in 1866, & in 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house, & then told her husband that either she or the woman must leave the house. The husband told her she might do as she liked, but that the woman would remain. The wife thereupon left, & never afterwards cohabited with her husband:—*Held:* the husband was guilty of deserting his wife.—DICKINSON *v.* DICKINSON (1889), 62 L. T. 330.

Annotations:—**Consd.** Sickert *v.* Sickert, [1899] P. 278. **Refd.** Bowron *v.* Bowron, [1925] P. 187.

2935. Adultery by husband—Further cohabitation impossible.]—FARMER *v.* FARMER, No. 2914, *ante*

2936. —— ——.]—Where the husband was living in adultery with a woman & refused to break off the connection, & thereby made it impossible for his wife to live with him, & in consequence she left his house:—*Held:* this amounted to desertion, which, coupled with the adultery, entitled the wife to a divorce.—PIZZALA *v.* PIZZALA (1896), 68 L. J. P. 91, n.; 12 T. L. R. 451.

Annotations:—**Folld.** Koch *v.* Koch, [1899] P. 221; Sickert *v.* Sickert, [1899] P. 278.

2937. —— ——.]—SICKERT *v.* SICKERT, No. 2930, *ante.*

2938. —— —— **Adultery with servant.**]—Upon a wife's petition for divorce on the grounds of desertion & adultery, it appeared that resp. had refused to break off relations with & to discharge a servant with whom, when taxed, he admitted that he had committed adultery. Petitioner thereupon left the house, &, although overtures were subsequently made by resp. for a resumption of cohabitation, petitioner never returned home, owing to the persistent refusal of resp. to discharge the servant in question:—*Held:* the conduct of the husband constituted "desertion" within the Divorce Acts.—KOCH *v.* KOCH, [1899] P. 221; 68 L. J. P. 90; 81 L. T. 61.

Annotations:—**Consd.** Sickert *v.* Sickert, [1899] P. 278. **Refd.** Bowron *v.* Bowron, [1925] P. 187.

2939. Ill-usage & cruelty of respondent.]—THOMAS *v.* THOMAS, No. 2925, *ante.*

conduct on her part which justifies him in believing that she has committed adultery, her conduct does not amount to constructive desertion by her unless it is marked by persistence regardless of consequences or is accompanied by refusal to discontinue that conduct, so as to show an intention on her part to break off matrimonial relations or an intention to persevere in intolerable conduct.

Decision of the Supreme Court of New South Wales (GORDON, J.) affirmed.—DEARMAN *v.* DEARMAN (1916), 21 C. L. R. 261.—**AUS.**

p. *Wife turned away from home—Charge of adultery not proved.*]—In an alimony action deft. in his defence alleged that he had refused, & still refused, to support pltf. by reason of her having committed adultery with M. Pltf., on being charged by deft. with adultery, & ordered to go away, left his home, though, before she actually departed, he forbade her to go. Deft. persisted in the charge of adultery, but did not attempt to prove it. Pltf. proved none of the acts of violence alleged in her statement of claim:—*Held:* the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part, & he must be taken to have dispensed with the necessity for pltf. offering to return.—FERRIS *v.* FERRIS (1885), 7 O. R. 496.—**CAN.**

2933 i. —— *Subsequent discovery of husband's adultery—Unwillingness of wife to return.*]—The wife had been ejected by her husband on a charge of adultery; & a petition had subsequently been presented by the husband, & a verdict found in the wife's favour; & that they had continued to live apart, the wife having obtained against her husband an order for maintenance. No attempt at a reconciliation had been made by either party, & the husband had lived with another woman in continuous adultery for upwards of two years preceding the filing of her petition:—*Held:* these facts sustained the charge of desertion by the husband. LAMB *v.* LAMB (1890), 8 N. Z. L. R. 424.—**N.Z.**

q. *Ill usage & cruelty.*]—DENNING *v.* DENNING (1922), 53 O. L. R. 130.—**CAN.**

(g) *Deeds of Separation—Effect of.*

2940. General rule.]—Desertion cannot arise apart from a separation without the consent of the party alleging desertion.

A separation by deed implies consent of the parties & negatives desertion. If one party fails to pay the allowance provided by the deed, & the other, relying upon the deed, takes steps to enforce payment thereunder, the latter cannot successfully plead desertion.—ROE *v.* ROE, [1916] P. 163; 85 L. J. P. 141; 114 L. T. 1184; 32 T. L. R. 490; 60 Sol. Jo. 495; *subsequent proceedings*, 115 L. T. 792.

Annotation :—**Refd.** Walsh *v.* Walsh (1919), 122 L. T. 463.

2941. Whether evidence of consent to negative desertion—Deed not acted upon.]—A separation, which was never acted upon, either as to the husband & wife living apart, or as to certain stipulations about money matters contained in it, does not deprive the husband's subsequently leaving the wife against her will of the character of desertion.—COCK *v.* COCK (1864), 3 Sw. & Tr. 514; 4 New Rep. 413; 33 L. J. P. M. & A. 157; 10 L. T. 726; 10 Jur. N. S. 806; 13 W. R. 189; 164 E. R. 1375.

2942. —— —— Petitioner not consenting to separation.]—After a husband had deserted his wife, he wrote to her asking for assistance to save him from starving, but he refused to return to her or to allow her to come to him. She consented to make him an allowance. & a few months after the desertion they both signed a deed of separation, whereby the payment of the allowance was secured to him. The deed was not carried into effect, but she paid the allowance to him for three months, & then stopped it, because she thought that by continuing the payment she was encouraging him to keep apart from her. She afterwards wrote & asked him to resume cohabitation, which he refused to do. More than two years having elapsed since the commencement of the desertion, she filed a petition :—*Held :* as she never consented to his remaining apart from her, the desertion for two years & upwards was established.—NOTT *v.* NOTT (1866), L. R. 1 P. & D. 251; 36 L. J. P. & M. 10; 15 L. T. 299.

Annotations :—**Distd.** Parkinson *v.* Parkinson (1869), L. R. 2 P. & D. 25. **Refd.** Piper *v.* Piper, [1902] P. 198.

2943. —— Failure to make allowance secured by deed.]—CRABB *v.* CRABB, No. 2489, *ante*.

2944. —— —— —.]—A husband deserted his wife, but within two years from the desertion a deed of separation was agreed to, by which he covenanted to make her an allowance & to charge it upon his reversionary interest in a sum of money. This deed was executed by the husband & wife, & by a trustee on behalf of the wife, but no part of the allowance had been paid :—*Held :* the wife had bargained away her right to relief, & could not establish a charge of desertion without cause for two years.—PARKINSON *v.* PARKINSON (1869), L. R. 2 P. & D. 25; 39 L. J. P. & M. 14; 21 L. T. 732.

Annotation :—**Consd.** Piper *v.* Piper, [1902] P. 198.

2945. Upon a summons by a married woman under Married Women (Maintenance in Case of Desertion) Act, 1886 (c. 52), it appeared that disputes had arisen between her & her husband & that they had lived apart under an agreement for separation, by which he undertook to pay her a weekly allowance so long as she should live chastely & should not molest him. He had ceased to make & had refused to continue the weekly payments under the agreement. He charged his wife with adultery, but the justices found that the charge was not proved :—*Held :* the refusal of the husband to pay his wife the weekly allowance & to carry out the agreement of separation was not sufficient evidence of "desertion" within the Act to warrant the justices in making an order against him for her support.—PAPE *v.* PAPE (1887), 20 Q. B. D. 76; 57 L. J. M. C. 3; 58 L. T. 399; 52 J. P. 181; 36 W. R. 125; 4 T. L. R. 76, D. C.

Annotations :—**Distd.** R. *v.* Birwistle, etc. JJ. (1889), 58 L. J. M. C. 158. **Apprvd.** R. *v.* Leresche, [1891] 2 Q. B. 418. **Distd.** Chudley *v.* Chudley (1893), 62 L. J. M. C. 97. **Refd.** Wilkinson *v.* Wilkinson (1894), 58 J. P. 415.

2946. R. *v.* LERESCHE, No. 2910, *ante*.

2947. PIPER *v.* PIPER, No. 6088, *post*.

2948. — — —.]—A husband & wife separated under a deed. After four months the former ceased to make payments under the deed. The wife subsequently petitioned for a divorce on the ground of the husband's desertion & adultery :—*Held :* the deed of separation did not prevent petitioner relying upon the charge of desertion.—HUSSEY *v.* HUSSEY (1913), 109 L. T. 192; 29 T. L. R. 673.

Annotations :—**Folld.** Smith *v.* Smith, [1915] P. 288. **Consd.** Roe *v.* Roe, [1916] P. 163.

2949. —— — — Deed repudiated by conduct.]—A husband having threatened to break up the matrimonial home, entered into a deed of separation, but, after a short time he made no further payment to his wife under the deed. Upon a petition by the wife :—*Held :* he was guilty of desertion, &, upon proof of his adultery the wife was entitled to a decree *nisi* dissolving the marriage.

Qu. : whether the mere failure to pay an allowance provided by the terms of a deed of separation would constitute desertion.—SMITH *v.* SMITH, [1915] P. 288; 85 L. J. P. 16; 113 L. T. 1166; 32 T. L. R. 43; 60 Sol. Jo. 25.

2950. —— — — —.]—ROE *v.* ROE, No. 2940, *ante*.

2951. —— —— ——.]—A deed of separation provided for the parties living apart & contained a covenant by the husband to pay the wife a weekly allowance & a mutual covenant not to sue for restitution. The husband had failed to pay the allowance & repudiated the deed; the wife had not sued under the deed. The wife sued for dissolution of marriage on the grounds of desertion & adultery :—*Held :* the ct. would not take notice of the deed, & even, if defending, the husband could not avail himself of the deed.—LOOKER *v.* LOOKER, [1918] P. 132; 87 L. J. P. 72; 118 L. T. 654; 34 T. L. R. 270; 62 Sol. Jo. 405.

Annotation :—**Refd.** Holroyd *v.* Holroyd (1920), 36 T. L. R. 479.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (g).

2940 i. *(General rule.)*—Where a deed of separation has been entered into by husband & wife the husband cannot be afterwards held guilty of desertion during the continuance of such separation. Resumption of cohabitation prevents such deed from being pleaded as a bar to subsequent desertion.—*cf.* FISHER (1901), 23 N. Z. L. R. 386.—**N.Z.**

2941 i. *Whether evidence of consent to negative desertion—Failure to make allowance secured by deed.*]—The parties had signed a deed of separation in which the husband agreed to allow his wife the sum of £100 a year for maintenance. Petitioner had received this allowance for one year only, resp. having refused to continue it. Since that time petitioner had been earning her own living. No attempt to resume cohabitation had been made by either party since their separation, & the husband had lived with another woman in continuous adultery for upwards of two years prior to the filing of the petition :—*Held :* these facts sustained the charge of desertion against the husband.—COOMBS *v.* COOMBS (1897), 16 N. Z. L. R. 56.—**N.Z.**

Sect. 5.—*Matrimonial offences and remedies therefor: Sub-sect.* 8, *B.* (*g*), *C. & D.* (*a*) *&* (*b*), *E. & F.* (*a*) *&* (*b*).]

2952. ——————.]—WALSH *v.* WALSH, No. 2880, *ante*.

2953. —— **No covenant to condone—No covenant not to sue.**]—MOORE *v.* MOORE, CHADWICK & GRIFFITHS, No. 3045, *post*.

2954. —— **Deed obtained mala fide.**]—A husband, before leaving his wife, told her that, if she would sign a deed of separation, he would make her an allowance of £1 a week, otherwise he would give her nothing. He thereupon took her to his solr.'s office where the deed of separation was already drawn up. The solr. told her that the only way to get any money from her husband was to sign the deed. At first she refused to do so, but at length consented, her child being then three months old. She had no independent advice. She received the allowance under the deed for some years. The husband having subsequently committed adultery, she brought an action for divorce, alleging adultery & desertion:—*Held:* the wife was not a consenting party to the deed, having been forced into signing it by the circumstances of her position, & therefore she was not prevented from relying on the desertion.—ADAMSON *v.* ADAMSON (1907), 23 T. L. R. 434.

Annotation:—**Apld.** Holroyd *v.* Holroyd (1920), 36 T. L. R. 479.

2955. ——————.]—HARRISON *v.* HARRISON, No. 2973, *post*.

2956. ——————.]—A husband for four years before deserting his wife pressed her continuously to sign a paper under which he agreed to pay her a small weekly sum for the maintenance of herself & her three young children, but she always refused to do so. Finally, in 1917, he left her, taking with him all the money in the house with the exception of a sum of 4*d*. Some weeks later, when she discovered his whereabouts, he declined to come home or to provide her with any money unless she signed a document which he had prepared after consulting a solr. He threatened if she did not sign to leave the country & let her & her children starve or go into the workhouse. In these circumstances she signed the paper & had been receiving a small weekly sum which had become wholly inadequate:—*Held:* the wife was not a consenting party, but had been forced into signing the document by her husband's threats, her own ill-health & destitution, & she was not prevented from relying on desertion, coupled with the husband's adultery.—HOLROYD *v.* HOLROYD (1920), 36 T. L. R. 479.

C. Statutory Desertion.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 185 (1).

2957. Desertion for two years & upwards.]—Judicial separation decreed by reason of the wife's desertion of her husband for two years & upwards without reasonable cause.—MILLAR *v.* MILLAR (1883), 8 P. D. 187; 32 W. R. 95.

2958. Failure to obey restitution decree.]—In a petition by a wife for divorce on the ground of adultery & desertion it appeared that the husband had failed to comply with a decree for restitution of conjugal rights, & that he had also been guilty of adultery before the date of the decree:—*Held:* sufficient proof of adultery & desertion had been given to satisfy Matrimonial Causes Act, 1884 (c. 68), s. 5, & the wife was entitled to a decree for divorce.—BIGWOOD *v.* BIGWOOD (1888), 13 P. D. 89; 57 L. J. P. 80; 58 L. T. 642; 36 W. R. 928.

Annotation:—**Consd.** Beauclerk *v.* Beauclerk, [1895] P 220.

2959. Not where compliance impossible.]—Where a husband had refused to comply with a decree ordering him to resume cohabitation within fourteen days of the service thereof, the ct., under Matrimonial Causes Act, 1884 (c. 68), s. 5, granted a decree of judicial separation, although the period of two years had not elapsed.

If resp. had failed to comply with the order of restitution because he had not the means of doing so, & because he did not know where his wife was, I would not make a decree of judicial separation (HANNEN, P.).—HARDING *v.* HARDING (1886), 11 P. D. 111; 55 L. J. P. 59; 56 L. T. 919.

2960. —— **Effect of Matrimonial Causes Act, 1884 (c. 68), s. 5.**]—The effect of above sect. which enacts that resp. who fails to comply with a decree for restitution of conjugal rights shall be deemed guilty of desertion without reasonable cause, & that a suit for judicial separation may be forthwith instituted, is to give the ct. power to refuse a decree for restitution whenever the result of such a decree would be to compel the ct. to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case.—RUSSELL *v.* RUSSELL, [1895] P. 315; 64 L. J. P. 105; 73 L. T. 295; 44 W. R. 213; 11 T. L. R. 579; 39 Sol. Jo. 722, C. A.; *on appeal*, [1897] A. C. 395, H. L.

Annotations:—**Apld.** Oldroyd *v.* Oldroyd, [1896] P. 175. **Consd.** Beer *v.* Beer (1906), 94 L. T. 704; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80; Greene *v.* Greene, [1916] P. 188. **Apld.** Walter *v.* Walter, [1921] P. 302. **Consd.** Thomas *v.* Thomas, [1924] P. 194. **Refd.** Armytage *v.* Armytage (1898), 78 L. T. 689; Walker *v.* Walker (1898), 77 L. T. 715; Synge *v.* Synge, [1900] P. 180; Jeapes *v.* Jeapes (1903), 89 L. T. 74; Frowd *v.* Frowd, [1904] P. 177; Baron *v.* Baron (1908), 52 Sol. Jo. 282; Harriman *v.* Harriman, [1909] P. 123; Butland *v.* Butland (1913), 29 T. L. R. 729; Moss *v.* Moss, [1916] P. 155; Fisk *v.* Fisk (1920), 122 L. T. 803; Foster *v.* Foster, [1921] P. 438; Harnett *v.* Harnett, [1924] P. 126.

2961. ——————.]—WALTER *v.* WALTER, No. 2494, *ante*.

2962. — **Wife's right of election.**]—LESLIE *v.* LESLIE, No. 5516, *post*.

2963. —— **Time for obedience—Inclusion of Sundays.**]—Where the period limited for compliance with a decree for restitution of conjugal rights includes one or more Sundays, those days will be included in computing the time, the lapse of which, without compliance with the decree, constitutes statutory desertion within the meaning of the Matrimonial Causes Act, 1884 (c. 68), s. 5.—BLACKWELL *v.* BLACKWELL (1920), 89 L. J. P. 143; 123 L. T. 175; 36 T. L. R. 478.

Proof of service of restitution decrees.]—*See* Nos. 3925, 3926, *post*.

D. Commencement of Desertion.

(*a*) *In General.*

2964. From time of intention to desert.]—WALSH *v.* WALSH, No. 2880, *ante*.

Whether possible during cessation of cohabitation.]—*See* Nos. 2837, 2845, 2846, 2850, 2910, *ante*.

Effect of petition in matrimonial court or order of justices, *see* Sub-sect. 8, F. (*b*), *post*.

(*b*) *Where Separation originally by Consent.*

2965. Intention to desert—& live in adultery.]—Desertion held to commence, not at the time when the husband & wife ceased to cohabit, but at the time when the husband made up his mind to abandon the wife & live with another woman.—GATEHOUSE *v.* GATEHOUSE (1867), L. R. 1 P. & D. 331; 36 L. J. P. & M. 121; 16 L. T. 34.

Annotations:—**Folld.** Stickland *v.* Stickland (1876), 35 L. T. 767. **Refd.** Fitzgerald *v.* Fitzgerald (1869), L. R. 1 P. & D. 694; Pulford *v.* Pulford, [1923] P. 18.

2966. Repudiation of separation deed.]—WALSH *v.* WALSH, No. 2880, *ante*.

2967. Commencement of adultery.]—A husband left his house in England, with the consent & knowledge of his wife, for Australia, & for some years regularly corresponded with her. The correspondence having suddenly been broken off, & nothing heard of the husband, inquiries were made, when it was found that he had been living with another woman as his wife, who had born him three children :—*Held :* there was evidence of an intention to desert from the time when the intimacy with the woman in Australia commenced or from the time when the correspondence with the wife at home ceased.—STICKLAND *v.* STICKLAND (1876), 35 L. T. 767 ; 25 W. R. 114.

Annotation :—**Refd.** Chudley *v.* Chudley (1893), 62 L. J. M. C. 97.

2968. ——.]—The wife petitioned for a divorce on the grounds of desertion coupled with adultery. The marriage took place in Apr. 1875, & in 1876 or early in 1877 there was a temporary separation, which petitioner stated to have been on account of resp.'s intemperate habits. In 1877 resp., who was a hosier at the date of the marriage, finally left his wife, but they continued to correspond for some years. In or about the year 1884 the wife heard rumours as to her husband's mode of life ; & subsequently, in 1886, she went to Australia, partly with the object of ascertaining the truth of these rumours, & partly with the object of singing at concerts, by which latter means she was supporting herself & child. She found he was living with a woman, & had children by her. The wife made no request to her husband to return to her, or to take her back to live with him. Subsequently she returned to England, & eventually instituted this suit, charging adultery & desertion in & since 1886 :—*Held :* although there was in law no desertion prior to 1886, yet the fact of his taking up with another woman & starting in another home, & not contributing anything to her support, constituted desertion in & since 1886 ; & petitioner was entitled to a decree *nisi* for the dissolution of the marriage upon that ground, coupled with adultery.—DREW *v.* DREW (1891), 64 L. T. 840.

2969. Discovery of adultery.]—FARMER *v.* FARMER, No. 2914, *ante*.

2970. Resumption & continuance of adultery.]—DAVIS *v.* DAVIS, No. 2875, *ante*.

2971. Cessation of correspondence.]—STICKLAND *v.* STICKLAND, No. 2967, *ante*.

2972. Cessation of occasional cohabitation.]—GARCIA *v.* GARCIA, No. 2856, *ante*.

2973. Separation obtained mala fides—Husband living abroad in adultery.]—Where the ct. was satisfied that resp. had *mala fide* persuaded his wife to agree to a temporary deed of separation for six months, & was now living abroad in adultery, a decree of divorce was granted to the wife, notwithstanding that the commencement of the desertion was calculated prior to the date on which the separation should have come to an end.—HARRISON *v.* HARRISON (1910), 54 Sol. Jo. 619.

E. Continuance of Desertion.

Effect of filing of petition or order of justices—Whether desertion terminated.]—*See* Sub-sect. 8, F. (*b*), *post*.

2974. During imprisonment.]—A., on Oct. 4, 1854, deserted his wife, without reasonable excuse, & never returned to her again. On Nov. 16, 1856, he was arrested on a charge of felony, & was subsequently convicted & sentenced to four years' penal servitude. Between Oct. 4, 1854, & Nov. 16, 1856, he was twice imprisoned for debt ; on the first occasion for seven, on the second for nineteen days. The above facts having been proved in a suit by the wife, commenced before the expiration of the term of penal servitude, for dissolution of marriage, on the ground of adultery & desertion :—*Held :* after consideration, the husband had been guilty of desertion for two years & upwards.—ASTROPE *v.* ASTROPE (1859), 29 L. J. P. & M. 27.

2975. —— Manifest intention to desert.]—In a wife's suit for dissolution on the ground of adultery & desertion, it appeared that resp. when he left his wife stated to her that he was going to Ireland for a week's shooting, but in fact he went to Australia to escape arrest on a charge of embezzlement. Up to the time of his flight he had been carrying on an adulterous intercourse with a woman with whom he made arrangements to go away, & he was found living in adultery with another woman at Sydney. Subsequently he was brought back to this country in custody, tried, & sentenced to ten years' penal servitude :—*Held :* the circumstances under which resp. left his wife constituted desertion, & the desertion would continue notwithstanding the fact that he was brought back to this country in custody & prevented by his imprisonment from returning to his wife.—DREW *v.* DREW (1888), 13 P. D. 97 ; 57 L. J. P. 64 ; 58 L. T. 923 ; 36 W. R. 927.

Annotations :—**Apld.** Wynne *v.* Wynne, [1898] P. 18. **Distd.** Wilson *v.* Wilson (1908), 72 J. P. 112.

2976. Same state of things must continue.]—KAY *v.* KAY, No. 2850, *ante*.

2977. Intermittent visits after wilful desertion—No intention to resume cohabitation.]—Where a husband has wilfully separated from his wife without her consent, intermittent visits by him to her during the statutory period necessary for desertion, without the intention on his part of remaining, or of resuming marital intercourse, does not constitute a return to cohabitation.—THURSTON *v.* THURSTON (1910), 26 T. L. R. 388.

Necessity for withdrawal from existing state of cohabitation.]—*See* Sub-sect. 8, B. (*b*), *ante*.

F. Termination of Desertion.

(*a*) *In General.*

Refusal to resume cohabitation.]—*See* No. 2929, *ante*.

Entry into deed of separation.]—*See* No. 2944, *ante*.

(*b*) *Effect of Petition in Matrimonial Court or Order of Justices.*

2978. General rule.]—KAY *v.* KAY, No. 2850, *ante*.

2979. ——.]—(1) Desertion as contemplated by the Matrimonial Causes Act, 1857 (c. 85), must be persistent for two years, & cannot be relied on by a spouse who has so acted as to prevent the time from running.

(2) The insertion in orders of justices, made

PART XIII. SECT. 5, SUB-SECT. 8.—E.

r. ***During absence on military service.***]—In 1917 resp. went to the war, & petitioner received a compulsory allotment from his pay of 3*s.* day, & further received from the Defence Department 3*s.* per day separation allowance & 1*s.* 6*d.* per day for each of her two children. These payments ceased in 1919 on his return. Since his return resp. had not contributed to petitioner's support :—*Held :* there was no continuing desertion during resp.'s absence at the war, & there was no continuous period of 3 years during which resp. could be held to have habitually & without just cause left petitioner without reasonable maintenance.—MORRIS *v.* MORRIS, [1920] N. Z. L. R. 706.—**N.Z.**

Sect. 5,—Matrimonial offences and remedies therefor: Sub-sect. 8, F. (b), & G. (a) & (b).]

under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), of the non-cohabitation provision is unnecessary in cases of desertion or neglect to maintain. If inserted it puts an end to any desertion on the part of the husband that may have commenced within Matrimonial Causes Act, 1857 (c. 85).

(3) Justices should not grant such orders where the wife's safety does not require it, & where a maintenance order is sufficient.—DODD *v.* DODD, [1906] P. 189; 75 L. J. P. 49; 94 L. T. 709; 70 J. P. 163; 54 W. R. 541; 22 T. L. R. 484; 50 Sol. Jo. 528.

Annotations:—As to (1) **Distd.** Bristol Union Grdns. *v.* Paddington Grdns. (1906), 70 J. P. 447. **Consd.** Failes *v.* Failes, [1906] P. 326. **Folld.** Wilson *v.* Wilson (1908), 99 L. T. 307. **Apprvd.** Harriman *v.* Harriman, [1909] P. 123. **Refd.** Taylor *v.* Taylor (1907), 23 T. L. R. 566. *As to* (2) **Folld.** Robinson *v.* Robinson, [1919] P. 352. **Consd.** Timmins *v.* Timmins, [1919] P. 75. **Refd.** Harriman *v.* Harriman, [1909] P. 123.

2980. — —.]—Where proceedings are pending in the Divorce Div. of the High Ct. between husband & wife, justices ought not to entertain any application by the wife against her husband under Summary Jurisdiction (Married Women) Act, 1895 (c. 39). In Oct. 1906, a husband filed a petition for divorce, & an order was made for a weekly payment of alimony to the wife *pendente lite*. The weekly payments were made down to Jan. 4, 1907. On Feb. 19, 1907, an order was made by the President that petitioner should pay resp. her taxed costs, & should deposit £20 in ct. as security for the wife's costs, & the usual order was made staying the suit until the order was complied with. On Apr. 15, 1907, a summons was taken out by the wife under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, on the ground that the husband had deserted her. The justices made an order, dated Apr. 22, for separation & maintenance, & recited in the reasons they gave for their decision that "the husband not going on with his proceedings in the High Ct., that ct., by the registrar, ordered a stay of proceedings therein":—*Held:* as the divorce suit was still pending, there could be no desertion, & the justices had no jurisdiction to make the order.—CRAXTON *v.* CRAXTON (1907), 71 J. P. 399; 23 T. L. R. 527; 51 Sol. Jo. 484, D. C.

2981. Whether desertion terminated—Filing of petition.]—A wife's petition for dissolution of marriage by reason of cruelty & adultery was, by leave of the ct., withdrawn & petition afterwards filed for dissolution of marriage by reason of the same adultery & also by reason of desertion for two years, which had not accrued at the date of the first petition.—KNAPP *v.* KNAPP (1880), 6 P. D. 10; 49 L. J. P. 69; 43 L. T. 384; 29 W. R. 80.

Annotation:—**Consd.** Kay *v.* Kay, [1904] P. 382.

2982. — — —.]—Where an undefended suit, in which no appearance had been entered on behalf of resp., for dissolution on the ground of resp.'s adultery & cruelty, was part heard, & the ct. was satisfied with the evidence adduced on behalf of petitioner in confirmation of the charge of adultery alleged against resp., but adjourned the case for the production of further evidence as to the alleged charges of cruelty, the ct. granted leave to amend the petition by adding a charge of desertion, the requisite two years, though complete at the time of the making of the application, not having been completed until subsequent to the filing of the petition in the suit.—KETTLEWELL *v.* KETTLEWELL (1880), 41 L. T. 737.

Annotation:—**Consd.** Kay *v.* Kay, [1904] P. 382.

—.]—WOOD *v.* WOOD, No. *post.*

2984. — — —.]—A petition presented by a wife for dissolution on the ground of adultery & cruelty was filed in Aug. 1886. In June, 1886, resp. deserted his wife & had never afterwards returned to cohabitation, & in July, 1888, she obtained leave to amend her petition by adding a charge of desertion. The ct. at the hearing, when the charge of cruelty was abandoned, declined to entertain the charge of desertion on the ground that the cause of action was not complete at the time of filing the petition, & while ready to grant a judicial separation on the ground of adultery:—*Held:* further relief could only be obtained by filing a fresh petition.—LAPINGTON *v.* LAPINGTON (1888), 14 P. D. 21; 58 L. J. P. 26; 59 L. T. 608; 52 J. P. 727; 37 W. R. 384.

Annotations:— **Consd.** Kay *v.* Kay, [1904] P. 382. **Folld.** Stevenson *v.* Stevenson, [1911] P. 191.

2985. KAY *v.* KAY, No. 2850, *ante*.

2986. — — —.]—The filing & prosecution of a suit for judicial separation precludes petitioner from successfully pleading that the period of desertion was running during the time the suit was being maintained.—STEVENSON *v.* STEVENSON, [1911] P. 191; 80 L. J. P. 137; 105 L. T. 183; 27 T. L. R. 517, C. A.

2987. — — —.]—A woman who has obtained a decree for judicial separation by reason of her husband's adultery may afterwards obtain a dissolution of the marriage on the grounds of desertion prior to the petition for judicial separation & of adultery subsequent to such decree.—FULLERTON *v.* FULLERTON (1922), 39 T. L. R. 46.

2988. — — **Order of justices.**]—A. deserted his wife, & cohabited with another woman. On two occasions he was taken before magistrates, & compelled to contribute to his wife's support:—*Held:* nevertheless, she was entitled to a dissolution of her marriage by reason of her husband's adultery coupled with his desertion.—OLIVER *v.* OLIVER (1859), 5 Jur. N. S. 606.

2989. — — — **Non-cohabitation clause.**]—Although it is provided by Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (*a*) that an order of a ct. of summary jurisdiction made under that Act, that appct. is no longer bound to cohabit with her husband, is, while in force, to have the effect in all respects of a decree of judicial separation, such order cannot extend, abridge, or alter the jurisdiction of the Divorce Div. of the High Ct. of Justice under the Matrimonial Causes Acts.

An order was obtained by a married woman against her husband from justices, under the Act of 1895, on the ground of desertion. Such desertion need not continue for two years. Subsequently a state of things arose which constituted desertion for two years under the Matrimonial Causes Act, 1857 (c. 85):—*Held:* the order of the justices need not be taken into consideration in determining whether there had been desertion of which the High Ct. would take cognisance.—SMITH *v.* SMITH, [1905] P. 249; 74 L. J. P. 113; 93 L. T. 457; 54 W. R. 220.

Annotations:—**Consd.** Dodd *v.* Dodd, [1906] P. 189. **Folld.** Failes *v.* Failes, [1906] P. 326. **N.F.** Harriman *v.* Harriman, [1909] P. 123.

2990. — — — —.]—DODD *v.* DODD, No 2979, *ante*.

2991. — — — **Clear intention to desert.**]—Where a husband leaves his wife in circumstances which clearly point to an intention to desert her, the fact that she subsequently applies to a ct. of summary jurisdiction & obtains a separation order

there is not a bar to her right to plead such deserton under Matrimonial Causes Act, 1857 (c. 85), &, after two years, upon proof of adultery, to obtain against her husband, who has continued to desert her, a decree of divorce.—FAILES *v.* FAILES, [1906] P. 326 ; 75 L. J. P. 95 ; 95 L. T. 547 ; 22 T. L. R. 687.

Annotations :—**Distd.** Taylor *v.* Taylor (1907), 23 T. L. R. 566. **Dbtd.** Wilson *v.* Wilson (1908), 99 L. T. 307. **N.F.** Harriman *v.* Harriman, [1909] P. 123.

2992. Two years' desertion complete before order.]—A wife having been deserted by her husband for more than two years, obtained from a ct. of summary jurisdiction a separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39). She subsequently discovered that her husband had both before & after the separation order committed adultery. She then filed a petition for divorce :—*Held :* as there had been desertion for two years & upwards at the time when the separation order was made, & as her husband had then committed adultery, the jurisdiction of the ct. was complete, &, as she was unaware of her husband's adultery at the time when she obtained the separation order, the latter was no bar to her setting up the desertion with his adultery as a ground for divorce.—LETT *v.* LETT (1907), 23 T. L. R. 569 ; 51 Sol. Jo. 532.

Annotation :—**Folld.** Churner *v.* Churner (1912), 106 L. T.

2993. — A husband deserted his wife, & she applied to justices under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), for an order upon him for the payment to her of an allowance. The justices made an order for separation & also for the payment of an allowance. The husband, who was living in adultery with a woman, made some payments under the order, & some years afterwards he was committed for non-payment of arrears of the allowance, & the wife filed a petition for divorce upon the ground of his adultery & desertion. Subsequently she agreed to accept a smaller sum than the full amount due for the arrears of the allowance, & he was released from prison :—*Held :* after the order of the justices there was no desertion, & the petition for divorce upon that ground must fail.—TAYLOR *v.* TAYLOR (1907), 23 T. L. R. 566 ; 51 Sol. Jo. 515 ; 71 J. P. Jo. 244.

2994. ——.]—A wife obtained an order from the justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), under which she was to live separate & apart from her husband, the grounds upon which the order was granted being his desertion. The desertion took place within two years before the order was made. The husband subsequently committed adultery, & the wife, after the expiration of two years from the date of the separation order, filed a petition for divorce :—*Held :* the husband had not been guilty of desertion for two years & upwards, as required by statute, & the wife was not entitled to a decree of divorce.—WILSON *v.* WILSON (1908), 99 L. T. 307 ; 72 J. P. 112 ; 24 T. L. R. 256 ; 52 Sol. Jo. 283.

2995. —.]—(1) In July, 1905, resp. deserted petitioner & never returned to her or contributed to her support. In Mar. 1906, a stipendiary magistrate, upon the complaint of petitioner that resp. had deserted her, made an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, that resp. should pay a specified weekly sum to petitioner for her support ; the order contained also a provision under s. 5 (*a*) of the Act that petitioner should no longer be bound to cohabit with resp. In 1907 resp. committed adultery, & in Dec. 1907, petitioner presented a petition for dissolution of the marriage on the grounds of adultery & of desertion for two years without reasonable excuse :—*Held :* the effect of the non-cohabitation clause in the magistrate's order was to prevent the continuance of the desertion after the date of the order ; there had therefore not been desertion without reasonable excuse for two years by resp. so as to satisfy the requirements of Matrimonial Causes Act, 1857 (c. 85), s. 27 ; & petitioner was not entitled to a decree for dissolution of the marriage.

(2) Where a married woman applies for an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, upon the ground of desertion only, a non-cohabitation clause is in general an inappropriate remedy & should not be inserted in the order.—HARRIMAN *v.* HARRIMAN, [1909] P. 123 ; 78 L. J. P. 62 ; 100 L. T. 557 ; 73 J. P. 193 ; 25 T. L. R. 291 ; 53 Sol. Jo. 265, C. A.

Annotations :—*As to* (1) **Expld.** Stevenson *v.* Stevenson, [1911] P. 191. **Distd.** Churner *v.* Churner (1912), 106 L. T. 769. **Consd.** Robinson *v.* Robinson, [1919] P. 352. **Rcfd.** Eastbourne Grdns. *v.* Croydon Grdns., [1910] 2 K. B. 16 ; Timmins *v.* Timmins, [1919] P. 75 ; Rutherford *v.* Rutherford, [1922] P. 144.

2996. ——.]—A wife obtained from justices, under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), an order in her favour on the ground of her husband's desertion for a period of two years & over, & that order contained a non-cohabitation clause. Subsequently the husband committed adultery :—*Held :* as there had been desertion for two years when the separation order was made, & as the husband had been guilty of adultery, petitioner was entitled to her decree.—CHURNER *v.* CHURNER (1912), 106 L. T. 769 ; 28 T. L. R. 318.

2997. ——.]—NILAND *v.* NILAND, No. 3638, *post*.

2998. ——.]—ROBINSON *v.* ROBINSON, No. 6133, *post*.

2999. —— **Clause subsequently struck out.**]—A wife whose husband had deserted her in June 1916, obtained in July 1916, a separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5. The order provided *inter alia*, that she should no longer be bound to cohabit with her husband. In Apr. 1919, the order was varied on the wife's application with notice to the husband, & the "non-cohabitation clause" was struck out. In June 1921, the wife presented a petition for dissolution of marriage, alleging adultery & desertion for two years & upwards :—*Held :* although the effect of the "non-cohabitation clause" in the order had been to prevent the continuance of desertion from July, 1916, until Apr. 1919, the husband's continued absence from the wife for two years & upwards after he was aware that the clause had been struck out of the order constituted such desertion as, coupled with proof of adultery, entitled the wife to a decree *nisi* for dissolution of marriage.—BOULTON *v.* BOULTON, [1922] P. 229 ; 91 L. J. P. 157 ; 127 L. T. 558 ; 38 T. L. R. 611.

G. Defences to Charge of Desertion.

(*a*) *Separation by Consent.*

See Sub-sect. 8, B. (*d*), (*g*), *ante*.

(*b*) *Offer to resume Cohabitation.*

See Sub-sect. 8, B. (*e*) ii. & iii., *ante*.

Sect. 5.—*Matrimonial offences and remedies therefor: Sub-sect.* 8, *G.* (*c*), *H. & I. Sects.* 6 & 7: *Sub-sects.* 1 & 2.]

(c) *Reasonable Cause for Withdrawal from Cohabitation.*

Reasonable cause for withdrawal as defence to suit for restitution of conjugal rights, *see* Sect. 5, sub-sect. 1, F. (*b*), *ante*.

3000. General rule.]—In answer to a petition for judicial separation on the ground of desertion, resp. may set out facts showing that there was reasonable cause for the desertion, but such facts should be stated succinctly.—HILL *v.* HILL (1864), 33 L. J. P. M. & A. 187; 10 Jur. N. S. 371.

3001. Necessity to show reasonable cause.]—A husband who withdraws from cohabitation with his wife may be guilty of the offence of "desertion" within Matrimonial Causes Act, 1857 (c. 85), although he continues to support her. Desertion "within cause" means "without reasonable cause." Such reasonable cause is not necessarily a distinct matrimonial offence on which a decree of judicial separation or dissolution could be founded; but it must be grave & weighty. Mere frailty of temper & habits which are distasteful to a husband, are not reasonable grounds for depriving a wife of the protection of his home & society.—YEATMAN *v.* YEATMAN (1868), L. R. 1 P. & D. 489; 37 L. J. P. & M. 37; 18 L. T. 415; 16 W. R. 734.

Annotations:—**Consd.** Oldroyd *v.* Oldroyd, [1896] P. 175. **Refd.** Cowley *v.* Cowley (1897), *Times*, Feb. 3; Frowd *v.* Frowd, [1904] P. 177; Fisk *v.* Fisk (1920), 122 L. T. 803. **Mentd.** Yeatman *v.* Yeatman (1870), L. R. 2 P. & D. 187.

3002. ——.]—FROWD *v.* FROWD, No. 6106, *post*.

3003. What is "reasonable cause"—Conduct falling short of matrimonial offence—Not mere frailty of temper & habits.]—YEATMAN *v.* YEATMAN, No. 3001, *ante*.

3004. —— **Belief that wife impotent.**]—The parties were married in Dec. 1868. In May, 1869, petitioner separated from resp., she being, as he alleged, either incapable or unwilling to consummate the marriage. Three years afterwards resp. formed an adulterous connection with co-resp., & gave birth to a child. At the hearing she was called as a witness in her own behalf, & attributed the fault of the non-consummation of the marriage to petitioner. The ct., being satisfied that petitioner had separated from resp. in consequence of the *bonâ fide* belief that the incapacity lay with her:—*Held*: he had not been guilty of such desertion or wilful separation without reasonable excuse, as should disentitle him to a decree for dissolution of his marriage.—OUSEY *v.* OUSEY & ATKINSON (1874), L. R. 3 P. & D. 223; 43 L. J. P. & M. 35; 30 L. T. 911; 22 W. R. 556; *subsequent proceedings* (1875), 1 P. D. 56.

Annotations:—**Consd.** Synge *v.* Synge, [1900] P. 180; Davis *v.* Davis, [1918] P. 85; Wickins *v.* Wickins, [1918] P. 265. **Refd.** Russell *v.* Russell, [1924] A. C. 687. **Mentd.** Otway *v.* Otway (1888), 13 P. D. 141.

3005. —— **Not refusal of wife to exonerate suspected rival.**]—The husband withdrew from cohabitation, & refused to return & live with his wife, unless she wrote a letter exonerating a certain lady of whom she had reason to be jealous. The wife, having grounds for believing that her suspicions were well founded, refused to comply with the condition, but was desirous to live with her husband, & pressed him to return to cohabitation. The husband occasionally met & corresponded with her, but persisted in his refusal to live with her:—*Held*: the denial of *consortium* by the husband amounted to desertion, & the desertion was without reasonable excuse.—DALLAS *v.* DALLAS (1874), 43 L. J. P. & M. 87; 31 L. T. 271.

3006. —— **Not conviction & imprisonment of wife for criminal offence.**]—*Semble*: the conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, &, if such refusal conduces to her adultery, the ct. will not grant her husband a dissolution of his marriage.

The conviction & imprisonment of a husband or wife for an offence against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not in this ct. justify him in deserting her. . . . In this case I have to consider not only whether there was desertion by the husband without legal excuse . . . (SIR JAMES HANNEN, P.).—WILLIAMSON *v.* WILLIAMSON (1882), 7 P. D. 76; 51 L. J. P. 54; 46 L. T. 920; 30 W. R. 616.

3007. —— **Refusal to comply with restitution decree.**]—RUSSELL *v.* RUSSELL, No. 2960, *ante*.

3008. —— **Petitioner's cruelty—Apprehension of physical restraint.**]—In an action by a husband against his wife for divorce on the ground of desertion for the statutory period, it appeared that she had left him because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, & because of menaces by him sufficient to create in her a well-founded apprehension of physical restraint & culminating in an act of violence against her person:—*Held*: she had reasonable cause for leaving her husband's house & for declining to return to it.—MACKENZIE *v.* MACKENZIE, [1895] A. C. 384, H. L.

Annotations:—**Consd.** *Re* Mackenzie, Mackenzie *v.* Edwards-Moss, [1911] 1 Ch. 578. **Refd.** Synge *v.* Synge, [1900] P. 180; Greene *v.* Greene (1916), 115 L. T. 127. **Mentd.** Oldroyd *v.* Oldroyd, [1896] P. 175; Russell *v.* Russell, [1897] A. C. 395; Harnett *v.* Harnett [1924] P. 126.

3009. —— **Refusal to permit marital intercourse.**]—SYNGE *v.* SYNGE, No. 3631, *post*.

3010. —— **Statement made before marriage—Regarding paternity of child born in wedlock.**]—Where a husband had deserted his wife on account of a statement made before marriage as to the paternity of a child born in wedlock:—*Held*: this was not a reasonable cause or excuse.—HOLT *v.* HOLT (1908), 53 Sol. Jo. 84; 72 J. P. Jo. 580, D. C.

3011. —— **Not innocent contraction of venereal disease before marriage—Though communicated to spouse.**]—The innocent contraction of a venereal disease by a wife before marriage, though communicated to her husband, does not afford the husband sufficient ground for leaving his wife, &, therefore, is no defence to her complaint to a ct. of summary jurisdiction for maintenance on the ground of desertion.—BUTLER *v.* BUTLER, [1917] P. 244; 86 L. J. P. 135; 117 L. T. 542; 33 T. L. R. 494; 61 Sol. Jo. 631, D. C.

3012. Making of monetary allowance—No defence.]—A wife is entitled to the society & protection of her husband, & if, after refusing to live with her, he gives her an allowance, the payment of such allowance to her is no answer to the charge of wilful desertion.—MACDONALD *v.* MACDONALD (1859), 4 Sw. & Tr. 242; 164 E. R. 1508.

Annotation:—**Refd.** Cowley *v.* Cowley (1897), *Times*, Feb. 3.

3013. —— ——.]—YEATMAN *v.* YEATMAN, No. 3001, *ante*.

PART XIII. SECT. 5, SUB-SECT. 8.—G. (c).

s. *What is reasonable cause—Unfaithfulness of wife—deserted by her husband.*]—Unfaithfulness of a wife deserted by her husband during the five years following the desertion is a just cause for the husband keeping away from the wife even if the husband did not know it.—DOUGLAS *v.* DOUGLAS (1903), 23 N. Z. L. R. 584.—**N.Z.**

H. Evidence.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

3014. Decree in previous suit.]—STOATE *v.* STOATE, No. 2671, *ante*.

3015. Order of justices.]—A wife obtained an order from justices, under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (*a*), that she was no longer bound to cohabit with her husband on account of his desertion. More than two years after the desertion & the order she filed a petition for divorce, the husband having committed adultery since the order. The ct. pronounced a decree *nisi* for divorce upon the ground of the adultery & desertion for two years.—LEVY *v.* LEVY (1904), 21 T. L. R. 157.

Annotation :—**Refd.** Dodd *v.* Dodd, [1906] P. 189.

I. Remedies.

NOTE.—*It is no longer necessary for a wife to prove desertion & adultery ; adultery of the husband alone being a sufficient ground for divorce.—See Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 176 (*b*).

Judicial separation—Desertion without cause for not less than two years.]—*See* Supreme Court Judicature (Consolidation) Act (c. 49), s. 185 (1).

Divorce.]—*See* Note above.

withhold a decree of dissolution of marriage on the ground of the suppression of material facts by a petitioner, when it appears upon all the facts being disclosed to the ct. that the petitioner is entitled to a decree. A petition contained two charges of adultery, & alleged that neither of them had been condoned. The Queen's Proctor intervened & proved condonation of one adultery but not of the other, & the ct. made a decree absolute on the ground of the uncondoned adultery, notwithstanding the suppression of the material fact of condonation of the other adultery.—ALEXANDRE *v.* ALEXANDRE (1870), L. R. 2 P. & D. 164 ; 39 L. J. P. & M. 84 ; 23 L. T. 268 ; 18 W. R. 1087.

Annotations :—**Consd.** Butler *v.* Butler (1890), 15 P. D. 66 ; Bernstein *v.* Bernstein, [1893] P. 292. **Expld.** Rogers *v.* Rogers, [1894] P. 161 ; Roche *v.* Roche (1905), 21 T. L. R. 332. **Consd.** Hunter *v.* Hunter, [1905] P. 217. **Refd.** Brooke *v.* Brooke (1912), 28 T. L. R. 314.

Absence of consummation of marriage—Whether bar to suit—On ground of adultery.]—*See* Nos. 2697–2701, *ante*.

—— —— **On ground of desertion.**]—*See* No. 2838, *ante*.

Defences to suit for restitution of conjugal rights.]—*See* Sect. 5, sub-sect. 1, F., *ante*.

Defences to charges of cruelty.]—*See* Sect. 5, sub-sect. 2, E., *ante*.

Defences to charge of desertion.]—*See* Sect. 5, sub-sect. 8, G., *ante*.

SECT. 6.—LEGITIMACY DECLARATIONS.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 188 ; BASTARDY, Vol. III., pp. 369, 370, Nos. 100–121.

SECT. 7.—BARS TO RELIEF.

SUB-SECT. 1.—IN GENERAL.

3016. Disorderly conduct after separation.]—Pltf. sued her husband, after affirming that she had a right to be restored to his home & marital affection. Pltf. was married to deft. in 1812 ; soon after which a separation, by mutual consent, took place, deft. allowing her a specific sum annually. Deft. opposed the libel & pleaded the disorderly conduct of his wife as a bar to the libel : —*Held :* Mrs. D. was not entitled to her remedy of restitution of conjugal rights, partly in consequence of the length of time between the separation of the parties, but more especially on account of her conduct since she & deft. separated.—DRAPER *v.* DRAPER (1837), 1 Jur. 872.

3017. Pendency of appeal in previous suit.]—EVANS *v.* EVANS & ROBINSON, No. 3027, *post*.

3018. Failure of proof.]—On the husband's petition for dissolution, co-resp. put the charge of adultery in issue ; but the wife did not answer the petition. On trial of the issue, the jury found a verdict of adultery against co-resp. ; & the judge ordinary, not being satisfied that the adultery was proved by the evidence, refused to make a decree against the wife but permitted petitioner to amend his evidence if he could.—DOLBY *v.* DOLBY & HEWITT (1861), 2 Sw. & Tr. 228 ; 30 L. J. P. M. & A. 110 ; 3 L. T. 679 ; 9 W. R. 476 ; 164 E. R. 982.

3019. Suppression of material facts—Petitioner otherwise entitled to relief.]—Matrimonial Causes Act, 1860 (c. 144), s. 7, does not empower the ct. to

SUB-SECT. 2. INSANITY.

See, generally, LUNATICS.

3020. Restitution suit—Cohabitation unsafe.]—The wife libelled for restitution of conjugal rights. The husband alleged the wife's insanity & a morbid hatred towards himself which rendered cohabitation unsafe. The wife's responsive allegation allowing that she had been insane, but asserting her recovery & denying the facts on which the husband relied to show continuance on insanity, admitted to proof.—HAYWARD *v.* HAYWARD (1858), 1 Sw. & Tr. 81 ; 31 L. T. O. S. 24 ; 6 W. R. 638 ; 164 E. R. 638.

Annotation :—**Refd.** Russell *v.* Russell, [1895] P. 315.

3021. —— ——.]—In a wife's petition for restitution of conjugal rights the husband's answer alleged all the circumstances & the evidence in a former suit for judicial separation, on the ground of his wife's cruelty. It also alleged that the husband allowed his wife £260 a year to live separately from him, & it set out at a great length a series of subsequent acts tending to show his wife's insanity. The ct., on motion to reform the answer, directed all the particulars of the cruelty & the former suit to be struck out, & the fact of the suit simply to be pleaded. It also struck out the allegation of the allowance ; &, as to the insanity, directed that only such facts should be pleaded as tended to show that it was unsafe for the husband to live with his wife.—RADFORD *v.* RADFORD (1869), 20 L. T. 279.

Annotation :—**Consd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

3022. Judicial separation—Inference of insanity from petitioner's evidence.]—Where the evidence on behalf of petitioner discloses facts from which resp.'s insanity may be inferred, the ct. will require to be satisfied that such facts admit of a different explanation, before it will make a decree in favour of petitioner.—HALL *v.* HALL (1864), 3

PART XIII. SECT. 7, SUB-SECT. 1.

1. *Nullity—Separation order.*] — A summary separation order obtained by resp. against petitioner is not in itself a bar to a petition for nullity of marriage on the ground of the malformation of resp.—A. *v.* A. (1915), 34 N. Z. L. R. 1039.—**N.Z.**

Sect. 7 —Bars to relief: Sub-sects. 2 & 3, A. (a), (b), (c) & (d).]

Sw. & Tr. 347; 33 L. J. P. M. & A. 65; 9 L. T. 810; 164 E. R. 1309.

Annotation:—**Consd.** Baron *v.* Baron (1908), 24 T. L. R. 273.

3023. Dissolution of marriage—Adultery before insanity.]—The ct. refused to allow a husband to proceed with a petition against his wife, who was a lunatic, for the dissolution of their marriage on the ground of adultery, alleged to have been committed by her previous to her lunacy.—BAWDEN *v.* BAWDEN (1862), 2 Sw. & Tr. 417; 31 L. J. P. M. & A. 94; 6 L. T. 27; 8 Jur. N. S. 157; 10 W. R. 292; 164 E. R. 1057.

Annotation:—**N.F.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

3024. —— Incapacity to understand act alleged —Intermittent mania.]—(1) To a suit by the wife for dissolution of marriage on the ground of cruelty & adultery, resp. pleaded that at the time of the commission of the offences alleged he was a lunatic & of unsound mind, & incapable of understanding their nature & consequences:—*Held:*—such plea was not proved by evidence that resp. suffered from intermittent or recurrent mania.

(2) *Qu.:* whether proof of the commission of the offences charged under the influence of permanent insanity would constitute a defence to the suit.—HANBURY *v.* HANBURY (1892), 8 T. L. R. 559, C. A.

Annotation:—**Refd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

3025. —— —— Delusions.]—(1) In a petition by the husband for a dissolution of the marriage on the ground of the wife's adultery, the guardian *ad litem* of the wife, who was insane at the time of the presentation of the petition, pleaded that if she had committed adultery she was not of sound mind or responsible for her actions at the time, & that she was incapable of understanding the guilty nature of her acts, & legally incompetent to consent to them:—*Held:* though the wife might have been subject to insane delusions on some points, if at the time she committed adultery she was capable of appreciating the nature of the act & its probable consequences, her insanity was not a defence to the petition.

(2) *Qu.:* whether such insanity as would entitle deft. in an indictment for a criminal offence to an acquittal would constitute a valid answer to a suit for divorce on the ground of adultery.—YARROW *v.* YARROW, [1892] P. 92; 61 L. J. P. 69; 66 L. T. 383; 8 T. L. R. 215.

SUB-SECT. 3.—ABSOLUTE BARS.

A. Res judicata; Estoppel.

(a) In General.

See, generally, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

3026. Dissolution suit—Previous judicial separation.]—A wife, in answer to the husband's petition for dissolution on the ground of adultery, pleaded that in a former suit she had been judicially separated from him. The ct. refused to hold the prior decree as a bar to the husband's suit.—YEATMAN *v.* YEATMAN & RUMMELL (1870), 21 L. T. 733.

Whether desertion terminated—By proceedings in matrimonial court or order of justices.]—*See* Sect. 5, sub-sect. 8, F. (*b*), *ante.*

(b) Previous Findings of Fact.

See, generally, ESTOPPEL, Vol. XXI., p. 163, Nos. 222–224.

3027. Suit for dissolution—Same evidence as in former suit—For judicial separation.]—The answer to a petition for a dissolution of marriage, by reason of the wife's adultery, pleaded that the husband had instituted, in the Ct. of Arches, a suit for a divorce *a mensâ et thoro*, on the ground of the same acts of adultery, & that judgment had been given against him for defect of proof of the adultery. It also pleaded that the husband had appealed from that judgment to the Privy Council:—*Held:* (1) by such judgment the husband was not estopped from bringing a suit for dissolution of marriage; (2) the pendency of the appeal was no bar to such a suit.—EVANS *v.* EVANS & ROBINSON (1858), 1 Sw. & Tr. 173; 27 L. J. P. & M. 57; 31 L. T. O. S. 170; 6 W. R. 640; 164 E. R. 680.

Annotations:—*As to* (1) **Consd.** Ciocci *v.* Ciocci (1860), 29 L. J. P. M. & A. 60; Finney *v.* Finney (1868), L. R. 1 P. & D. 483.

3028. —— —— ——.]—WELLS *v.* WELLS & HUMMERSTON (1863), 32 L. J. P. M. & A. 65, n.

3029. —— —— ——.]—Where there were cross suits, & the wife in her suit, which was for a judicial separation on the ground of cruelty, was by the verdict of the jury acquitted of the charges of adultery alleged in the husband's answer, the ct. refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution in which the same acts of adultery were charged.—BANCROFT *v.* BANCROFT & RUMNEY (1864), 3 Sw. & Tr. 597; 34 L. J. P. M. & A. 14; 164 E. R. 1407.

Annotation:—**Refd.** Butler *v.* Butler, [1894] P. 25.

3030. —— —— ——.]—A wife petitioned for judicial separation on the ground of cruelty, & the charges of cruelty being traversed by the husband, the ct. found that they were not proved, & dismissed the petition:—*Held:* she was estopped from setting up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution.—FINNEY *v.* FINNEY (1868), L. R. 1 P. & D. 483; 37 L. J. P. & M. 43; 18 L. T. 489.

Annotations:—**Consd.** Harriman *v.* Harriman, [1909] P. 123. **Refd.** Stokes *v.* Stokes, [1911] P. 195.

3031. —— Same allegations as in prior suit—For dissolution—Additional evidence.]—A wife had filed a petition for a dissolution of marriage, on the ground of adultery, coupled with desertion & cruelty. The case was tried before the passing of Matrimonial Causes Act, 1859 (c. 61), which renders the wife competent to give evidence of desertion & cruelty. The full ct. refused to dissolve the marriage, on the ground that there was not sufficient evidence of desertion & cruelty, but pronounced a decree of judicial separation, on the ground of adultery. After the passing of Matrimonial Causes Act, 1859 (c. 61), petitioner applied for leave to file a second petition for a dissolution of marriage, containing the allegations that she had before failed to establish. The judge ordinary granted leave, but expressed a strong opinion that the full ct. would refuse to re-hear the case.—BEVAN *v.* BEVAN (1859), Sea. & Sm. 76; 4 Sw. & Tr. 265; L. J. P. & M. 45; 164 E. R. 1517.

3032. —— Charges against petitioner—Con-

PART XIII. SECT. 7, SUB-SECT. 3.—A. (b).

3032 i. *Suit for dissolution—Charges against petitioner—Conclusiveness of finding in previous suit.*]—In a previous suit for dissolution of marriage instituted by petitioner, in which another party had been cited as co-resp., the petition had been dismissed in consequence of alleged misconduct on petitioner's part:—*Held:* the ct.

clusiveness of finding in previous suit.]—CONRADI *v.* CONRADI, WORRALL & WAY, No. 2764, *ante*.

3033. —— —— ——.]—BUTLER *v.* BUTLER, No. 2760, *ante*.

3034. Suit for restitution—Same charges as in previous suit—For judicial separation—Identical issues triable by same evidence.]—B. petitioned for restitution of conjugal rights, C. in answer alleged (*inter alia*) B.'s adultery between certain dates. B. replied, by way of estoppel, that same charges of adultery had been put in issue in a suit for judicial separation brought by C. against him, in which she had failed to prove the adultery. On demurrer to this reply of estoppel:—*Held:* C. was not entitled, in answer to the petition for restitution, to allege same facts of adultery, which she failed to prove in the previous suit.

Semble: if the identical issue were triable by different evidence in the one case, & in the other, the doctrine of estoppel would not apply.—SOPWITH *v.* SOPWITH (1861), 2 Sw. & Tr. 160; 30 L. J. P. M. & A. 131; 4 L. T. 256; 7 Jur. N. S. 554; 164 E. R. 954.

Annotation:—**Consd.** Bancroft *v.* Bancroft & Rumney (1864), 3 Sw. & Tr. 597.

3035. Previous finding that no desertion existed—No bar to finding subsequent desertion.]—A previous finding by a competent ct. that desertion at an earlier date had not been proved is no bar to a finding of desertion between same parties at a later date.—FROUD *v.* FROUD (1920), 123 L. T. 176 36 T. L. R. 501 26 Cox, C. C. 605, D. C.

(c) *Admissions and Agreements as to Procee*

3036. Admission of validity of marriage in former proceedings.]—(1) Citation, in a suit of nullity of marriage, by reason of incurable impotence, not sustained. Complainant having confessed the validity of the marriage in former proceedings for divorce, by reason of adultery, against him.

(2) The length of time which has elapsed is, in itself, almost a bar; for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case, where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of the law with which I am acquainted (SIR WILLIAM SCOTT).—GUEST *v.* SHIPLEY (FALSELY CALLING HERSELF GUEST) (1820), 2 Hag. Con. 321; 161 E. R. 757.

Annotations:—*As to* (1) **Consd.** Anon. (1857), Dea. & Sw. 295. *As to* (2) **Apld.** B——n *v.* B——n (1854), Ecc. & Ad. 248. **Refd.** Castleden *v.* Castleden (1861), 9 H. L. Cas. 187; W. (falsely called R.) *v.* R. (1876), 1 P. D. 405; G. *v.* M. (1885), 10 App. Cas. 174, n.

3037. Dismissal of suit by consent—Fresh evidence.]—*Semble:* an inhibition does not remain in force so as to prevent the inferior ct. from proceeding on same, & also on additional facts in a subsequent suit, the original suit having been dismissed in the Ct. of Appeal by consent of parties.—SMYTH *v.* SMYTH (1831), 4 Hag. Ecc. 72; 162 E. R. 1374.

3038. Subsequent suit involving same charges.]—Husband filed a petition for dissolution of marriage in May, 1873. In July, 1874, the petition was dismissed before hearing on petitioner's application, & with the consent of resp. & co-resp. In Oct. 1878, petitioner filed a fresh petition, which included the charges of adultery against resp. & co-resp. contained in the first petition:—*Held:* he was not precluded by the dismissal of the first petition from repeating those charges.—HALL *v.* HALL & RICHARDSON (1879), 48 L. J. P. 57; 40 L. T. 525; 27 W. R. 664.

3039. Settlement of suit.]—On a wife's petition for dissolution of marriage, certain issues of cruelty & adultery came on for trial on Mar. 12, 1861, when an agreement was signed by the respective counsel of the parties, by which (*inter alia*) a separation deed was to be executed, & petitioner agreed not to take further proceedings in this ct. Petitioner moved the ct. to set down the case again for trial on the ground that the agreement was not signed by counsel with her consent; the full ct., on appeal, confirmed the judge ordinary's rejection of this motion. In 1863 petitioner filed a fresh petition alleging same acts of adultery as in the former petition, certain other acts previous to Mar. 1861, which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since Mar. 1861, & various acts of cruelty, some alleged to be different from those contained in the former petition. In the result, the ct. held that petitioner was bound by the agreement of Mar. 1861, not to take any proceedings in respect of any matter before that date; & as the subsequent acts of adultery, to which the ct. held the agreement not to extend, would not of themselves support the wife's petition for dissolution, it refused to give any directions as to the mode of trial.—ROWLEY *v.* ROWLEY (1866), L. R. 1 Sc. & Div. 63; 35 L. J. P. & M. 110, H. L.

Annotations:—**Consd.** Besant *v.* Wood (1897), 12 Ch. D. 605; Rose *v.* Rose (1883), 8 P. D. 98; Aldridge *v.* Aldridge (1888), 13 P. D. 210; Gooch *v.* Gooch, [1893] P. 99. **Refd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185; Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306; Hall *v.* Hall & Richardson (1879), 27 W. R. 664; Wood *v.* Wood (1887), 4 T. L. R. 39; McGregor *v.* McGregor (1888), 21 Q. B. D. 424; Balcombe *v.* Balcombe, [1908] P. 176.

3040. Agreement to stay proceedings.]—The wife filed a petition for restitution of conjugal rights, but agreed that the suit should be stayed upon terms which her husband was willing & ready to fulfil. She subsequently sought to proceed with the suit, but the ct. held that she was bound by the agreement, & refused to allow the petition to be set down for hearing.—STANES *v.* STANES (1877), 3 P. D. 42; 47 L. J. P. 19; 39 L. T. 46; 26 W. R. 238.

Proceedings before justices—Withdrawal of summons.]—*See* Nos. 6170–6172, *post*.

(d) *Where the Parties are Separated.*

Whether restitution suit barred.]—*See* Sect. 5, sub-sect. 1, F. (*c*).

Answer to charge of desertion—Consent of petitioner to separation.]—*See* Sect. 5, sub-sect. 8, B. (*d*).

—— **Effect of deeds of separation.**]—*See* Sect. 5, sub-sect. 8, B. (*g*).

Revival of matrimonial offence condoned by separation.]—*See* Sect. 7, sub-sect. 3, D. (*h*).

3041. Whether bar to judicial separation—On ground of cruelty—Suit not instituted bonâ fide.]—In answer to a petition for judicial separation on

should not take cognisance of what might have been alleged at the former trial, & the judgment given on that occasion was no bar to the granting of a decree.—BANNISTER *v.* BANNISTER (1894), 12 N. Z. L. R. 355.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 3.—A. (d).

a. *Whether dissolution suit barred by decree of judicial separation.*]—An existing decree of judicial separation must be set aside by the ct. before either of the parties to it can sue for a divorce on the ground of desertion.—PETERS *v.* PETERS (1924), 45 N. L. R. 223.—**S. AF.**

Sect. 7.—*Bars to relief: Sub-sect.* 3, *A.* (*d*) *& B.* (*a*) *& (b) i.*]

the ground of cruelty, resp. pleaded a traverse & condonation, & further alleged that petitioner had consented to a deed of separation, & that the suit was not instituted *bonâ fide*, but for the purpose of obtaining an increased allowance. The ct. refused to order these allegations to be struck out. An allegation that by reason of the deed of separation petitioner was not entitled to institute the suit, was ordered to be struck out. —WILLIAMS *v.* WILLIAMS (1866), L. R. 1 P. & D. 178; 35 L. J. P. & M. 85; 14 L. T. 770; 14 W. R. 1022.

Annotation:—**Consd.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186.

3042. —— —— Suit for dissolution by husband —Acts of cruelty prior to separation.]—The husband & wife lived apart, under a deed of separation, in which a trustee was appointed, a sufficient allowance was secured to the wife, & she had the custody of two children & access to the third. Subsequently the husband petitioned this ct. for a dissolution of marriage, by reason of his wife's adultery. She denied the adultery, pleaded cruelty, & prayed for a judicial separation. The acts of cruelty alleged all took place previous to the separation of the parties. The jury found that resp. had not been guilty of adultery & that petitioner had been guilty of cruelty:—*Held:* resp. was entitled to a decree of judicial separation.—BROWN *v.* BROWN & SHELTON (1874), L. R. 3 P. & D. 202; 43 L. J. P. & M. 47; 31 L. T. 272.

Annotations:—**Distd.** Besant *v.* Wood (1879), 12 Ch. D. 605. **Expld.** Gandy *v.* Gandy (1882), 51 L. J. P. 41. **Consd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Refd.** Kunski *v.* Kunski & Josephs (1907), 23 T. L. R. 615.

3043. —— —— Lapse of time.]—BESANT *v.* WOOD, No. 2490, *ante*.

3044. —— Application for alimony—Arising out of suit.]—In a separation deed, the husband covenanted with trustees to allow his wife £50 a year for her support, he being indemnified against all debts & liabilities on her account, & it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further, or greater, or other support, maintenance, or alimony" than the annuity of £50:—*Held:* in the absence of any act showing an unqualified acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the ct. would not, upon interlocutory motion, restrain her from proceeding in the Divorce Ct. to obtain an allowance for alimony, as incident to her petition for a judicial separation on the ground of cruelty, but the ct. put her under an undertaking to deal with the alimony as this ct. should direct.—WILLIAMS *v.* BAILY (1866), L. R. 2 Eq. 731.

Annotations:—**Consd.** Gandy *v.* Gandy (1882), 51 L. J. P. 41; Cahill *v.* Cahill (1883), 8 App. Cas. 420. **Refd.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186; Fearon *v.* Aylesford (1884), 32 W. R. 718; Greenhill *v.* North British & Mercantile Insce., [1893] 3 Ch. 474; *Re* Hodson, Williams *v.* Knight, [1894] 2 Ch. 421; Bishop *v.* Bishop, Judkins *v.* Judkins (1897), 76 L. T. 409.

3045. —— No covenant not to sue—No agreement to condone.]—In a suit by the husband for dissolution on the ground of his wife's adultery the wife in her answer made a cross-petition of desertion, & prayed for a judicial separation. It appeared that the husband left his wife in Nov. 1884, & in Jan. 1887, a deed was executed by which the wife agreed to live apart from her husband, but there was no covenant not to sue & no agreement to condone past offences. The jury found all the issues in favour of the wife:—*Held:* the deed was not a bar to the wife's remedy, & she was entitled to a decree of judicial separation.—MOORE *v.* MOORE, CHADWICK & GRIFFITHS (1887), 12 P. D. 193; 56 L. J. P. 104; 57 L. T. 568; 51 J. P. 632; 36 W. R. 110.

3046. Proceedings for judicial separation restrained—Agreement not to "molest, trouble or disturb husband."]—By a deed of separation, a husband covenanted with the trustee of the deed to make an allowance to his wife, & the trustee covenanted, on behalf of the wife, neither to sue for restitution of conjugal rights, alimony, nor to "molest, trouble, or disturb" the husband. Shortly after the execution of the deed, the wife who had duly received her allowance, commenced proceedings in the Divorce Ct. for a judicial separation & for alimony. Thereupon the husband filed a bill against his wife, praying that she might be restrained from continuing the proceedings, & from doing any act to molest, trouble, or disturb him:—*Held:* he was entitled to a perpetual injunction to the extent, only, of restraining the proceedings in the Divorce Ct.—FLOWER *v.* FLOWER (1871), 25 L. T. 902; 20 W. R. 231.

Annotation:—**Consd.** Besant *v.* Wood (1879), 12 Ch. D. 605.

3047. Whether nullity suit barred by.]—In a petition by husband against wife praying that the marriage celebrated between them might be declared null & void on the ground of her incapacity, resp. pleaded that she & petitioner after a year's cohabitation had agreed to live apart, & had bound themselves not to make any claim against each other either in a ct. of law or equity; & that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if resp. committed a breach of the agreement petitioner should be entitled to proceed in this ct. for a declaration of nullity. Averment that there had been no breach of the agreement on the part of resp.:—*Held:* resp.'s agreement not to sue was a sufficient consideration for the husband's engagement to do the like, & such an agreement although not by deed was therefore a bar to a petition for declaration of nullity.—ALDRIDGE *v.* ALDRIDGE (OTHERWISE MORTON) (1888), 13 P. D. 210; 59 L. T. 896; 37 W. R. 240; *sub nom.* A. *v.* M. (OTHERWISE A.), 58 L. J. P. 8.

Annotation:—**Mentd.** *Re* Weston, Davies *v.* Tagart, [1900] 2 Ch. 164.

3048. Agreement not under seal.]—ALDRIDGE *v.* ALDRIDGE (OTHERWISE MORTON), No. 3047, *ante*.

3049. ——.]—WALTER *v.* WALTER, No. 2494,

3050. Agreement obtained by duress.]—ADAMSON *v.* ADAMSON, No. 2954, *ante*.

3051. ——.]—HOLROYD *v.* HOLROYD (1920), 36 T. L. R. 479.

B. Connivance.

(*a*) *In General.*

3052. An absolute bar.]—In an action for adultery, proof that the husband willingly suffered his wife to live in a state of prostitution goes to bar the action, & not merely to mitigate the damages.—HODGES *v.* WINDHAM (1791), Peake, 53, N. P.

3053. ——.]—Where the wife made no defence to a suit for divorce by reason of her adultery, the ct. dismissed the suit on the ground that the husband, having connived at his wife's adultery with A. could not complain of an adultery, nearly

contemporary, with B.—LOVERING *v.* LOVERING (1792), 3 Hag. Ecc. 85 ; 162 E. R. 1089.

Annotations :—**Consd.** Rogers *v.* Rogers (1830), 3 Hag. Ecc. 57 ; Gipps *v.* Gipps & Hume (1864), 11 H. L. Cas. 1. **Refd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523 ; Everett *v.* Everett & McCullum, [1919] P. 298.

3054. ——.]—DENNISS *v.* DENNISS (1808), 3 Hag. Ecc. 348, n. ; 2 Rob. Eccl. 268, n. ; 162 E. R. 1182.

Annotations :—**Consd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523. **Refd.** Chambers *v.* Chambers (1810), 1 Hag. Con. 439 ; Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II. 665 ; Connelly *v.* Connelly (1851), 2 Rob. Eccl. 201.

3055. Distinguished from condonation — Conclusive evidence of criminality essential.]—TURTON *v.* TURTON, No. 2711, *ante*.

3056. Test of innocence—Honesty of intention.]—Mere imprudence & error of judgment are not connivance ; &, in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the honesty of his intentions, not the wisdon of his conduct, is to be considered.—HOAR *v.* HOAR (1801), 3 Hag. Ecc. 137 ; 162 E. R. 1108.

Annotation :—**Consd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523.

3057. Husband conniving at adultery of wife during cohabitation—Whether entitled to relief on ground of adultery with another after separation.]—HODGES *v.* HODGES, No. 3088, *post*.

3058. Husband conniving at adultery of wife with one man—Whether entitled to relief on ground of adultery with another.]—(1) A suit for a divorce, by reason of adultery, by the wife against the husband, met by a plea charging adultery against the wife, not denied, but replied to by an allegation of connivance on the part of the husband :—*Held :* the proof of the husband's adultery & connivance failed, & he was entitled to a sentence.

(2) *Obiter*. A husband, who has connived at his wife's adultery with one man, is not entitled to a separation on the ground of her adultery with another.

(3) Obscene & disgusting language on the part of a husband, entire disregard of decorum will not alone constitute connivance. Facts to constitute connivance must have a direct & necessary tendency to cause adultery to be committed or continued, & such adultery must be clearly proved.

Cruelty & desertion, though tending to induce the wife to disregard her own duties, are not connivance (DR. LUSHINGTON).—STONE *v.* STONE (1844), 1 Rob. Eccl. 99 ; 3 Notes of Cases, 278 ; 163 E. R. 978 ; *affd.* (1845), 4 Notes of Cases, 274.

3059. Husband conniving at one act—Whether entitled to divorce on ground of later act with same man.]—GIPPS *v.* GIPPS & HUME, No. 3064, *post*.

3060. Presumption against connivance.]—MOORSOM *v.* MOORSOM, No. 3082, *post*.

(b) What is Connivance.

i. In General.

Conduct not amounting to connivance.]—*See* Sub-sect. 3, B. (*c*), *post*.

3061. Intentional concurrence in conduct complained of.]—An allegation pleading facts to infer connivance as a bar to the husband's prayer for a sentence of separation, by reason of his wife's adultery rejected, because as no single fact pleaded necessarily inferred a knowledge of the wife's guilt, nor a suspicion that an adulterous intercourse had been or was about to be formed ; & as the whole taken together, did not warrant an imputation on the husband of consenting to, or intending his wife's adultery, his conduct laid in the allegation, even if proved, would not amount to connivance ; to constitute which there must be intentional concurrence. To constitute connivance, active corruption is not necessary ; passive acquiesence, with the intention, & in the expectation that guilt will follow is sufficient ; but on the other hand there must be consent, not mere negligence, inattention, confidence, or dullness of apprehension. Connivance is generally proved by circumstantial evidence.—ROGERS *v.* ROGERS (1830), 3 Hag. Ecc. 57 ; 162 E. R. 1079.

Annotations :—**Consd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II. 665 ; Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17 ; Lankester *v.* Lankester & Cooper, [1925] P. 114.

3062. — .]—BOULTING *v.* BOULTING, No. 3075, *post*.

3063. — **Corrupt intention essential.**]—In order to establish connivance by the husband at his wife's adultery, it must be shown that he gave a willing consent to it, & was an accessory before the fact. Mere negligence, inattention, dullness of apprehension or indifference will not suffice ; but there must be an intention on his part that she should commit adultery. If such a state of things exists as would, in the apprehension of reasonable men, result in the wife's adultery, whether produced by the connivance of the husband or independently of it, & he intending the adultery should take place, does not interfere when he might do so, he is guilty of connivance.

In a suit for dissolution of marriage, on the ground of the wife's adultery, a jury having found that the husband had connived at the adultery, the ct. being satisfied of the propriety of the verdict, dismissed the petition.

If there be a voluntary return to conjugal cohabitation, the innocent party agreeing to restore the offending party to the position he or she occupied before the offence, that is undoubtedly condonation in law. There is a difference between the case of a wife & that of a husband in this respect. It may be that the husband is living under the same roof with the wife when she gets the first information of his guilt, & that she has no one at hand to advise her, & has a difficulty in leaving his house, & may be constrained from the necessity of the case to occupy the same bed with him ; & yet, looking at all the circumstances, a reasonable man would be loth to come to the conclusion that she had condoned. But if she brings her husband voluntarily back to her house, & they continue to cohabit together, she treating him as a husband, reasonable people on those facts would come to a different conclusion (HILL, J.).—ALLEN *v.* ALLEN & D'ARCY (1859), Sea. & Sm. 84 ; 30 L. J. P. M. & A. 2.

Annotation :—**Refd.** Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17.

3064. —— ——.]—(1) The word "conniving" in Matrimonial Causes Act, 1857 (c. 85), s. 29, means not merely refusing to see an act of adultery, but also wilfully abstaining from taking any step to prevent adulterous intercourse, which, from what passes before the husband's eyes, he must reasonably expect will occur. So if he takes money from the adulterer not to complain of the wrong, but to abandon his legal remedy for it, & then leaves the wife in a situation likely to occasion a renewal of

PART XIII. SECT. 7, SUB-SECT. 3.—B. (a).

3059 l. *Husband conniving at one act—Whether entitled to divorce on ground of later act with same man.*]—NOTMANN *v.* NOTMANN (1911), 30 N. Z. L. R. 696.—**N.Z.**

Sect. 7.—Bars to relief: Sub-sect. 3, B. (b) i., ii.

the adulterous intercourse with the same person, he is "accessory" to it. Therefore, where A. presented a petition for a divorce in respect of the wife's adultery with B., & received from B. a sum of money not to include in the petition a prayer for damages, & afterwards, on receiving a promise from B. to execute a bond to pay a farther sum, offered no evidence in support of his petition, & allowed a verdict to be given for resp. & co-resp., & the petition to be dismissed, but made no provision for his wife, nor took any precaution to protect her against future intercourse with B.:—*Held:* his conduct was such as to bring him within the statute, so that his fresh petition in respect of renewed acts of adultery, occurring after the compromise, was properly dismissed.

(2) *Qu.:* whether the word "adultery" in sect. 31 of the Act is confined to the adultery alleged in the petition for the dissolution of marriage, so that if A. has connived at the adultery of his wife with B., he cannot obtain a divorce on account of her adultery with C.

(3) A husband cannot obtain a divorce in respect of an act of adultery committed with a particular person at one time, if at a previous time he has connived at her adultery with the same person.

To constitute connivance there must be a corrupt intention. The first arrangement in this case did not, in itself, amount to connivance, & did not bar the remedy in respect of a fresh act of adultery (LORD WENSLEYDALE & LORD CHELMSFORD).

(4) Renewed adultery with the same person is not a fresh act of adultery, but merely evidence of the adultery (LORD CHELMSFORD).

(5) A covenant to pay damages to a petitioner for a divorce on the ground of adultery, is altogether void as contrary to the policy of sect. 33 of above Act (LORD WENSLEYDALE).

(6) Where, by consent, a jury has been dispensed with on the trial of a petition for a divorce, if a new trial should be ordered, the consent previously given would no longer be binding, & petitioner might demand to have his case tried before a jury (LORD WENSLEYDALE).—GIPPS *v.* GIPPS & HUME (1864), 11 H. L. Cas. 1; 4 New Rep. 303; 33 L. J. P. M. & A. 161; 10 L. T. 735; 10 Jur. N. S. 641; 12 W. R. 937; 11 E. R. 1230, H. L.

Annotations:—*As to* (1) & (3) **Refd.** Dotzauer *v.* Dotzauer (1925), 41 T. L. R. 289; Lankester *v.* Lankester & Cooper, [1925] P. 114.

3065. ——— ———.]—BARNES *v.* BARNES & GRIMWADE, No. 3151, *post.*

3066. ——— **Though no active steps taken to procure adultery.**]—A husband who gives a willing assent to an act of adultery by his wife, desiring that it shall be committed, is guilty of connivance, although he may take no active step towards procuring it to be committed, & may not be an accessory before the fact. No blindness & weakness on the part of the husband, short of an actual willing consent beforehand to the wife's adultery, will constitute connivance, so as to bar his title to a dissolution of marriage by reason of the wife's adultery.

Qu.: whether, in conducting a suit on behalf of the Queen's Proctor, the A.-G. can claim any privilege as in Crown cases.—MARRIS *v.* MARRIS & BURKE (1862), 2 Sw. & Tr. 530; 31 L. J. P. M. & A. 69; 5 L. T. 768; 164 E. R. 1102.

Annotations:—**Refd.** Lankester *v.* Lankester & Cooper, [1925] P. 114. **Mentd.** Pollack *v.* Pollack (1862), 2 Sw. & Tr. 648; Harding *v.* Harding (1865), 5 Sw. & Tr. 145.

3067. Acts directly tending to cause adultery. STONE *v.* STONE, No. 3058, *ante.*

3068. Foreign decree of divorce obtained—At petitioner's instance.]—A domiciled Englishman in 1850 left his wife in England, & went to America. In 1852 his wife joined him there. In 1856, at her suit, an American ct. dissolved the marriage on the ground of the husband's adultery, giving both parties liberty to marry again. The husband subsequently married A., & remained in America, but whether he had abandoned his English domicil did not appear. In a suit, by the wife for dissolution of marriage on the ground of adultery & cruelty, the only evidence of adultery was the husband's cohabitation with A. after the American sentence of divorce:—*Held:* the cohabitation with A. would not support the charge of adultery, for if the sentence of the American ct. was valid, the husband was at liberty to marry again; & if invalid, inasmuch as it was obtained at the wife's instance, she could not complain of the probable consequences, but might be considered to have connived at the adultery.—PALMER *v.* PALMER (1859), 1 Sw. & Tr. 551; 29 L. J. P. & M. 26; 23 J. P. 535; 164 E. R. 855.

Annotation:—**Consd.** Lankester *v.* Lankester & Cooper, [1925] P. 114.

3069. ——— **Acquiescence & active co-operation of petitioner.**]—With the acquiescence & active co-operation of her husband, who was domiciled in England, a wife obtained a decree of divorce in South Dakota & afterwards remarried. The husband afterwards, having ascertained that the American decree was invalid in England, presented a petition here for dissolution of his marriage on the ground of his wife's adultery in remarrying after the American decree. The husband knew when he acquiesced in the American divorce proceedings, that his wife would remarry if she obtained a decree; & the ct. was not satisfied that he genuinely believed at that time that the American decree would dissolve his marriage:—*Held:* (1) the husband had connived at & been accessory to his wife's adultery & was therefore disentitled to relief; (2) had it been possible to hold that his conduct did not amount to connivance, it was conduct which conduced to his wife's adultery, & in the circumstances the ct. would not, in its discretion, have pronounced a decree.—LANKESTER *v.* LANKESTER & COOPER, [1925] P. 114; 94 L. J. P. 71; 133 L. T. 349; 41 T. L. R. 594; 69 Sol. Jo. 663.

3070. Wilful abstention from preventing adultery—Abandonment of legal remedy.]—GIPPS *v.* GIPPS & HUME, No. 3064, *ante.*

ii. *Knowledge of Adultery.*

3071. Necessity for proof of.]—To establish connivance, in bar to a suit on account of the wife's adultery, it is not necessary to show knowledge of, & privity to, the actual commission of adultery. Such extreme negligence to the conduct of his wife & such encouragement of acquaintance & familiar intimacy as are likely to lead to an adulterous intercourse are sufficient.—GILPIN *v.* GILPIN (1804), 3 Hag. Ecc. 150; 162 E. R. 1112.

Annotations:—**Distd.** Rogers *v.* Rogers (1830), 3 Hag. Ecc. 57. **Consd.** Gipps *v.* Gipps (1864), 11 H. L. Cas. 1. **Refd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523.

3072. ——— **Of adultery or improper familiarities—By direct or circumstantial evidence.**]—Connivance, plea of, by the wife, in bar to a suit by the husband for a divorce by reason of her adultery, not sustained, judgment of the ct. below, for the divorce, being affirmed.

In order to establish & make out the plea of what is called connivance, there must be proof, either by direct evidence, or by evidence of acts

which would justify a legal presumption, that a husband charged with conniving at his wife's adultery knew the fact. Anything which falls short of that, amounting only to negligence, is not connivance. To constitute connivance, there must be actual knowledge, that is, proof of knowledge, or irresistible presumption of knowledge, of the adultery, or of the improper familiarities (LANGDALE, M.R.).—PHILLIPS *v.* PHILLIPS (1847), 5 Notes of Cases, 435, P. C.

Annotations :—**Consd.** Gipps *v.* Gipps (1864), 11 H. L. Cas. 1. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II. 665; Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17; Boulting *v.* Boulting (1864), 3 Sw. & Tr. 329; Symons *v.* Symons, [1897] P. 167.

3073. Permission of prostitution.]—SMITH *v.* ALLISON (1765), Bull. N. P. 27.

3074. ——.]—HODGES *v.* WINDHAM, No. 3052, *ante*.

3075. Acquiescence in husband's adultery—Wife in receipt of allowance—Lapse of time.]—(1) Connivance is knowledge of, & acquiescence in, the conduct complained of.

Where a wife, who was petitioner in a suit for judicial separation on the ground of adultery, had for many years before the commencement of the suit known of such adultery without complaint or remonstrance, & had been in receipt of an allowance from her husband :—*Held :* those facts were evidence to go to a jury in support of a charge of connivance.

(2) A. married B. in 1833. A. since 1835 lived apart from B., her husband, under an ordinary separation deed. About 1842, B. commenced an adulterous cohabitation with C., which continued to the date of the trial. A. was aware of the fact of the adulterous cohabitation in 1843, & thenceforward. A. petitioned for judicial separation, & issues of connivance & undue delay were found against her by the verdict of a special jury. A rule *nisi* for a new trial, on the ground of insufficient evidence of connivance, was granted, but discharged on argument.

Semble : undue delay cannot be pleaded in bar to a suit for judicial separation; but lapse of time between knowledge of the conduct complained of & the commencement of the suit requires explanation, & may, along with the circumstances of the case, induce the ct. to withhold the relief sought. In such cases the ct. will require to be satisfied of the sincerity of the complaint of petitioner.—BOULTING *v.* BOULTING (1864), 3 Sw. & Tr. 329; 33 L. J. P. M. & A. 33; 9 L. T. 779; 10 Jur. N. S. 182; 12 W. R. 389; 164 E. R. 1302.

3076. —— —— Consent given to obtain allowance.]—ROSS *v.* ROSS, No. 3094, *post*.

3077. Continued cohabitation—Not amounting to condonation.]—HARE *v.* HARE & DAVIDSON (1920), 36 T. L. R. 331.

iii. *Where there is Likelihood of Adultery.*

3078. General rule.]—ALLEN *v.* ALLEN & D'ARCY, No. 3063, *ante*.

3079. Permitting co-respondent to reside in house—After suspicion of adultery communicated.]—It is not a bar to an action of crim. con. that pltf. allowed deft. to remain in his house after a suspicion of his wife's fidelity has been intimated to him.—FOLEY *v.* PETERBOROUGH (LORD) (1785), 4 Doug. K. B. 294; 99 E. R. 888.

3080. Permitting co-respondent to visit house frequently—Wife partly maintained by co-respondent.]—In a husband's suit for dissolution on the ground of adultery, resp. pleaded connivance, wilful neglect, & conduct conducing to adultery. In support of these pleas it was proved that petitioner had permitted co-resp. to visit frequently at his house in his absence, to send provisions into his house, & to make his wife an allowance of £1 a week, & that he had sent his wife to borrow money from co-resp. Also that he had allowed him to escort his wife to London. The jury found the issue of adultery in favour of petitioner, & they acquitted him of connivance, but they found that he had been guilty of wilful neglect & conduct conducing to the adultery. The ct. refused to grant a decree *nisi*, & dismissed the petition. It also condemned him in his wife's costs, but made no order as to co-resp.'s costs.—BROWN *v.* BROWN & ROBEY (1869), 21 L. T. 181.

3081. Invitation to commit adultery.]—TIMMINGS *v.* TIMMINGS, No. 3195, *post*.

3082. Connivance at improper familiarity—Inference of corrupt intent.]—(1) Passive connivance is as much a bar to relief as active conspiracy, but there must be an intention that guilt should ensue. Connivance of a passive & permissive kind, is to be proved by a train of conduct & circumstances. It is not necessary to show connivance at actual adultery. The ct., from connivance at improper familiarity, will infer corrupt intent as to the result. To establish connivance as a bar, it is not sufficient that the man did not act as a wise, or prudent, or attentive man nor even that he in fact contributed to his wife's guilt; he must be shown intentionally to contribute thereto; there must be intentional permission or corrupt facility.

(2) Indifference, ill behaviour, or cruelty is not pleadable in answer to a charge of adultery nor relevant to a plea of connivance.

(3) The presumption of law is against connivances; & if the facts can be accounted for without supposition of intention, the ct. will incline to that construction (SIR WILLIAM SCOTT).—MOORSOM *v.* MOORSOM (1792), 3 Hag. Ecc. 87; 162 E. R. 1090.

Annotations :—*As to* (1) **Consd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523; Symons *v.* Symons, [1897] P. 167. **Refd.** Gipps *v.* Gipps & Hume (1864), 4 New Rep. 303; Lankester *v.* Lankester & Cooper, [1925] P. 114. *As to* (2) **Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90. *As to* (3) **Refd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523. *Generally*, **Refd.** Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17.

3083. —— Proof of actual knowledge.]—PHILLIPS *v.* PHILLIPS, No. 3072, *ante*.

3084. Long continued toleration—Presumption of knowledge.]—CREWE *v.* CREWE, No. 3133, *post*.

3085. Consent to residence in paramour's house.]—The adultery of the wife being proved, but she having, with her children, but without her husband, resided in a gentleman's house (of which she was treated as the mistress, & where she was delivered of three children) without the husband sufficiently accounting for his absence or providing for her, or interfering with such residence, the ct. dismissed her, on the ground that the husband, by such conduct, had consented to the connection & adultery.—MICHELSON *v.* MICHELSON (1804), 3 Hag. Ecc. 147; 162 E. R. 1111.

3086. Extreme negligence—Encouragement of intimacy.]—GILPIN *v.* GILPIN, No. 3071, *ante*.

3087. Acquiescence in transactions—Likely to lead to adultery.]—(1) To establish connivance, it is not necessary to prove that the husband was an accessory before the fact, or that he took active measures to bring about the result of adultery; but it must appear that he was cognisant that such a result would follow from transactions of which he approved, & to which he consented.

(2) Resp.'s counsel is not at liberty to abstain from comment upon the evidence produced in

Sect. 7.—Bars to relief: Sub-sect. 3, *B.* (*b*) *iii., iv., v. & vi., & (c).*]

support of the petition in opening resp.'s case, & to reserve his comments for his summing up. The proper course is to confine his summing up to the evidence for resp.

(3) If co-resp.'s counsel does not intend to call evidence, he must address the ct. after resp.'s counsel has opened his case, & before the examination of resp.'s witnesses.

(4) If co-resp.'s counsel puts questions to any of resp.'s witnesses, he adopts that witness as his own.—GLENNIE *v.* GLENNIE & BOWLES (1862), 32 L. J. P. M. & A. 17; 8 Jur. N. S. 1158; 11 W. R. 28; *subsequent proceedings* (1863), 3 Sw. & Tr. 109.

Annotations:—As to (1) **Consd.** Gipps *v.* Gipps (1864), 11 H. L. Cas. 1. *As to* (4) **Dbtd.** Allen *v.* Allen, [1894] P. 248. **Refd.** Brown *v.* Brown, [1915] P. 83.

Procurement of adultery—Through agent.]—*See* Sub-sect. 7, B. (*b*) v., *post.*

iv. *Where the Parties are Separated.*

3088. Connivance at acts previous to separation—No bar on proof of subsequent adultery.]—Where a husband proved his wife's adulterous connection with one individual, five years after separation, of which connection two children were born:—*Held:* the husband's knowledge of, & consent to gross indelicacies, or even adultery, with three other persons during cohabitation would not bar him.—HODGES *v.* HODGES (1795), 3 Hag. Ecc. 118; 162 E. R. 1100.

Annotations:—**N.F.** Stone *v.* Stone (1844), 3 Notes of Cases, 278. **Mentd.** Steward *v.* Bateman (1842), 3 Curt. 201.

Connivance at adultery with one or more persons—Whether bar to relief on grounds of adultery with another.]—*See* Nos. 3058, 3088, *ante.*

3089. Connivance at acts during separation—Construction of separation deed.]—If a deed of separation be so worded as rightly to found a presumption that it might (so intended) go to sanction even adultery committed by the wife, living apart from the husband under that deed, that presumption must be rebutted by evidence, to entitle the husband to a sentence of divorce, as by reason of such adultery committed by the wife.—BARKER *v.* BARKER (1824), 2 Add. 285; 162 E. R. 298.

Annotations:—**Apld.** Thomas *v.* Thomas (1860), 2 Sw. & Tr. 113. **Consd.** Ross *v.* Ross (1869), L. R. 1 P. & D. 734. **Refd.** Studdy *v.* Studdy (1858), 1 Sw. & Tr. 321.

3090. —— ——.]—A husband & a wife executed an agreement to live separate on certain conditions. The last clause in the agreement was as follows: "Mrs. S. (the wife) promises, that if she does not fulfil her part of the agreement, Major S. (the husband) shall have the full power of a husband over her, whatever his way of living may be." The wife petitioned for a judicial separation, by reason of her husband's adultery before the separation, unknown to her, & also since the separation. The husband pleaded connivance, & in support of his plea relied on the last clause in the agreement:—*Held:* the words in the agreement, "whatever his way of living may be," might be construed to apply to the place where & to the mode in which the husband might choose to live in reference to his establishment, & as an innocent meaning might fairly be given to these words, the ct. would not presume the immoral contract asserted to have been intended, & petitioner was entitled to the relief prayed.—STUDDY *v.* STUDDY (1858), 1 Sw. & Tr. 321; 28 L. J. P. & M. 44; 32 L. T. O. S. 228; 5 Jur. N. S. 22; 7 W. R. 144; 164 E. R. 747; *affd.* (1859), 28 L. J. P. & M. 105.

Annotation:—**Refd.** Higgins *v.* Higgins (1924), 41 T. L. R. 25.

3091. Corrupt facilities—Intentional permission.]—All separations, merely voluntary, are illegal. . . . There was "an express understanding" . . . that the husband, if the wife consented to the separation, would not object to any connection she might form, or any course of life she might adopt. . . . Mrs. D., deprived of the society & protection of her husband, & banished from her natural home, fell into a course of adultery, the husband, perfectly insensible to his own dishonour, looked at the whole transaction in a pecuniary point of view, & directed his immediate object to the reduction of 4*s.* in the amount of her allowance. . . . I cannot but regard this as a case in which the husband has given a corrupt facility, if not an intentional permission, to his wife's adultery, &, by so doing, has barred himself from the remedy to which he would otherwise be entitled (DR. PHILLIMORE).—DREW *v.* DREW (1842), 1 Notes of Cases, 315; 6 Jur. 110.

Annotation:—**Expld.** Wilson *v.* Glossop (1887), 19 Q. B. D. 379.

3092. —— Deed entered into between husband, wife & co-respondent.]—A wife having carried on an adulterous intercourse with co-resp. from 1852 till Jan. 1855, then left her home & went to reside in the house of co-resp., & subsequently lived with him as his wife. In Feb. 1855, a deed of separation was entered into between the husband, his wife & co-resp., by which the husband covenanted with co-resp. to permit his wife to live separate from him, as if she were unmarried, & to allow her a certain sum for her maintenance, & co-resp. covenanted that the wife should not molest her husband, that she should maintain a child to which she gave birth in 1853, & that he would indemnify the husband against her debts. The husband was aware of the adulterous intercourse, & he admitted, on being examined by the ct., that he had always believed that co-resp. was the father of the child born in 1853. He had nevertheless allowed co-resp. subsequently to its birth to visit at his house. A petition being presented by the husband for a dissolution of marriage, was dismissed on the ground that the husband knew of the adulterous intercourse, & that the deed of separation was virtually an assignment by him of his wife to co-resp.—WALTON *v.* WALTON & HIBELL (1859), 28 L. J. P. & M. 97.

3093. —— Knowledge of adultery at date of execution of deed.]—A husband & wife executed a deed of separation in 1854, which recited, amongst other things, that the husband had for some months been living with a Miss H., & referred to certain articles of agreement concerning certain trust moneys & other property to which Miss H. as well as the husband & wife had been party. In 1860 the wife petitioned for a judicial separation on the ground of the husband's adultery with H. in 1858–1859:—*Held:* the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, & dismissed the petition.—THOMAS *v.* THOMAS (1860), 2 Sw. & Tr. 113; 3 L. T. 180; 164 E. R. 935.

Annotations:—**Distd.** Ross *v.* Ross (1869), L. R. 1 P. & D. 734; Dotzauer *v.* Dotzauer (1925), 41 T. L. R. 289. **Refd.** Gandy *v.* Gandy (1882), 7 P. D. 77.

3094. —— —— Absence of evidence as to.]—(1) A deed of separation securing an allowance to a wife, held not to prove the wife's connivance at the husband's adultery, in the absence of evidence that at the time when it was entered into the wife was aware of the adulterous intercourse which the husband had then established with another woman, & that she consented to its being continued.

(2) If a wife, although unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him she is guilty of connivance.—Ross *v.* Ross (1869), L. R. 1 P. & D. 734; 38 L. J. P. & M. 49; 20 L. T. 853.

Annotation :—As to (1) **Refd.** Higgins *v.* Higgins (1924), 41 T. L. R. 25.

3095. ——— ——— ———.]—DOTZAUER *v.* DOTZAUER (1925), 41 T. L. R. 289; 69 Sol. Jo. 587.

v. *Adultery induced by Agent.*

Conduct conducing to adultery, *see* Sub-sect. 4, C., *post*.

3096. With petitioner's knowledge & concurrence.]—If a husband, whose wife is leading a life of prostitution, pay money, or cause money to be paid to a person to commit an act of adultery with her, in order that he may obtain evidence to enable him to institute a suit for a dissolution of his marriage, the ct. will not grant a decree in consequence of the act of adultery so committed with his concurrence.

Where A., a friend of petitioner, offered B. £5 if he would obtain evidence against resp., & B. made an arrangement with co-resp. that he should commit adultery with resp. & receive half the money, & the adultery was accordingly committed, & the money paid by A. & divided between B. & co-resp., the judge ordinary directed the jury that if the arrangement between B. & co-resp. was made without the knowledge & concurrence of petitioner, petitioner would be entitled to a decree by reason of the adultery committed in pursuance of the arrangement.—SUGG *v.* SUGG & MOORE (1861), 31 L. J. P. M. & A. 41.

Annotations :—**Consd.** Gower *v.* Gower (1872), L. R. 2 P. & D. 428. **Refd.** Roche *v.* Roche (1905), 21 T. L. R. 332.

3097. ———.]—POLLARD *v.* POLLARD (1904), *Times*, Mar. 17 & 31, Apr. 21 & 22.

3098. Without petitioner's knowledge or concurrence.]—A decree of dissolution of marriage on the ground of the wife's adultery will not be granted when the adultery has been brought about by persons acting on behalf of petitioner, although without his knowledge.

Whilst the husband was abroad, his father employed A. to watch the wife. A. employed B. At B.'s instigation, but without the knowledge or concurrence of petitioner or his father, co-resp. induced the wife to commit adultery. The ct. dismissed the petition.—PICKEN *v.* PICKEN & SIMMONDS (1864), 34 L. J. P. M. & A. 22.

Annotation :—**Refd.** Roche *v.* Roche (1905), 74 L. J. P. 50.

3099. ———.]—If a person employed by a husband to watch his wife for the purpose of obtaining evidence of her adultery, brings about an act of adultery, the husband cannot obtain a decree of dissolution on the ground of such adultery, although he may not have directed or authorised his agent to bring it about.—GOWER *v.* GOWER (1872), L. R. 2 P. & D. 428; 41 L. J. P. & M. 49; 27 L. T. 43; 20 W. R. 889.

Annotation :—**Refd.** Roche *v.* Roche (1905), 74 L. J. P. 50.

3100. ———.]—The wife, who was living apart from her husband, employed her solrs. to watch him. Unknown to her, & without her authority, the solr.'s clerk induced resp. to commit adultery. A decree *nisi* for the dissolution of the marriage was granted on his evidence, & the wife's as to acts of cruelty. The Queen's Proctor intervened on the ground that petitioner was not entitled to a decree on the ground of such adultery :—*Held :* the decree *nisi* must be rescinded; but, as the intervention of the Queen's Proctor did not touch the wife's charge of cruelty, the petition would not be dismissed, so as to give her an opportunity of applying for a judicial separation.—BELL *v.* BELL (1889), 58 L. J. P. 54.

3101. ———.]—THOMPSON *v.* THOMPSON (1908), *Times*, Nov. 25.

vi. *Passive Connivance.*

3102. As much a bar as active conspiracy—On proof of corrupt intention.]—MOORSOM *v.* MOORSOM, No. 3082, *ante*.

3103. ——— ———.]—ROGERS *v.* ROGERS, No. 3061, *ante*.

3104. ——— **Presumption of knowledge.**]—CREWE *v.* CREWE, No. 3133, *post*.

3105. Proved by train of conduct & circumstances.]—MOORSOM *v.* MOORSOM, No. 3082, *ante*.

3106. Acquiescence with expectation of guilt.]—ROGERS *v.* ROGERS, No. 3061, *ante*.

(c) *Conduct not amounting to Connivance.*

3107. Great inattention—Unless husband privy to wife's guilt.]—On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence, he must have been privy to her guilt, or have led her into the crime.—RIX *v.* RIX (1777), 3 Hag. Ecc. 74; 162 E. R. 1085.

Annotation :—**Refd.** Davidson *v.* Davidson (1856), Dea. & Sw. 132.

3108. The law on this subject is now clearly settled to be, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even loose or improper conduct, not amounting to a consent, it only goes in reduction of damages (BULLER, J.).—DUBERLEY *v.* GUNNING (1792), 4 Term Rep. 651; 100 E. R. 1226.

Annotations :—**Refd.** Price *v.* Severn (1831), 7 Bing. 316; Bernstein *v.* Bernstein, [1893] P. 292. **Mentd.** Jones *v.* Sparrow (1793), 5 Term Rep. 257; Goldsmith *v.* Sefton (1796), 3 Anst. 808.

3109. Mere permission of opportunity.]—TIMMINGS *v.* TIMMINGS, No. 3195, *post*.

3110. Mere imprudence—& error of judgment.]—HOAR *v.* HOAR, No. 3056, *ante*.

3111. Leaving wife—After conviction of adultery—Not amounting to legal proof.]—Separation on proof of the adultery of the wife, not barred by the conduct of the husband.

If the husband connives at, or acquiesces in adultery, the law is clear, he loses his remedy *volenti non fit injuria;* still more so, if he actively promotes it. But, to say that a husband quitting his wife because he is convinced of her adultery, & only waiting for full proof before he institutes proceedings, & not supporting her because he had no means of doing so, is guilty of connivance, would be to state a principle void of authority (SIR JOHN NICHOLL).—REEVES *v.* REEVES (1813), 2 Phillim. 125; 161 E. R. 1097.

Annotations :—**Expld.** Phillips *v.* Phillips (1844), 1 Rob. Eccl. 144. **Consd.** Hodgson *v.* Hodgson, [1905] P. 233. **Refd.** Morgan *v.* Morgan (1841), 2 Curt. 679; Clowes *v.*

PART XIII. SECT. 7, SUB-SECT. 3.—B. (c).

3109 i. *Mere permission of opportunity.*]—A husband who was not on good terms with his wife, & had reason to suspect her conduct, was informed that she intended to visit a man at G., with whom he knew she had been corresponding, & he instructed detectives to watch her movements. His wife informed him that she desired to visit friends at S. & asked if she should go. She also asked for money. He replied, " certainly go " & gave her £2. She went to G., where an act of adultery was committed :—*Held :* the facts did not support a plea of *lenocinium*, & decree of divorce granted.—THOMSON *v.* THOMSON (1908), S. C. 179; 45 Sc. L. R. 95; 15 S. L. T. 503.—SCOT.

Sect. 7.—Bars to relief: Sub-sect. 3, *B.* (*c*) *& C.* (*a*) *& (b) i.*]

Clowes (1844), 2 L. T. O. S. 427; Clowes *v.* Clowes (1845), 4 Notes of Cases, 1; Grant *v.* Grant (1846), 10 Jur. 103.

3112. Mere patience & forbearance—Of wife.]—Divorce by reason of the adultery of the husband. Connivance on the part of the wife from forbearance not inferred. Objection to libel overruled.—KIRKWALL (LADY) *v.* KIRKWALL (LORD) (1818), 2 Hag. Con. 277; 161 E. R. 742.

3113. —— ——.]—ANGLE *v.* ANGLE, No. 3219, *post*.

3114. Mere use of obscene language—& disregard of decorum.]—STONE *v.* STONE, No. 3058, *ante*.

3115. Cruelty & desertion—Though tending to induce wife to disregard duties.]—STONE *v.* STONE, No. 3058, *ante*.

3116. Mere negligence.]—PHILLIPS *v.* PHILLIPS, No. 3072, *ante*.

3117. —— Inattention or indifference.]—ROGERS *v.* ROGERS, No. 3061, *ante*.

3118. —— ——.]—ALLEN *v.* ALLEN & D'ARCY, No. 3063, *ante*.

3119. Agreement with adulterer to send wife home—At adulterer's expense.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 3368, *post*.

3120. Mere blindness & weakness—Short of actual willing consent.]—MARRIS *v.* MARRIS & BURKE, No. 3066, *ante*.

3121. Execution of separation deed—With knowledge of previous adultery.]—Where a husband has been guilty of adultery & of cruelty to his wife & the parties have then entered into a deed of separation & the husband has, subsequently to the deed, committed adultery & been guilty of desertion for more than two years, the ct., on a petition by the wife for divorce, ought not to hold that the execution of the deed was an anticipatory connivance by the wife at further adultery by her husband unless there is clear evidence of an intention to connive.—HIGGINS *v.* HIGGINS (1924), 41 T. L. R. 25, C. A.

3122. Mere assent to separation—Consenting to Jewish divorce.]—Petitioner & resp., who were of the Jewish religion, were married in a synagogue in 1917, but in 1919 they agreed to separate & shortly after the execution of a deed of separation went through the ceremony before a rabbi by which a husband divorces a wife according to the law of Moses & Israel. Both parties, however, knew that such a ceremony had not the effect of dissolving the marriage according to English law; & at the time of the ceremony no other marriage according to Jewish law was contemplated by either party. In 1921 resp. in Berlin went through what was said to be a form of marriage according to the law of Moses & Israel with a Rumanian woman, & they had since lived together as man & wife. In a suit by petitioner for divorce on the ground of resp.'s adultery resp. pleaded that petitioner had connived at his adultery & conduced to it by consenting to a Jewish divorce & to resp.'s marrying again according to Jewish laws:—*Held:* on the evidence there was no assent to anything except to a separation, & resp. had failed to prove connivance & conduct conducing, & there must be a decree *nisi*.—PREGER *v.* PREGER (1926), 42 T. L. R. 281.

C. Collusion.

(*a*) *In General.*

3123. Distinguished from fraud.] — Circumstances stated in an allegation, which, though they may amount to fraud in the obtaining a decree, do not amount to collusion, & which do not prove that the judge was misled.

Distinction between fraud & collusion. The collusion must have been between pltf. & deft. in the suit. Collusion between either of them & a third party is insufficient.—MEDDOWCROFT *v.* HUGUENIN (1844), 4 Moo. P. C. C. 386; 8 Jur. 431; 13 E. R. 352, P. C.

Annotations:—**Refd.** Perry *v.* Meddowcroft (1846), 10 Beav. 122. **Mentd.** The Justyn (1862), 6 L. T. 553.

3124. Criminal offence—Liability of solicitors aiding parties.]—KYNASTON *v.* HICKMAN & BROWN (1919), *Times*, Nov. 6.

3125. Transactions tainted with suspicion of collusion—Necessity for parties & legal advisers to avoid.]—Every transaction either between the parties or between their legal advisers during the pendency of divorce proceedings, which makes the material elements of a decree of divorce the subject of negotiation, taints the transaction with suspicion of collusion, & must be avoided both by the parties & by their representatives.—CARMICHAEL *v.* CARMICHAEL (1925), 42 T. L. R. 133.

3126. Agreement for maintenance prior to instituting petition.]—CLARKE *v.* CLARKE (1925), 42 T. L. R. 132.

3127. Bar to judicial separation.]—The ct. refused to pronounce a decree for a judicial separation upon the application of a wife, who had obtained a verdict of cruelty & adultery against her husband, but who had subsequently, upon the intervention of the Queen's Proctor, been found guilty of colluding with her husband.—BUTLER *v.* BUTLER (1890), 63 L. T. 256.

Annotation:—**Consd.** Synge *v.* Synge, [1900] P. 180.

3128. Must be between plaintiff & defendant—Collusion of either with third party insufficient.]—MEDDOWCROFT *v.* HUGUENIN, No. 3123, *ante*.

3129. Collusion between solicitors—Parties to

3116 i. *Mere negligence.* To constitute connivance it is essential that there should be on the part of the injured spouse willingness & mental assent to the commission of a matrimonial offence with full knowledge of the circumstances; mere knowledge, negligence or inaction are not sufficient.—BELL *v.* BELL (1909), T. S. 500.—**S. AF.**

b. *Mere inaction.*]—A wife, without just cause, left her husband's house, & refused to return to it, or to allow him to live with her. Having reason to suspect her of adultery with a certain man, the husband, for the purpose of obtaining proof of her guilt, secretly watched the house in which she lived. On one occasion he saw the man whom he suspected enter the house in the evening & leave at an early hour the following morning, &, on another occasion, saw the pair in the act of adultery. He did not interfere on either occasion:—*Held:* these facts did not establish connivance.—DAVIS *v.* DAVIS & HUGHES (1904), 2 C. L. R. 178.—**AUS.**

c. ——.]—Petitioner & a friend watched the window of a room in a boarding-house occupied by resp., for about an hour, & then forced an entrance, & discovered resp. & co-resp. in the act of adultery:—*Held:* petitioner was not guilty of connivance.—BEWES *v.* BEWES (1903), 22 N. Z. L. R. 665.—**N.Z.**

3121 i. *Execution of separation deed—With knowledge of previous adultery.*]—A man who married a prostitute with whom he had lived for some time on several occasions both before & after the marriage in the presence of witnesses cast up to her her former mode of life & told her to return to it. Some months after the marriage he left her & went to America but gave directions to his man of business to carry out an arrangement for a separation. This was done within 2 months. Under the deed of separation suitable aliment in proportion to the husband's means was provided for her. Two years after the husband went away the wife entered again on a course of continuous prostitution:—*Held:* as the expressions above referred to had been used in *nixa* & were not intended or understood to be intended to be acted upon the provision made for the wife being inconsistent with such intention & as the wife's return to her former manner of life was so far disconnected with those expressions in point of time there was no ground for the plea of *lenocinium* & decree of divorce granted.—HUNTER *v.* HUNTER (1883), 11 R. (Ct. of Sess.) 359.—**SCOT.**

suit not implicated.]—Where the solrs. for petitioner & resp. conducted the proceedings in a suit for dissolution of marriage in such a way as to give rise to a reasonable suspicion of collusion, & the Queen's Proctor thereupon obtained leave to intervene & show cause against the decree *nisi* being made absolute, but it appeared, on showing cause, that neither of the partes to the suit had been implicated in the irregularities of their solrs., the ct. made absolute the decree *nisi*, & made no order as to the costs of the intervention.—COX *v.* COX (1861), 2 Sw. & Tr. 306; 30 L. J. P. M. & A. 255; 4 L. T. 450; 9 W. R. 924; 164 E. R. 1013.

3130. Collusion in previous proceedings—Marriage not dissolved by decree obtained in previous suit.]—The fact that petitioner has been guilty of fraud & collusion in obtaining a decree of divorce between resp. & her first husband, petitioner himself being the co-resp. in the divorce proceedings, is no bar to his obtaining a decree of nullity upon the ground that the decree for divorce upon which his subsequent marriage with resp. was founded was bad.—BONAPARTE *v.* BONAPARTE (OTHERWISE MEGONE), [1892] P. 402; 62 L. J. P. 1; 8 T. L. R. 759; 1 R. 490; *sub nom.* BONAPARTE *v.* MEGONE (FALSELY CALLED BONAPARTE), 67 L. T. 531.

Annotation: —**Expld.** Bater *v.* Bater, [1906] P. 209.

——**Previous petition not actually brought—Collusive agreement spent.**]—Collusion at an earlier period in respect of proceedings then contemplated does not preclude the ct. granting petitioner relief on a petition subsequently presented & prosecuted in good faith, & with full & frank disclosure of all material facts.—WATKIN *v.* WATKIN & MALCOLM (1919), 122 L. T. 225.

Annotation: —**Expld.** Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3132. Evidence to rebut—Admissibility of respondent's confession to witness.]—(1) Upon the trial of issues as to a co-resp.'s alleged adultery & as to a cross-petition of collusion put forward in co-resp.'s answer, the evidence of a witness, called by petitioner to prove statements made to him by the witness detailing a confession alleged to have been made by resp., who had not appeared to the citation, was admitted as being relevant to the cross-petition of collusion to present a false case to the ct. & to obtain a decree contrary to the justice of the case.

(2) A person, who attends in ct. on subpœna, cannot against his will be asked to stand up in ct. for identification.—FARULLI *v.* FARULLI & PEDERZOLI, [1917] P. 28; 86 L. J. P. 35; 116 L. T. 18; 61 Sol. Jo. 116.

(*b*) *What is Collusion.*

i. *In General.*

3133. Agreement to commit or appear to commit adultery.]—(1) On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not have been ignorant, the ct., after much hesitation & difficulty, granted the sentence of separation, as it could not affect the husband with a direct knowledge of the adultery, & as three witnesses had positively sworn they believed the husband was ignorant.

(2) On proof of adultery, sentence may be barred by *compensatio criminis*, by condonation, by active procurement or passive toleration, &, possibly, by other conduct.

(3) Collusion is an agreement between the parties, for one to commit, or appear to commit, a fact of adultery, so as to suffer the other to obtain a remedy at law as for a real injury. The law permits no co-operation for such purpose, & refuses a remedy for adultery committed with such intent; but it is not proof of collusion that, after the crime is committed, both parties are desirous of a separation.

(4) The 105th Canon requiring that divorce should not go on confession alone, the ct. is almost bound to reject an affirmative issue in a suit for separation for adultery.

(5) Passive connivance, or toleration, arising from the husband's insensibility to his own honour, or unwillingness to seek redress is a bar to relief; if there be proved a long course of criminal conduct, of which he was, or of which he must be presumed to be, cognisant, he may wait for adequate proof, but no longer.

(6) A judgment by default against the paramour, & no defence on the part of the wife, are not proof of collusion.—CREWE *v.* CREWE (1800), 3 Hag. Ecc. 123; 162 E. R. 1102.

Annotations:—*As to* (1) **Refd.** Phillips *v.* Phillips (1844), 1 Rob. Eccl. 144. *As to* (3) & (4) **Expld.** Churchward *v.* Churchward, [1895] P. 7. *As to* (5) **Refd.** Phillips *v.* Phillips (1816), 4 Notes of Cases 523; Gipps *v.* Gipps & Hume (1863), 3 Sw. & Tr. 116.

3134. Action in concert in conduct of suit.]—In a suit for dissolution of marriage on the ground of the wife's adultery the adultery was proved, but it appeared from the evidence of witnesses called by the ct., that an agent employed by petitioner to procure evidence & serve the citations on resps., then living together as man & wife, had, whilst on that mission, associated with them on intimate terms; had received money from the co-resp.; & had paid him money, which was afterwards repaid by the wife's father, in order that he might be enabled to complete the chain of evidence; that the father of the wife had paid money to petitioner on his signing the petition, & also to induce him to proceed with the suit; had acted in concert with petitioner in the conduct of the suit; & had aided in getting up the case by giving facilities for obtaining evidence of the adultery. The ct., being of opinion that the petition was prosecuted in collusion with resp., in compliance with Matrimonial Causes Act, 1857 (c. 85), s. 30, dismissed it.—LLOYD *v.* LLOYD & CHICHESTER (1859), Sea. & Sm. 39; 1 Sw. & Tr. 567; 30 L. J. P. M. & A. 97; 1 L. T. 335; 164 E. R. 862.

Annotations:—**Consd.** Churchward *v.* Churchward, [1895] P. 7. **Refd.** Plumer *v.* Plumer & Bygrave (1859), Sea. & Sm. 147; Todd *v.* Todd (1866), L. R. 1 P. & D. 121. **Mentd.** Y. *v.* Y. (1860), 1 Sw. & Tr. 598.

3135. Agreement or understanding between parties.]—GETHIN *v.* GETHIN, No. 3144, *post*.

3136. Improper act or improper refraining from act—For dishonest purpose.]—Collusion is an improper act done, or an improper refraining from doing an act, for a dishonest purpose.

Where a wife (petitioner), who had obtained a

PART XIII. SECT. 7, SUB-SECT. 3. C. (b) i.

d. *Evidence must be clear.*]—MCDONALD *v.* MCDONALD, [1923] 3 D. L. R. 319; 50 N. B. R. 56.—**CAN.**

e. *Action in concert in conduct of suit.*]—Subsequently to the institution of a suit for dissolution of marriage, & on the same day on which the suit came on for hearing, petitioner & resp. each filed petitions, setting out that it was agreed between them that from that date the marriage between them should be dissolved; that neither of them should have any claim against the other; that each should marry again at pleasure, & prayed that dissolution of the marriage might be granted on these terms, each party bearing his & her own costs:—*Held:* this amounted to collusion.—CHRISTIAN *v.* CHRISTIAN (1885), I. L. R. 11 Calc. 651.—**IND.**

3135 i. *Agreement or understanding between parties.*]—On a petition for divorce at the suit of the husband, it was held that a direct agreement between petitioner & resp. is not necessary to establish collusion sufficient to defeat the petition.—HAYES *v.* HAYES (1911), 1 W. W. R. [illegible] **CAN.**

Sect. 7.—Bars to relief: Sub-sect. 3, C. (b) i., ii., iii., iv. & v.]

decree of judicial separation on the ground of desertion with permanent alimony at the rate of £160 a year, informed her husband's brother, through whom it was paid, that the allowance was insufficient for the support of herself & her daughter, & was thereupon informed by him that, if she would institute proceedings for divorce, the necessary information for which would be supplied, her husband would pay her a sum of £300 down on the filing of the petition, another £300 on the decree being made absolute, & £500 a year by way of permanent maintenance in lieu of £160 a year theretofore paid as permanent alimony:—*Held:* there was in the circumstances no misconduct on the part of petitioner in consenting to these proposals, & pronounced a decree *nisi* accordingly.—SCOTT *v.* SCOTT, [1913] P. 52; 82 L. J. P. 39; 108 L. T. 49; 29 T. L. R. 206.

Annotation:—**Consd.** Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3137. Not merely desire for separation—After crime committed.]—CREWE *v.* CREWE, No. 3133, *ante*.

ii. *Agreements to Institute Proceedings.*

3138. Initiation & conduct provided for by agreement—Though no facts falsely dealt with or withheld.]—CHURCHWARD *v.* CHURCHWARD & HOLLIDAY, No. 3143, *post*.

3139. Payment to petitioner with request to initiate suit—Made on behalf of respondent.]—A wife instituted a suit for divorce against her husband on the ground of his cruelty, desertion, & adultery. For some time the parties had been living apart under a separation deed, & at the time of the divorce proceedings being taken there was due to petitioner under this deed a sum of £325. Resp., who had left the country, had never communicated with petitioner, but he corresponded with his sister, who sent a friend to petitioner urging her to divorce resp. & expressed her willingness to pay a sum of £100 to petitioner & the costs if she would do so. Thereupon, petitioner agreed to institute divorce proceedings:—*Held:* as the wife was only obtaining from the resp. in a different way that which by process of law she might have compelled him to pay, the arrangement as to the payment by resp.'s sister did not amount to collusion within *Churchward* v. *Churchward & Holliday*, No. 3143, so as to disentitle petitioner to a decree.—MALLEY *v.* MALLEY (1909), 25 T. L. R. 662; 53 Sol. Jo. 617.

Annotations:—**Consd.** Scott *v.* Scott (1913), 108 L. T. 49; Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3140. —— Petitioner not moved by any improper motive.]—SCOTT *v.* SCOTT, No. 3136, *ante*.

iii. *Agreements Not to Defend.*

3141. General rule.]—BARNES *v.* BARNES & GRIMWADE, No. 3151, *post*.

3142. ——.]—An agreement between the parties to a divorce suit to withhold any relevant evidence from the ct. amounts to collusion.

A husband, before commencing a suit for dissolution of marriage, agreed with his wife that, if no opposition were offered to his petition, he would pay the costs of all parties. Resp. & co-resp. did not appear. After a decree *nisi* the Queen's Proctor intervened, & resp. gave evidence of petitioner's promise as to the costs, & also alleged that he had been guilty of cruelty & had connived at her cohabitation with the co-resp. The ct. held that the parties had been guilty of collusion, & rescinded the decree *nisi*.—BACON *v.* BACON & ASHBY (1877), 25 W. R. 560.

Annotation:—**Consd.** Churchward *v.* Churchward, [1895] P. 7.

3143. —— No material fact withheld.]—If the initiation of a divorce suit be procured, & its conduct, especially if abstention from defence be a term provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld.

Petitioner made an agreement with resp., who had committed adultery with co-resp., by which she undertook to settle money on the child of the marriage, & he to take proceedings for divorce, which she was not to defend & of which she was to pay the costs, he not claiming damages against co-resp. The agreement was disclosed to the ct. Petitioner did not connive at the adultery, & no false testimony was adduced before the ct. in proof of it. It was not shown that there were any specific facts, material in defence or recrimination, which might have been brought forward by resp.; but it was not proved that there were no material facts which she might have brought forward by way of defence or recrimination. On the intervention of the Queen's Proctor:—*Held:* the agreement constituted collusion between petitioner & resp., so as to disentitle petitioner to a divorce.—CHURCHWARD *v.* CHURCHWARD & HOLLIDAY, [1895] P. 7; 64 L. J. P. 18; 71 L. T. 782; 43 W. R. 380; 11 T. L. R. 69; 11 R. 626.

Annotations:—**Distd.** Malley *v.* Malley (1909), 25 T. L. R. 662; Scott *v.* Scott, [1913] P. 52. **Consd.** Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3144. Necessity to prove agreement or understanding between parties.]—In order to establish a charge of collusion against petitioner & resp. in a suit for dissolution of marriage, it is necessary to prove that there was some understanding or agreement between them.

Where a husband & wife, both of them being anxious to obtain a divorce, presented cross-petitions, & the husband's petition was dismissed upon his own application, & he abstained from making any defence to his wife's petition, the judge ordinary directed the jury that if that course had not been taken in consequence of any understanding or agreement between the parties, but each had acted independently of the other, petitioner was not guilty of collusion.—GETHIN *v.* GETHIN (1861), 31 L. J. P. M. & A. 43; *subsequent proceedings* (1862), 2 Sw. & Tr. 560.

Annotation:—**Consd.** Churchward *v.* Churchward, [1895] P. 7.

iv. *Suppression of Material Facts.*

3145. General rule.]—Where the Queen's Proctor obtains the leave of the ct. to intervene, &

PART XIII. SECT. 7, SUB-SECT. 3.—C. (b) ii.

3138 i. *Initiation & conduct provided for by agreement—Though no facts falsely dealt with or withheld.*]—Collusion exists where the initiation of the proceeding for dissolution of marriage is procured & its conduct, especially if abstention from defence be a term, provided for by agreement or bargain between the spouses or their agents, although it does not appear that any specific fact has been falsely dealt with or withheld.—STE. CROIX *v.* STE. CROIX (1917), I. L. R. 44 Calc. 1091.—**IND.**

3138 ii. —— ——.]—Where no specific fact has been falsely dealt with or withheld from the ct., an agreement by which a divorce suit is initiated, but which contains no term to abstain from a defence, is not collusion for the purpose of obtaining a divorce contrary to the justice of the case within the meaning which should be given to those words in N.Z., having regard to the present form of the divorce law in the colony as laid down by statutory enactments.—LIVINGSTONE *v.* LIVINGSTONE (1902), 21 N. Z. L. R. 626.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 3.—C. (b) iii.

3141 i. *General rule.*]—Collusion is the permitting a false case to be substantiated or keeping back a just defence.—WALKER *v.* WALKER, [1911] S. C. 163.—**SCOT.**

pleads collusion between petitioner & resp., such plea is a good plea; but petitioner is entitled to be acquainted with the character of the collusion intended to be charged, by way of specification or particulars.

With reference to amending the plea, by stating evidence or the facts on which the collusion is supposed to be founded, it is quite out of question. As to oppression, I think the Legislature has guarded against that by putting it in the hands of a public officer. My difficulty is this: collusion is not, like condonation, a well-understood term; it may be by keeping back evidence of what would be a good answer, or by agreeing to set up a false case (*per* CUR.).

In this case I think it is by no means necessary to state the facts that are intended to be proved; but the character of the collusion pleaded should be given as by way of particulars (*per* CUR.).—JESSOP *v.* JESSOP (1861), 2 Sw. & Tr. 301; 30 L. J. P. M. & A. 193; 4 L. T. 308; 7 Jur. N. S. 609; 9 W. R. 640; 164 E. R. 1011.

Annotation:—**Consd.** Churchward *v.* Churchward, [1895] P. 7.

3146. Criminal offence.]—In my view when parties agree together to take steps to obtain a divorce by suppressing or concealing facts from the ct., they are guilty of a criminal offence, & any solr. who assists the parties is also guilty of a criminal offence (LORD READING, C.J.).—KYNASTON *v.* HICKMAN & BROWN (1919), *Times* Nov. 6.

3147. Agreement to withhold relevant evidence.]—BACON *v.* BACON & ASHBY, No. 3142, *ante*.

3148. —— In support of counter charge—Though facts suppressed insufficient to establish charge.]—If, by agreement between the parties to a divorce suit, pertinent & material facts, which might be adduced in evidence in support of a cross-petition against petitioner by resp. or co-resp., be withheld from the ct., such agreement will amount to collusion, even though the suppressed facts might not have been sufficient to establish the cross-petition.—HUNT *v.* HUNT & WRIGHT (1877), 47 L. J. P. 22; 39 L. T. 45.

Annotations:—**Consd.** Butler *v.* Butler (1890), 15 P. D. 66; Churchward *v.* Churchward, [1895] P. 7.

3149. —— —— ——.]—A wife having petitioned for a divorce from her husband on the ground of his cruelty & adultery with several women, the husband presented a cross-petition on the ground of his wife's adultery. During the trial of the petitioners, the husband & wife, by their respective solrs., entered into an agreement that the wife should give evidence of cruelty to the satisfaction of the ct., & of the husband's adultery with W., one of the women charged, & that if the ct. was satisfied on that evidence the decree should go, the wife should withdraw the other charges, & the husband should withdraw his petition. The wife's counsel proceeded with the trial as if the agreement had not been entered into; but the husband's counsel acted in accordance with instructions based on the agreement, & did not cross-examine the wife. The jury found that the husband had committed adultery with W. only, that he had been guilty of cruelty, & that the wife had not committed adultery. On these findings a decree *nisi* was granted. The Queen's Proctor intervened, & after a hearing at which further evidence was adduced, the judge left to the jury the questions (*a*) Were material facts withheld from the knowledge of the ct.? (*b*) Was there collusion? (*c*) Did the wife commit adultery? The jury answered the two first questions in the affirmative, but were unable to agree as to the third:—*Held:* (1) under the Matrimonial Causes Act, 1857 (c. 85), a wife was deprived of her right to a decree, not only if she had been guilty of a matrimonial offence, but also if her petition had been presented or prosecuted in collusion with resp.; (2) an agreement between the parties to a divorce suit to withhold from the ct. pertinent & material facts, which might have been adduced on the trial in support of a counter-charge, amounted to collusion, even though the facts suppressed might not have been sufficient to establish such counter-charge.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM (1890), 15 P. D. 66; 59 L. J. P. 25; 62 L. T. 344; 38 W. R. 390; 6 T. L. R. 148, C. A.

Annotations:—*As to* (2) **Apld.** Rogers *v.* Rogers, [1894] P. 161. **Consd.** Churchward *v.* Churchward, [1895] P. 7; Hunter *v.* Hunter, [1905] P. 217. **Refd.** Roche *v.* Roche, [1905] P. 142; Wain *v.* Wain & Eves (1909), 26 T. L. R. 131.

3150. Petitioner's adultery.]—DRUMMOND *v.* DRUMMOND, No. 3158, *post*.

Suppression by petitioner of own adultery.]—*See* Sect. 20, sub-sect. 3, B. (*b*), *post*.

3151. Conduct conducing to adultery.]—(1) Petitioner obtained a decree *nisi* in a suit in which neither resp. nor co-resp. appeared. Afterwards the Queen's Proctor intervened, & alleged (*inter alia*) collusion between petitioner & resp., & that material facts respecting the conduct of petitioner had not been brought before the ct. The ct. reversed the decree, upon the ground that the fact of petitioner having before & after the institution of the suit given money to resp. to offer no opposition to the suit, & urged her so to do, as he should get a decree cheaper, established collusion; that the facts that petitioner was in the habit of going with resp. & co-resp. to places of amusement, allowing her to dance frequently with co-resp., & on leaving left her in his care, were material facts conducing to the adultery, which ought to have been brought before the ct. *Semble:* the above facts do not establish a plea of connivance, as connivance to be a bar must be a corrupt connivance.

(2) A wife, being entitled to alimony *pendente lite*, the voluntary gift of money during progress of a suit by him for a divorce, does not, *per se*, prove collusion.

(3) Where the suppression of material facts is averred without specifying such facts, petitioner is entitled to particulars.

(4) Where a charge of collusion was sustained against petitioner by the Queen's Proctor, but a further charge of adultery, which petitioner had come prepared to meet was abandoned, the ct. made no order as to costs.—BARNES *v.* BARNES & GRIMWADE (1867), L. R. 1 P. & D. 505; 37 L. J. P. & M. 4; 17 L. T. 268; 16 W. R. 281.

Annotations:—*As to* (1) **Consd.** Churchward *v.* Churchward, [1895] P. 7. **Refd.** Butler *v.* Butler, Butler *v.* Butler & Burnham (1890), 38 W. R. 390; Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3152. Agreement to conceal condonation.]—ROGERS *v.* ROGERS, No. 5172, *post*.

v. *Other Cases.*

3153. Co-respondent suffering judgment by default—No defence on part of wife.]—CREWE *v.* CREWE, No. 3133, *ante*.

3154. Agreement to collect evidence.]—*Semble:* it is collusion for both parties to a suit instituted on grounds which would entitle petitioner only to sue, to concur in getting up evidence in support of the petition, though the evidence be true.

Qu.: whether it would be so if either party might have instituted a suit on same grounds.—

Sect. 7.—Bars to relief: Sub-sect. 3, C. (b) v., & D. (a) & (b) i.]

MIDGLEY (FALSELY CALLED WOOD) *v.* WOOD (1860), as reported in 30 L. J. P. M. & A. 57.
Annotation :—**Consd.** Churchward *v.* Churchward, [1895] P. 7.

3155. Request for evidence of past adultery.]—A request by a proposed petitioner for production by the proposed resp. of evidence of past acts of misconduct does not, apart from any arrangement as to the conduct of the proposed proceedings, constitute the offence of collusion.—LAIDLER *v.* LAIDLER (1920), 90 L. J. P. 28 ; 123 L. T. 208 ; 36 T. L. R. 510.

3156. Agreement to provide evidence—By committing adultery.]—(1) On the hearing of a suit by a wife for a dissolution of marriage on the ground of adultery, coupled with desertion, it was shown that the adultery charged & proved was committed by the husband in fulfilment of a promise previously made by him to the wife that he would give her an opportunity of obtaining a divorce ; that the adultery had been committed in order that it might be proved ; that evidence of it had been obtained by means of information supplied to the wife by the husband ; & that the wife was acting in concert with the husband to obtain evidence of it by the means indicated by him :—*Held :* the husband & wife were guilty of collusion within Matrimonial Causes Act, 1857 (c. 85), s. 30.

(2) The husband was ordered to pay the costs of the wife, although her petition for dissolution was dismissed on the ground that they had been guilty of collusion.—TODD *v.* TODD (1866), L. R. 1 P. & D. 121 ; 35 L. J. P. & M. 34 ; 13 L. T. 759 ; 12 Jur. N. S. 237 ; 14 W. R. 350.

3157. Agreement to set up false case.]—JESSOP *v.* JESSOP, No. 3145, *ante*.

3158. Failure to countercharge.]—(1) Where the Queen's Proctor intervenes in a suit for dissolution of marriage before the hearing, & pleads collusion & that petitioner has been guilty of adultery, his right to intervene cannot be defeated by petitioner asking only for a decree of judicial separation ; but he will be allowed to prove his pleas.

(2) The ct. will not, at the hearing in such a case, allow the prayer of the petition to be altered into a prayer of judicial separation for the purpose of ousting the Queen's Proctor.

(3) A wife who has been guilty of adultery since the commencement of the suit is not entitled to a decree of judicial separation on the ground of cruelty ; but upon proof of such adultery the ct. will dismiss the petition, although resp. may not have recriminated.

(4) *Semble :* if resp. is aware that petitioner has been guilty of adultery, his omission to recriminate is evidence of collusion.—DRUMMOND *v.* DRUMMOND (1861), 2 Sw. & Tr. 269 ; 30 L. J. P. M. & A. 177 ; 4 L. T. 416 ; 164 E. R. 998 ; *sub nom.* FORTH (VISCOUNTESS) *v.* FORTH (VISCOUNT), 7 Jur. N. S. 762.
Annotations :—*As to* (1) **Refd.** Dering *v.* Dering (1868), L. R. 1 P. & D. 531 ; Sottomayer *v.* De Barros (1879), 5 P. D. 94. *As to* (3) **Apprvd.** Otway *v.* Otway (1888), 13 P. D. 141. **Refd.** Synge *v.* Synge, [1900] P. 180 ; Hodgson *v.* Hodgson & Turner, [1905] P. 233 ; Everett *v.* Everett & McCullum, [1919] P. 298.

3159. Respondent assisting in identification—Undefended suit.]—Where resp., who did not appear, & gave petitioner's solr. a photograph to aid in her identification, & attended in ct. for same purpose, for which attendance she received from petitioner's solr. £1, the ct. having reason to believe that the parties were not acting in collusion, pronounced the decree.—HARRIS *v.* HARRIS & LAMBERT (1862), 4 Sw. & Tr. 232 ; 31 L. J. P. M. & A. 160 ; 164 E. R. 1505.
Annotations :—**Consd.** Churchward *v.* Churchward, [1895] P. 7. **Refd.** Laidler *v.* Laidler (1920), 90 L. J. P. 28.

3160. Allowance in lieu of alimony—Pendente lite.]—BARNES *v.* BARNES & GRIMWADE, No. 3151, *ante*.

D. Condonation.

(*a*) *In General.*

3161. Absolute bar.]—DUNN *v.* DUNN, No. 3130 *post*.

3162. Distinguished from connivance.]—TURTON *v.* TURTON, No. 2711, *ante*.

3163. Condonation of adultery—Distinguished from condonation of cruelty.]—MOSS *v.* MOSS, No. 3261, *post*.

3164. Question for jury.]—PEACOCK *v.* PEACOCK, No. 3207, *post*.

3165. ——.]—A husband who had received from his wife a confession of adultery, thereupon went home with her & they slept together upon that & the following night. He then sent her away to her relations, & they parted upon affectionate terms. The same day he saw her off at the railway station, he signed a petition praying for a divorce. Upon the plea of condonation put forward by the wife, the learned judge directed the jury that the fact of the parties sleeping together was not conclusive, but that they must take that fact in conjunction with the other facts of the case in forming a conclusion as to whether the adultery had been condoned.—HALL *v.* HALL & KAY (1891), 64 L. T. 837 ; *subsequent proceedings*, 60 L. J. P. 73, C. A.
Annotations :—**Consd.** Cramp *v.* Cramp & Freeman, [1920] P. 158. **Refd.** Crocker *v.* Crocker, [1921] P. 25.

Question for judge—Where condonation not pleaded.]—*See* Sub-sect. 3, D. (*g*), *post*.

3166. Must be followed by conjugal cohabitation.]—(1) A wife was charged in a petition with adultery, to which she pleaded condonation ; counsel for the husband, in order to repel this plea, by showing that at the time of the alleged condonation the husband was not cognisant of the whole of the wife's adultery, tendered evidence of acts of adultery not laid in the petition, & which were committed prior to, but were unknown to the husband at the time of the alleged condonation ; the judge ordinary ruled, *hæsitanter*, that, as the petition contained no averment of the acts of adultery, the evidence was inadmissible. There can be no condonation, by the law of England, which is not followed by conjugal cohabitation.

Qu. : whether condonation may not be constituted *per verba ?*

I have come to the conclusion that condonation means a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed (CRESSWELL, J. O.).

(2) On a decree of dissolution of marriage by reason of the wife's adultery, she having under a

PART XIII. SECT. 7, SUB-SECT. 3.—D. (a).

f. *What amounts to.*]—The circumstances held to show condonation by a husband of his wife's adultery, & his petition for divorce was, therefore, dismissed.—PITMAN *v.* PITMAN, [1922] 1 W. W. R. 1106 ; 66 D. L. R. 702.—**CAN.**

3166 i. *Must be followed by conjugal cohabitation.*]—In an action for crim. con. :—*Held :* the fact of pltf., having after verdict in his favour, from mere motives of compassion & consideration for their child, taken back his wife to live with him, was not such a condonation as would induce the ct. to grant a new trial.—MCMILLAN *v.* JELLY (1867), 17 C. P. 702.—**CAN.**

3166 ii. ——.]—W. *v.* W., [1922] 1 W. W. R. 238 ; 63 D. L. R. 332.—**CAN.**

marriage settlement the interest, settled by her husband, after her husband's death, of £10,000, & a right to dispose of one-fifth of that sum, the ct. directed the husband to secure her an annuity during his life of £150, *quamdiu casta vixerit*, on condition of her giving up the right to dispose of the £2,000; & directed the damages assessed against co-resp. to go, first, in payment of wife's costs; secondly, in payment of husband's; & thirdly, any surplus in satisfaction of the annuity to wife.

(3) The wife's costs will not be taxed against the husband after trial, when she has failed in her suit. —KEATS *v.* KEATS & MONTEZUMA (1859), 1 Sw. & Tr. 334; 28 L. J. P. & M. 57; 32 L. T. O. S. 321; 5 Jur. N. S. 176; 7 W. R. 377; 164 E. R. 751.

Annotations:—As to (1) **Apprvd.** Bernstein *v.* Bernstein, [1893] P. 292. **Consd.** Cramp *v.* Cramp & Freeman, [1920] P. 158; Crocker *v.* Crocker, [1921] P. 25. **Refd.** Hall *v.* Hall (1891), 60 L. J. P. 73. *As to* (2) **Refd.** Latham *v.* Latham & Gethin (1861), 30 L. J. P. M. & A. 43. *As to* (3) **Refd.** Whitmore *v.* Whitmore (1866), L. R. 1 P. & D. 96; Smith *v.* Smith (1882), 7 P. D. 84; Russell *v.* Russell, [1892] P. 152; Waudby *v.* Waudby & Bowland (1901), 84 L. T. 571.

3167. Condonation of adultery with one person—Whether avoided by uncondoned adulterous acts with another.]—ALEXANDRE *v.* ALEXANDRE, No. 3019, *ante*.

3168. ——— ———.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *post*.

(*b*) *What is Condonation.*

i. *In General.*

Condonation by wife—Distinguished from condonation by husband.]—*See* Sub-sect. 3, D. (*d*), *post*.

3169. Conditional forgiveness.]—Dr. Bever has very fully explained the effect of a condonation by matrimonial intercourse. It is a conditional forgiveness, which does not take away the right of complaint in case of a continuation of adultery, which operates as a reviver of former acts. The objection appears to be founded on a supposition, that the facts of adultery, pleaded subsequent to the condonation would not be proved, in which case the proof of those facts, previous to the forgiveness, could not weigh. The general objection is to the acquiescence of Lady Ferrers, from the year 1780, which is said to amount to condonation. It is contended also, that she is barred by length of time. But in this ct. it is not the measure of the injury which is to undergo consideration, but whether the party pltf. is entitled to a separation or not? So that the cts. of common law do not afford any conclusive rule which should bind this ct. in a question of this kind.

I will not lay it down as a rule, that a woman not bringing her complaint immediately on the discovery, shall be afterwards barred from laying her case before the ct.—FERRERS (LADY) *v.* FERRERS (LORD) (1791), 1 Hag. Con. 130; 1 Hag. Ecc. 781, n.; 161 E. R. 500.

Annotation:—**Refd.** D'Aguilar *v.* D'Aguilar (1794), 1 Hag. Ecc. 773.

3170. ———.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post*.

3171. — -.]—(1) In a suit for divorce on account of the husband's adultery after a condonation of former adulteries; there must be, in order to establish condonation of subsequent adultery as a bar to the wife's remedy, evidence that she was aware of this renewed misconduct; nor can such knowledge be inferred from slight facts, & from cohabitation, but it must be clearly & distinctly proved.

(2) If a wife forgives earlier adultery upon condition & assurance of future amendment, on the husband's again committing adultery, that previous injury revives.

(3) Condonation is not presumed, as a bar, so readily against the wife as against the husband.

(4) A groundless & malicious charge against the wife's chastity followed up by turning her out of doors, & not attempted to be pleaded nor proved, may be alleged with other acts of cruelty as a ground for separation. *Qu.:* whether it would not revive condoned adultery.—DURANT *v.* DURANT (1825), 1 Hag. Ecc. 733; 162 E. R. 734; *previous proceedings* (1824), 2 Add. 267.

Annotations:—*As to* (1) **Consd.** Dempster *v.* Dempster (1861), 2 Sw. & Tr. 438; Collins *v.* Collins & Eayres (1884), 9 App. Cas. 205. **Refd.** Bramwell *v.* Bramwell (1831), 3 Hag. Ecc. 618; Bernstein *v.* Bernstein, Sampson & Turner, [1893] P. 292; Rogers *v.* Rogers, [1894] P. 161. *As to* (2) **Expld.** Palmer *v.* Palmer (1860), 2 Sw. & Tr. 61. **Refd.** Snow *v.* Snow (1842), 2 Notes of Cases Supp. 1; Sopwith *v.* Sopwith (1860), 2 Sw. & Tr. 160. *As to* (3) **Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158. *As to* (4) **Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Dysart *v.* Dysart (1847), 5 Notes of Cases, 191; Gale *v.* Gale (1852), 2 Rob. Eccl. 421. *Generally*, **Refd.** R. *v.* Clarence (1888), 22 Q. B. D. 23.

3172. ———.]—All condonation is conditional on no offence of which the Matrimonial Ct. can take cognisance being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution.—PALMER *v.* PALMER (1860), 2 Sw. & Tr. 61; 29 L. J. P. M. & A. 124; 2 L. T. 363; 8 W. R. 504; 164 E. R. 914.

Annotations:—**Refd.** Blandford *v.* Blandford (1883), 8 P. D. 19; Collins *v.* Collins (1884), 9 App. Cas. 205; Rogers *v.* Rogers, [1894] P. 161.

3173. ———.]—From 1851 to Jan. 1855, a wife received great cruelty at the hands of her husband; besides acts of personal violence, he excluded her from the head of his table, & from the management of the household. On various occasions between Jan. 1855, & Sept. 1856, the wife left & returned to her husband's house; but after Jan. 1855, refused to return to her husband's bedroom, unless she were placed in her proper position in the household, which the husband refused to do. In Sept. 1856 she left, & did not return to her husband's house. In Sept. 1857, an arrangement was made, through the medium of friends, that she should pay to her husband a portion of income settled to her separate use, & he should allow the children from time to time to visit her. She paid the money, but in the early part of 1862 three years had elapsed since the husband had allowed any of the children to visit her, & he then refused to do so, though she was very ill. In July, 1862, she petitioned for judicial separation; the answer of the husband denied the cruelty, & alleged condonation & undue delay:—*Held:* the wife's return to the house showed a willingness to condone; but she annexed, as she had a right to do, a condition precedent, with which the husband never complied; therefore there was no

PART XIII. SECT. 7, SUB-SECT. 3.—D. (b) i.

3169 i. *Conditional forgiveness.*] —Condonation of matrimonial offences is always on the condition that there shall be no repetition of any matrimonial offence in the future; & the effect of a husband's subsequent adultery is to revive previously condoned acts of cruelty.—ALDRICH *v.* ALDRICH (1891), 21 O. R. 447.—**CAN.**

3169 ii. ———.]—Condonation is only a conditional forgiveness, the condition being that the offending party shall transgress no more. Where, after condonation, a party is again guilty of misconduct, the latter offence revives that which has been condoned, & the party offended against is entitled to the same relief as if there had been no condonation at all.—AKERSTEN *v.* AKERSTEN (1908), 27 N. Z. L. R. 1152.—**N.Z.**

Sect. 7.—Bars to relief: Sub-sect. 3, D. (b) i. & ii.]

condonation so as to bar her suit for judicial separation; but, if there had been, the husband's conduct & demeanour whilst she remained in the house would have sufficed to revive the gross acts of cruelty; less being sufficient to destroy condonation than to found an original suit. The whole of the transactions subsequent to the wife leaving the house in Sept. 1856, grew out of & were connected with the misconduct of the husband, & raised no suspicion that the suit was brought in 1862 with any other object than to obtain that legal protection to which the wife was entitled. Undue delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation.—COOKE *v.* COOKE (1863), 3 Sw. & Tr. 246; 32 L. J. P. M. & A. 154; 8 L. T. 644; 9 Jur. N. S. 754; 11 W. R. 957; 164 E. R. 1221.

Annotations:—**Consd.** Houghton *v.* Houghton, [1903] P. 150. **Refd.** Moss *v.* Moss, [1916] P. 155.

3174. ——.]—Condonation is only conditional forgiveness, & condoned adultery & cruelty may be revived by misconduct which falls short of adultery. A husband was guilty of adultery & cruelty, which were condoned by his wife. He afterwards made improper overtures to, & attempted to take liberties with, a female servant in his house:—*Held:* the husband's misconduct revived his condoned adultery, & the wife was entitled to a decree for dissolution of the marriage.—RIDGWAY *v.* RIDGWAY (1881), 29 W. R. 612.

3175. ——.]—Condonation is forgiveness upon condition that no matrimonial offences are committed in the future, & therefore one matrimonial offence committed after condonation is sufficient to revive all the matrimonial offences committed before it.

The parties to the suit were married in 1869. In 1874 resp. formed an adulterous connection with a married woman, & in 1875 he was guilty of an act of cruelty. He deserted petitioner from 1876 till 1878, in which year petitioner commenced a suit for a judicial separation, which was discontinued upon a deed of separation being signed. Later in the same year a reconciliation was effected, & the parties cohabited till 1882, when petitioner discovered that resp. had resumed his former adulterous connection, & commenced a suit for a dissolution of marriage:—*Held:* the condoned desertion, as well as the condoned adultery, had been revived by the subsequent adultery, & petitioner was entitled to a decree dissolving the marriage.—BLANDFORD *v.* BLANDFORD (1883), 8 P. D. 19; 52 L. J. P. 17; 48 L. T. 238; 31 W. R. 508.

Annotations:—**Consd.** Collins *v.* Collins (1884), 9 App. Cas. 205. **Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3176. —— Doctrine applicable equally to both sexes.]—COPSEY *v.* COPSEY, No. 3275, *post.*

3177. Forgiveness whereby offending party restored to former position.]—KEATS *v.* KEATS & MONTEZUMA, No. 3166, *ante.*

3178. ——.]—A mere forgiveness by a husband of a guilty wife whether expressed verbally or by letter, without restoration of the wife to her former position, cannot amount to condonation.

A husband whose wife had been guilty of adultery wrote to her a conditional letter of forgiveness. In answer the wife wrote a letter in which she accepted without qualification his offer of forgiveness. On receiving the husband's letter the wife refused an offer of a place in domestic service which she had intended to accept. The husband subsequently withdrew his offer & filed his petition for divorce:—*Held:* the two letters taken together did not constitute an agreement binding the husband not to take proceedings for divorce.—CROCKER *v.* CROCKER, [1921] P. 25; 90 L. J. P. 136; 124 L. T. 493; 37 T. L. R. 137; 65 Sol. Jo. 153, C. A.; *affg.* (1920), 122 L. T. 749.

Annotation:—**Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3179. —— Conditional reinstatement.]—(1) Condonation, as applied to matrimonial offences, though frequently defined as conditional forgiveness, is not forgiveness in the ordinary sense, but would be more properly defined as conditional reinstatement of the offending spouse. It is always subject to the condition that the offence must not recur. (2) Resumption by the husband of connubial intercourse with his wife, when he has full knowledge of her adultery, is conclusive proof of condonation. It cannot be rebutted by the fact that he never forgave her, though that fact is admitted by the wife.—CRAMP *v.* CRAMP & FREEMAN, [1920] P. 158; 89 L. J. P. 119; 123 L. T. 141; 36 T. L. R. 333.

Annotation:—*As to* (2) **Folld.** Turnbull *v.* Turnbull & Coats (1925), 41 T. L. R. 507.

3180. Unconditional forgiveness — Condonation of adultery.]—ROSE *v.* ROSE, No. 3470, *post.*

3181. Forgiveness legally releasing injury—Express or implied.]—In a suit for separation *a mensâ et thoro* by reason of the wife's adultery, she, having in a plea of recrimination, or *compensatio criminum*, proved a long series of misconduct, adultery, solicitation of the servants' chastity, & venereal disease communicated to her, for which she separated from him long prior to the adultery committed by her, is entitled to her dismissal; nor will a return to live in the same house, after a former separation on account of the husband's adultery, operate as a condonation so as to extinguish her right to set up his guilt as a bar to his prayer. Condonation is forgiveness legally releasing the injury & may be express or implied, as by the husband cohabiting with a delinquent wife; but the effect of cohabitation is less stringent on the wife, & condonation by implication is not held a strict bar against her, for it is not improper she should for a time show a patient forbearance & entertain hopes of her husband's reform. Unpleaded condonation can only avail as a bar so far as it is fully established by evidence. The general presumption is that a husband & wife, living in the same house, live on terms of matrimonial cohabitation; but particular circumstances may repel that presumption.

It does not follow that because condonation

3177 i. *Forgiveness whereby offending party restored to former position.*]—Even if condonation may be made by words alone it is necessary that there should be complete forgiveness. Evidence of an intention or an inclination to resume marital relations & to forgive past misdeeds will not alone establish it.—MORAN *v.* MORAN, [1920] 1 W. W. R. 612; 52 D. L. R. 339.—**CAN.**

3177 ii. ——.]—Condonation means the complete forgiveness & blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation.—STE. CROIX *v.* STE. CROIX (1917), I. L. R. 44 Calc. 1091.—**IND.**

3180 i. *Unconditional forgiveness—Condonation of adultery.*]—Full condonation of adultery, remission expressly or by implication in full knowledge of the acts forgiven, followed by cohabitation as man & wife, is a *remissio injuriæ* absolute & unconditional, & affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery, cohabitation following, be made conditional by any arrangement between the spouses.—COLLINS *v.* COLLINS (1884), 9 App. Cas. 205; 11 R. (Ct. of Sess.) 19; 21 Sc. L. R. 579, H. L.—**SCOT.**

will bar the remedy of a party agent it will destroy the defence of a party recriminating.—BEEBY *v.* BEEBY (1799), 1 Hag. Ecc. 789; 1 Hag. Con. 142, n.; 162 E. R. 755.

Annotations:—**Consd.** Anichini *v.* Anichini (1839), 2 Curt. 210; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Everett *v.* Everett & McCullum, [1919] P. 298. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Angle *v.* Angle (1848), 1 Rob. Eccl. 634; Keats *v.* Keats & Montezuma (1859), 1 Sw. & Tr. 334; Seller *v.* Seller (1859), 1 Sw. & Tr. 482; Suggate *v.* Suggate (1859), 1 Sw. & Tr. 492; Goode *v.* Goode & Hamson (1861), 2 Sw. & Tr. 253; Roberts *v.* Roberts & Temple (1917), 117 L. T. 157; Cramp *v.* Cramp & Freeman, [1920] P. 158; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3182. Forgiveness obtained by fraud.]—The wife had confessed to the husband that she had committed adultery with co-resp., & the husband agreed to forgive her on condition that she was not pregnant as a consequence of her said adultery. The wife falsely alleged that she was not pregnant, & in consequence the husband slept with her & had intercourse with her:—*Held:* there was no real condonation of her offence, & the husband was entitled to a decree *nisi* for the dissolution of his marriage.—ROBERTS *v.* ROBERTS & TEMPLE (1917), 117 L. T. 157; 33 T. L. R. 333; 61 Sol. Jo. 492.

Annotation:—**Consd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3183. Same meaning in Divorce Acts—As formerly in Ecclesiastical Courts.]—The word "condonation" has the same meaning in the Divorce Acts that it had in the Ecclesiastical Cts. Condoned adultery, therefore, may be so revived by subsequent cruelty as to found a sentence of dissolution. The ct. will, at the prayer of petitioner, at the hearing make a decree of judicial separation instead of a decree *nisi* for dissolution, although the petition prays for dissolution, & facts are proved on which the dissolution might have been granted.—DENT *v.* DENT (1865), 4 Sw. & Tr. 105; 34 L. J. P. M. & A. 118; 13 L. T. 252; 164 E. R. 1455.

Annotations:—**Consd.** Collins *v.* Collins (1884), 9 App. Cas. 205; Moore *v.* Moore, [1892] P. 382; Rogers *v.* Rogers, [1894] P. 161; Houghton *v.* Houghton, [1903] P. 150. **Refd.** Price *v.* Price & Brown, [1911] P. 201; Moss *v.* Moss, [1916] P. 155; Cramp *v.* Cramp & Freeman, [1920] P. 158.

Forgiveness with full knowledge of offence.]—*See* Sub-sect. 3, D. (*c*), *post*.

ii. *Return to or Continuation of Matrimonial Cohabitation.*

3184. General rule.]—SNOW *v.* SNOW, No. 3231, *post*.

3185. ——.]—ALLEN *v.* ALLEN & D'ARCY, No. 2532, *ante*.

3186. ——.]—KEATS *v.* KEATS & MONTEZUMA, No. 3166, *ante*.

3187. ——.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 3368. *post*.

3188. ——.]—The cohabitation between the parties lasted from Oct. 1872 to Mar. 1873. The adultery & cruelty were not denied, &, though there had been various attempts to bring the parties together again, & the wife was willing to forgive her husband, the ct. was satisfied that petitioner had done nothing in the interval to forfeit her right to a divorce, & granted a decree *nisi*.—PITT *v.* PITT (1875), 33 L. T. 136.

3189. ——.]—D'AGUILAR *v.* D'AGUILAR, No. 4064. *post*.

3190. — -.]—CRAMP *v.* CRAMP & FREEMAN. No. 3179, *ante*.

3191. — -.]—Sexual intercourse by a husband with knowledge of his wife's adultery is conclusive proof of condonation & cannot be rebutted by the fact that he never forgave her.—TURNBULL *v.* TURNBULL & COATS (1925), 41 T. L. R. 507; 69 Sol. Jo. 574.

3192. Parties occupying separate beds—Presumption of intercourse.]—Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed; it does not rest merely on the wife's not withdrawing herself.—DANCE *v.* DANCE (1799), 1 Hag. Ecc. 794, n.; 162 E. R 757.

Annotation:—**Refd.** Anichini *v.* Anichini (1839), 2 Curt. 210.

-.]—| *v.* BEEBY, No. 3181, *ante*.

3194. Parties occupying same bed—Whether conclusive as to condonation.]—HALL *v.* HALL & KAY, No. 3165, *ante*.

3195. Parties sleeping in same house—Whether cohabitation presumed—Onus of proof.]—If by evidence which the husband brings to establish adultery he implicates himself the wife has the full benefit of any condonation or connivance disclosed. Facility of condonation shows that he does not duly estimate the injury & induces the ct. to scrutinise jealously his subsequent conduct. A mere permission of opportunity for adultery is not a bar to the husband's suit but conduct amounting to an invitation to it is. Where a husband alleges that his wife slept at his house on the night after the act of adultery charged of which he was at the time informed he takes on himself the *onus* of showing that they did not cohabit & thereby condone the offence.—TIMMINGS *v.* TIMMINGS (1792) 3 Hag. Ecc. 76; 162 E. R. 1086.

Annotations:—**Consd.** Dillon *v.* Dillon (1842), 3 Curt. 86; Phillips *v.* Phillips (1844), 1 Rob. Eccl. 144; Gipps *v.* Gipps (1864), 11 H. L. Cas. 1. **Refd.** Drew *v.* Drew (1842), 1 Notes of Cases, 315; Snow *v.* Snow (1842), 2 Notes of Cases, Supp. i; Phillips *v.* Phillips (1846), 4 Notes of Cases, 523.

3196. —— **Occupying separate bedrooms—No matrimonial intercourse.**]—(1) To entitle a wife to separation by reason of cruelty there must be ill-treatment & personal injury, or the reasonable apprehension of personal injury.

(2) The force of condonation as a bar varies according to circumstances. The condonation by a husband of a wife's adultery, still more, repeated reconciliations after repeated adulteries create a

PART XIII. SECT. 7, SUB-SECT. 3.—D. (b) ii.

3184 i. *General rule.*]—Resumption of cohabitation is a necessary ingredient of condonation by the husband of any matrimonial offence committed by the wife, such as would prevent him from relying upon it as a defence to an alimony suit.—A. *v.* A. (1905), 15 Man. L. R. 483; 3 W. L. R. 113.—**CAN.**

3184 ii. ——.]—A decree for judicial separation & for permanent alimony granted to a wife is annulled by subsequent cohabitation of the parties & does not revive on subsequent separation.—MA NOO *v.* PO. THIT (1924), I. L. R. 2 Ran. 163.—**IND.**

3184 iii. ——.]—To establish a plea of condonation it must be proved that the injured spouse had knowledge of the offence, fully forgave it & was prepared to take back the offender, that the latter accepted the forgiveness & that a reconciliation ensued. Such reconciliation is most conclusively shown by subsequent cohabitation, though it is conceivably possible that there may be cases of reconciliation not followed by cohabitation.—BELL *v.* BELL (1909), T. S. 500.—**S. AF.**

g. After husband's adultery.]—In actions of judicial separation *ob sævitiam*, a renewal of intercourse after acts of cruelty, will not be held a *remissio injuriarum*, like the renewal of intercourse after knowledge of adultery in cases of divorce.—MACFARLANE *v.* MACFARLANE (1849), 11 Dunl. (Ct. of Sess.) 533.—**SCOT.**

3194 i. *Parties occupying same bed—Whether conclusive as to condonation.*]—In order to establish condonation, it is sufficient to prove that the spouses occupied the same bed, although marital intercourse is not proved.—ALEXANDER *v.* ALEXANDER, [1920] S. C. 327.—**SCOT.**

Sect. 7.—Bars to relief: Sub-sect. 3, D. (b) ii., (c)

bar of far greater effect, than does the condonation by a wife of repeated acts of cruelty.

(3) Cruelty generally consists of successive acts of ill-treatment, if not of personal injury, so that something of a condonation of the earlier ill-treatment necessarily takes place.

If a wife, after legal cruelty, consents to a reconciliation & to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar if no further ill-treatment took place.

The law does not require that there should be many acts; for if one act should be of that description which should induce the ct. to think that it is likely to occur again, & to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference (SIR JOHN NICHOLL).

(4) A deed of separation, upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, is no bar to such a suit.—WESTMEATH *v.* WESTMEATH (1827), 2 Hag. Ecc. Supp. 61; 162 E. R. 1012; *on appeal* (1829), 2 Hag. Ecc. Supp. 134.

Annotations:—As to (1) **Consd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470; Russell *v.* Russell, [1897] A. C. 395. **Refd.** Neeld *v.* Neeld (1831), 4 Hag. Ecc. 263; Geils *v.* Geils (1848), 6 Notes of Cases, 97; Gale *v.* Gale (1852), 2 Rob. Eccl. 421. *As to* (2) **Consd.** Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Collins *v.* Collins (1882), 9 App. Cas. 209, n. *As to* (3) **Consd.** Snow *v.* Snow (1842), 2 Notes of Cases, Supp. i.; Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192. **Refd.** Waddell *v.* Waddell (1862), 2 Sw. & Tr. 584. *Generally*, **Mentd.** Frankfort de Montmorency *v.* Frankfort de Montmorency (1843), 2 Notes of Cases, 494; Brown *v.* Brown (1850), 2 Rob. Eccl. 302; Covell *v.* Covell (1872), 41 L. J. P. & M. 81.

3197. Cohabitation by order of court.]—SNOW *v.* SNOW, No. 3231, *post*.

3198. ——.]—A suit for restitution & return to cohabitation, is a complete condonation of cruelty & affords reason to believe that there was no apprehension of cruelty incurring danger to life & limb; in order to revive cruelty that has been condoned, there must be something of the same kind, it is not necessary that it should be so strong as the original cruelty, but something to show that the husband continues of the same disposition & in the same state of mind, & that there is a well-grounded fear that he would be guilty of the same acts of cruelty originally complained of. Where the husband compelled his wife to sleep in one of the garrets of the house, notwithstanding her lameness, occasioned by paralysis, whilst he slept apart from her in another & a separate room, that, standing alone, is no act of legal cruelty, since the ct. cannot undertake to compel parties to sleep in one & the same bed. Where meat of inferior quality was provided for her, &, by the express order of the husband, generally boiled beef, notwithstanding the same had been on former occasions peremptorily forbidden by her medical attendants, on the ground of its being injurious to her health, which prohibition was well known to the husband, it was held not an act of cruelty. Mere intoxication, unless it lead to personal violence, is not sufficient to support a charge of cruelty; personal abuse may be very reprehensible, but it is not capable of being made a subject for the ct.'s investigation.—EVANS *v.* EVANS (1843), 2 Notes of Cases, 470; 7 Jur. 1046.

Annotation:—**Refd.** Hart *v.* Hart (1855), 2 Ecc. & Ad. 193.

3199. ——.]—Husband & wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which in itself amounted to legal cruelty; the wife afterwards sued in the Arches Ct. for restitution of conjugal rights, &, by virtue of a decree of that ct. the parties again cohabited, when the husband renewed his acts of cruelty towards his wife, who continued to cohabit with him notwithstanding for six months. Upon a suit brought by the wife for a divorce, by reason of cruelty:—*Held:* the former cruelty was revived by the subsequent acts, & was not condoned by the cohabitation enjoined by the sentence for restitution of conjugal rights.—WILSON *v.* WILSON (1849), 6 Moo. P. C. C. 484; 13 E. R. 771, P. C.; *affg.*, 6 Notes of Cases, 290.

Annotations:—**Refd.** Cooke *v.* Cooke (1863), 3 Sw. & Tr. 126; Moss *v.* Moss, [1916] P. 155.

3200. Condonation of cruelty by.]—SNOW *v.* SNOW, No. 3231, *post*.

3201. ——.]—SIMMONS *v.* SIMMONS, No. 2797, *ante*.

3202. ——.]—Return to husband's bed does not necessarily condone previous cruelty.—TURNER *v.* TURNER (1854), 2 Ecc. & Ad. 201, n.: 164 E. R. 387.

Annotation:—**Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3203. ——.]—When, on an issue before a jury of cruelty or not cruelty, condonation, by cohabitation continued after the last act of cruelty laid, appears on the evidence, the ct. would probably refuse to pronounce a decree on a verdict finding cruelty. But if, in such circumstances it would notice condonation, though not pleaded, it would also admit evidence of acts of cruelty subsequent to the condonation, though not pleaded.

Semble: regard being had to the maintenance of the children, the wife, when she succeeds in her suit, has a *primâ facie* right to the custody of the children under fourteen years of age: for she is not to buy the relief to which she is entitled owing to her husband's misconduct at the price of being deprived of the society of the children.

In dealing with the custody of children the ct. will consider the interests of the parents & of the children.—SUGGATE *v.* SUGGATE (1859), 1 Sw. & Tr. 492; 29 L. J. P. M. & A. 167; 34 L. T. O. S. 54; 23 J. P. 551; 8 W. R. 20; 164 E. R. 828.

Annotations:—**Refd.** Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39. **Mentd.** Sant *v.* Sant (1874), 43 L. J. P. C. 73.

(c) *Full Knowledge of Act Condoned.*

3204. Whether essential.]—TURTON *v.* TURTON, No. 2711, *ante*.

3205. ——.]—(1) Condonation is a conditional forgiveness on a full knowledge of all antecedent guilt.

(2) Less cruelty is necessary to revive condoned adultery than to found an original suit.

Cruelty, to revive condoned adultery, may be

PART XIII. SECT. 7, SUB-SECT. 3.—D. (c).

3204 i. *Whether essential.*]—Condonation is forgiveness with a full knowledge of all the facts, subject to the implied condition that the injury shall not be repeated.—SAYER *v.* SAYER & COWMAN (1910), 30 N. Z. L. R. 351.—**N.Z.**

3204 ii. ——.]—Letters even if they amount to condonation of an act of adultery which the wife had expressed cannot be pleaded in condonation of a previous act of which the husband was ignorant when he wrote them.—RALSTON *v.* RALSTON & LORD ADVOCATE (1881), 8 R. (Ct. of Sess.) 371; 18 Sc. L. R. 233.—**SCOT.**

h. *Presumption of condonation rebuttable.*]—Condonation by a husband

less violent in degree & less stringent in proof than when it forms the original charge (DR. LUSHINGTON).—BRAMWELL *v.* BRAMWELL (1831), 3 Hag. Ecc. 618; 162 E. R. 1285.

Annotations:—As to (1) **Consd.** Dempster *v.* Dempster (1861), 2 Sw. & Tr. 438. **Refd.** Collins *v.* Collins (1882), 9 App. Cas. 214, n.; Bernstein *v.* Bernstein, [1893] P. 292. *As to* (2) **Refd.** Sopwith *v.* Sopwith (1861), 2 Sw. & Tr. 160. *Generally*, **Refd.** Sant *v.* Sant (1874), 43 L. J. P. C. 73.

3206. ——.]—SNOW *v.* SNOW, No. 3231, *post.*

3207. ——.]—Condonation is forgiveness of a conjugal offence with full knowledge of the facts, & in each particular case it is a question to be decided by the jury.

When the wife proceeds for a judicial separation & it is granted she is entitled to her costs as a matter of right. In the absence of any order of the ct. to the contrary they would follow the decree for a separation as a matter of course (*per* CUR.).—PEACOCK *v.* PEACOCK (1858), 1 Sw. & Tr. 183; 27 L. J P. & M. 71; 31 L. T. O. S. 302; 6 W. R. 866; 164 E. R. 684.

Annotations:—**Consd.** Bernstein *v.* Bernstein, [1893] P. 292; Cramp *v.* Cramp & Freeman, [1920] P. 158.

3208. ——.]—Before the ct. can come to the conclusion of condonation by the husband, it must be satisfied that the husband continued to live with his wife with full knowledge of the acts of adultery alleged to be condoned.

Where, to an action for maintenance, the husband had alleged the wife's adultery, but failed to prove it, & afterwards lived with her, the ct. refused to come to the conclusion of condonation.—ELLIS *v.* ELLIS & SMITH (1865), 4 Sw. & Tr. 154; 34 L. J. P. M. & A. 100; 13 L. T. 211; 11 Jur. N. S. 610; 13 W. R. 964; 164 E. R. 1475.

3209. ——.]—CRAMP *v.* CRAMP & FREEMAN, No. 3179, *ante.*

3210. —— **Condonation of subsequent adultery.**]—DURANT *v.* DURANT, No. 3171, *ante.*

3211. —— **Separation deed executed in ignorance.**]—Upon motion by a wife for an injunction to restrain her husband from proceeding in the Divorce Ct. to obtain a dissolution of marriage, on the ground of a contract by deft. to condone all former causes of complaint, & not to take legal proceedings in respect thereof:—*Held:* as the contract might be set up by way of defence in the Divorce Ct., & as it was executed by the husband in ignorance of the fact that his wife had committed adultery, & on her positive assertion of innocence, this ct. would not interfere to stay proceedings in the Divorce Ct.—BROWN *v.* BROWN (1868), L. R. 7 Eq. 185; 38 L. J. Ch. 153; 19 L. T. 594; 17 W. R. 98.

Annotations:—**Mentd.** Hood *v.* N. E. Ry. (1870), L. R. 11 Eq. 116; Fearon *v.* Aylesford (1884), 32 W. R. 718.

3212. Knowledge saltem probabilem criminis commissi.]—DILLON *v.* DILLON, No. 2712, *ante.*

3213. Condonation of adultery with particular person—Whether affected by previous undisclosed adultery with others.]—(1) At the trial of a petition by a husband for divorce, on the ground of the adultery of his wife, with two co-resps. & claiming damages against one of such co-resps. the jury found that resp. had been guilty of adultery with both co-resps. but that petitioner had condoned the adultery with the one against whom damages were claimed, & that no damages were payable by such co-resp. in respect of the adultery committed by him. It appeared that the condonation was subsequent to the adultery with both co-resps. & that at the time of the condonation petitioner did not know of the adultery with the other co-resp. A decree *nisi* was granted by the President on the ground of the adultery with co-resp. whose adultery had not been condoned; but as against the other the petition was dismissed with costs:—*Held:* the decision of the President was right; for a condonation by a husband of adultery with one person is not avoided by the fact that the wife had previously to the condonation committed acts of adultery with another person of which he was not aware; & although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer, but only went in mitigation of damages, the case is different under Matrimonial Causes Act, 1857 (c. 85), & where, on a petition for divorce & for damages against co-resp. a divorce is refused on the ground that the adultery has been condoned, petitioner is not entitled to a judgment, even for nominal damages, against co-resp. but the petition will be dismissed, & petitioner may be ordered to pay co-resp.'s costs.

(2) Claims for damages are placed wholly under the jurisdiction of the Divorce Ct., & can only be made by petition, & the damages recovered are placed under the control of the ct. The petition must be served on the wife, unless the ct. dispenses with such service. The petition must be dismissed, if petitioner has been accessory to or conniving at the adultery complained of, or has condoned the same. The claim for damages is subject to all these overriding provisions (LINDLEY, L.J.).—BERNSTEIN *v.* BERNSTEIN, [1893] P. 292; 69 L. T. 513; *sub nom.* BERNSTEIN *v.* BERNSTEIN TURNER & SAMPSON, 63 L. J. P. 3; 9 T. L. R. 639; 37 Sol. Jo. 730; 6 R. 609, C. A.

Annotations:—As to (1) **Consd.** Roberts *v.* Roberts & Temple (1917), 117 L. T. 157; Cramp *v.* Cramp & Freeman, [1920] P. 158. **Refd.** Crocker *v.* Crocker, [1921] P. 25. *As to* (2) **Folld.** Hyman *v.* Hyman & Goldman, [1904] P. 403; Cox *v.* Cox, [1906] P. 267. **Distd.** Stocker *v.* Stocker, Brice & Patterson, [1917] P. 264. **Refd.** Brydges *v.* Brydges & Wood, [1909] P. 187; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Kent *v.* Atkinson, [1923] P. 142. *Generally*, **Mentd.** Harris *v.* Taylor (1914), 111 L. T. 564.

(*d*) *Condonation by Wife.*

3214. Distinguished from condonation by husband.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *post.*

3215. ——.]—BEEBY *v.* BEEBY, No. 3181, *ante.*

3216. —— .]—DURANT *v.* DURANT, No. 3171, *ante.*

3217. ——.]—WESTMEATH *v.* WESTMEATH, No. 3196, *ante.*

3218. ——.]—SNOW *v.* SNOW, No. 3231, *post.*

3219. ——.]—Divorce by reason of adultery by the wife against the husband; plea in bar, that the wife was privy to the adultery:—*Held:* although the wife might have been too patient & forgiving, she had not condoned or connived at her husband's adultery, the doctrine of condonation being totally different when applied to a wife from that applied to a husband; it being meritorious in a wife to continue cohabitation as long as there is a possible chance of reclaiming her husband.—ANGLE *v.* ANGLE (1848), 1 Rob. Eccl. 634; 6 Notes of Cases, 192; 12 Jur. 525; 163 E. R. 1161.

3220. ——.]—ALLEN *v.* ALLEN & D'ARCY (1859), Sea. & Sm. 84; 30 L. J. P. M. & A. 2.

Annotation:—**Refd.** Glennie *v.* Glennie & Bowles (1862), 32 L. J. P. M. & A. 17.

of his wife's adultery was not to be inferred from his allowing her to return to his home after he had knowledge of the fact.—EDGAR *v.* EDGAR (1902), 4 F. (Ct. of Sess.) 632; 39 Sc. L. R. 424; 9 S. L. T. 495.—**SCOT.**

Sect. 7.—Bars to relief: Sub-sect. 3, D. (e), (f), (g) & (h) i.

(e) Condonation after Decree Nisi.

3221. Suspension of further proceedings—Petition not dismissed.]—LEWIS *v.* LEWIS, No. 4539, *post.*

3222. Decree absolute refused—Decree nisi rescinded.]—HYMAN *v.* HYMAN & GOLDMAN, No. 3227, *post.*

3223. —— ——.]—SNEYD *v.* SNEYD & BURGESS (1925). *Times*, Dec. 22; *previous proceedings*, 42 T. L. R. 106.

(f) Effect on Claim for Damages against Co-Respondent.

3224. General rule.] — BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *ante.*

3225. Whether claim barred.] — Condonation of the wife's adultery is no answer to the husband's claim for damages against co-resp.—POMERO *v.* POMERO & HADLEY (1884), 10 P. D. 174; 54 L. J. P. 93; 34 W. R. 124.

Annotations:—**Overd.** Bernstein *v.* Bernstein, [1893] P. 292. **Consd.** Hyman *v.* Hyman & Goldman, [1904 P. 403.

3226. ——.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *ante.*

3227. ——.]—The effect of condonation of a wife's adultery by her husband, after decree *nisi* & before decree absolute, considered.

If a petition is dismissed by reason of condonation it is dismissed for all purposes, & cannot be kept alive temporarily for the purpose of enabling a petitioner to recover damages which have been awarded against a co-resp. in the suit, but co-resp. may still be held liable for, & may be ordered to pay, the costs of the suit, which, on the intervention of the King's Proctor & by reason of condonation subsequent to decree *nisi*, has been dismissed.

Petitioner, in such a case, may be ordered to pay the costs of the King's Proctor's intervention, but he may add the amount of these costs to the costs which he is still held entitled to recover from co-resp.

If the decree absolute cannot be pronounced then the prayer for damages fails also (JEUNE, P.). —HYMAN *v.* HYMAN & GOLDMAN, [1904] P. 403; 73 L. J. P. 106; 91 L. T. 361; 20 T. L. R. 696.

Annotations:—**Refd.** Brydges *v.* Brydges & Wood, [1909] P. 187; Quartermaine *v.* Quartermaine & Glenister, [1911] P. 180; Hope *v.* Hope & Johnson (1924), 130 L. T. 761.

3228. ——.]—Condonation by the husband would be an answer to a claim for damages against a co-resp. even if brought by a separate petition under Matrimonial Causes Act, 1857 (c. 85), s. 33; but a petition for damages does not in all cases stand or fall with a petition for dissolution of marriage.

Where a petition for dissolution was filed against one co-resp. & afterwards a second co-resp. was added & a decree *nisi* was obtained & made absolute on evidence of adultery with the second co-resp. without any trial of the case against the first:—*Held:* petitioner's cause of action against co-resp. A. for damages was not abated & A. was not entitled to have the petition against him dismissed with costs; & an application by the wife for her costs of the original petition was premature until the petition had been heard on the question of damages.—STOCKER *v.* STOCKER, BRICE & PATTERSON, [1917] P. 264; 86 L. J. P. 156; 117 L. T. 543; 33 T. L. R. 533; 62 Sol. Jo. 232.

Annotations:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Kent *v.* Atkinson, [1923] P. 142.

(g) Pleading and Proof.

3229. Pleading condonation up to certain date.]—To a petition alleging adultery on divers occasions in Sept. & Oct. 1862, resp. pleaded a denial of the adultery, &, further, that if she had committed adultery as alleged, petitioner condoned it up to Sept. 29, 1862. The ct. refused to order the latter plea to be struck out upon motion.—WINDHAM *v.* WINDHAM & GIUGLINI (1863), 32 L. J. P. M. & A. 89; 9 Jur. N. S. 82.

3230. Where condonation not pleaded—Whether considered by court—Not unless fully established by evidence.]—BEEBY *v.* BEEBY, No. 3181, *ante.*

3231. —— —— ——.]—When condonation is to be inferred from evidence only, without any facts being pleaded on either side which would raise the question . . . unless such condonation was established by the clearest & most conclusive evidence, the ct. would not be satisfied to act upon it; for if it had been expressly pleaded, the other party might have produced further evidence to explain & disprove the defence. . . . This reasoning does not apply to the case where the alleged condonation is to be inferred from the statements in the libel alone. A return by the husband or wife to the marriage bed is, in almost all ordinary cases, a *præsumptio juris et de jure* of connubial intercourse; a return to connubial intercourse is *primâ facie* a condonation of past adultery & previous cruelty, liable to be rebutted, in many cases, as, where the return to connubial intercourse was compulsory no such inference could be drawn. . . . There would be no condonation in a case of adultery where the whole of the adultery committed is not known to the party aggrieved. A great distinction respecting condonation exists between a husband's adultery & a wife's adultery, & much would be considered culpable in a husband which is praiseworthy in a wife. . . . When once condonation has actually taken place, the right to complain of previous cruelty or adultery is gone, unless revived by the commission of the like offences, or something approaching to or savouring of them; cruelty may be revived by a less degree of cruelty than is necessary to found a suit for divorce in the first instance, & adultery may be revived in a case of attempting to have adulterous intercourse with other persons. . . . With respect to condonation of cruelty by cohabitation, where such cohabitation is the effect of force or fraud, it never could amount to legal condonation; connubial cohabitation after the last act of cruelty is not necessarily & universally a bar, as condonation to a wife's suit, even though such cohabitation may be in one sense a voluntary cohabitation, or may not be forced or fraudulently brought about by the husband. There are many circumstances in which it would be exceedingly difficult, if not impossible, for the wife to withdraw from cohabitation, especially when abroad; & if such continued cohabitation were wholly unaccompanied with any intention to condone, & attended by a determina-

PART XIII. SECT. 7, SUB-SECT. 3.—D. (e).

3222 i. *Decree absolute refused—Decree nisi rescinded.*]—JOBSON *v.* JOBSON (1910), 30 N. Z. L. R. 48.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 3.—D. (f).

3225 i. *Whether claim barred.*]—No claim to damages for adultery, where party continued to cohabit with his wife after he had discovered her guilt.—AITKEN *v.* MACREE (1810), 15 Fac. Coll. 562.—**SCOT.**

3225 ii. ——.]—Where a husband has condoned his wife's adultery he is not

tion to separate on the first safe opportunity, the ct. could not hold the wife to be entirely deprived of all remedy in cases of great cruelty, where there was no reason to believe that the husband was *emendatus moribus* (DR. LUSHINGTON).—SNOW *v.* SNOW (1842), 2 Notes of Cases, Supp. i; 6 Jur. 285.

Annotations:—**Refd.** Turner *v.* Turner (1854), 2 Ecc. & Ad. 201, n.; Cooke *v.* Cooke (1863), 3 Sw. & Tr. 126; Collins *v.* Collins (1892), 9 App. Cas. 209, n.; Cramp *v.* Cramp & Freeman, [1920] P. 158.

3232. —— —— Proved at hearing.]—CURTIS *v.* CURTIS, No. 4650, *post*.

3233. —— —— Admissibility of acts subsequent to condonation.]—SUGGATE *v.* SUGGATE, No. 3203, *ante*.

3234. —— Evidence of condonation—Question for judge.]—A wife & husband presented cross-petitions for dissolution of their marriage. During the hearing before the jury the husband admitted adultery, but alleged that it had been subsequently condoned by the wife. There was no allegation of condonation on the pleadings, & the wife denied in evidence that she had condoned her husband's adultery. It was contended by counsel for the husband that the ct. was bound to take notice of condonation even if not pleaded, &, if thought advisable, could seek a jury's assistance:—*Held:* where condonation had not been pleaded, the ct. would take upon itself the responsibility of deciding whether it existed.—MOOSBRUGGER *v.* MOOSBRUGGER, MOOSBRUGGER *v.* MOOSBRUGGER & MARTIN (1913), 109 L. T. 192; 29 T. L. R. 715.

3235. Necessity for strict proof—Condonation or renewal of conjugal intercourse.]—CAMPBELL *v.* CAMPBELL, No. 4369, *post*.

(h) Revival of Condoned Offence.

i. *In General.*

Condonation—Defined as conditional forgiveness.]—*See* Sub-sect. 3, D. (*b*) i., *ante*.

3236. All matrimonial offences revived—By one offence committed after condonation.]—BLANDFORD *v.* BLANDFORD, No. 3175, *ante*.

3237. ——.]—COLLINS *v.* COLLINS, No. 3272, *post*.

3238. Evidence of acts subsequent to condonation—Admitted where condonation not pleaded.]—SUGGATE *v.* SUGGATE, No. 3203, *ante*.

3239. Revival of condoned offence not pleaded—Whether petitioner entitled to decree.]—In a wife's suit for dissolution of marriage, evidence was given of resp.'s cruelty & adultery from Mar. 1908, to July, 1909, in which latter month petitioner left resp. on account of his cruelty. In Aug. 1909, petitioner filed a petition for divorce, which, however, was not served, as resp. fell ill & at his request she returned to nurse him. In 1910, as resp. was again guilty of cruelty, she finally left him & filed her petition:—*Held:* petitioner was entitled to a decree, although revival of the previous misconduct on the part of resp. had not been specifically pleaded.—BRADDOCK *v.* BRADDOCK (1910), 27 T. L. R. 55 Sol. Jo. 79.

3240. Subsequent discovery of contemporaneous offence.]—Where, on an unopposed petition by the wife for dissolution by reason of the husband's cruelty & adultery, it appeared that after the cruelty, which was proved to have taken place, the wife had continued to cohabit with her husband, in ignorance, however, of the adultery which had then in fact taken place, though it did not come to her knowledge till afterwards, the ct. inclined to hold that cruelty condoned in such circumstances would, in effect, revive upon the subsequent knowledge of the adultery & action taken thereupon; the wife's acquaintance with the husband's delinquencies of every sort may be a branch of the condition on which all condonation depends; but under Matrimonial Causes Act, 1857 (c. 85), ss. 30, 31, petitioner was clearly entitled to a decree *nisi*.—DEMPSTER *v.* DEMPSTER (1861), 2 Sw. & Tr. 438; 31 L. J. P. M. & A. 20; 5 L. T. 433; 8 Jur. N. S. 44; 164 E. R. 1066.

Annotations:—**Consd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185; Bernstein *v.* Bernstein, [1893] P. 292.

ii. *Where Condonation before Separation.*

3241. Separation deed—Commission of subsequent offence.]—A husband & wife entered into a deed of separation, in which it was provided that, in case either party should take proceedings against the other in respect of any cause of complaint which might afterwards arise, no offence or misconduct committed before the execution of the deed, & no act, deed, neglect, or default of either party in relation to such offence or misconduct should be pleaded or alleged by either party to be admissible as evidence.

The husband having subsequently sued for a divorce on the ground of his wife's adultery committed with co-resp. after the date of the deed:—*Held:* he was not barred by the deed from introducing evidence as to familiarities having taken place between resp. & co-resp. previously to the deed, in order to support the charge of adultery.—HARRIS *v.* HARRIS & WOODDEN (1872), 41 L. J. P. & M. 61; 27 L. T. 428; 21 W. R. 80.

3242. —— ——.]—ROSE *v.* ROSE, No. 3470, *post*.

3243. —— ——.]—AUBOURG *v.* AUBOURG, No. 2614, *ante*.

3244. —— ——.]—A husband & wife separated under a separation deed which provided that the wife should not take any proceedings of any sort against her husband in respect of anything done up to that date. Subsequently, while they were living apart, the husband committed two acts of cruelty towards his wife:—*Held:* she was not precluded by the separation deed from suing for a judicial separation.—KUNSKI *v.* KUNSKI & JOSEPHS (1907), 23 T. L. R. 615.

3245. —— ——.]—A covenant by a wife in a deed of separation, to the effect that all proceedings in a suit which she had instituted against her husband on the ground of cruelty shall be stayed & that she "shall in no wise attempt to revive

barred thereby from suing her alleged paramour for *solatium* & damages.—MACDONALD *v.* MACDONALD (1885), 12 R. (Ct. of Sess.) 1327; 22 Sc. L. R. 896.—**SCOT.**

PART XIII. SECT. 7, SUB-SECT. 3. D.

3235 i. *Necessity for strict proof—Condonation or renewal of conjugal intercourse.*]—Where a wife has become infected by disease, the result of her husband's adultery & suffers from that disease for months, so that conjugal intercourse cannot be resumed, then in order that the husband's adultery may be condoned there must be conclusive evidence of such complete reconciliation that the only inference is that as soon as she recovers she will restore him to the conjugal rights which he forfeited by his adultery.—A. *v.* B. (1911), 30 N. Z. L. R. 669.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 3.—D. (h) i.

3236 i. *All matrimonial offences revived—By one offence committed after condonation.*]—Condonation of matrimonial offences by the resumption of cohabitation is generally subject to the implied condition that no such further offence shall occur; &, if such an offence should be subsequently committed, the forgiveness is cancelled & the former causes of complaint are revived, even if the new offence is not *ejusdem generis* with the former ones.—*Re* BRIZARD & BRIZARD (No. 2) (1914), 26 W. L. R. 734; 5 W. W. R. 1013, 1160; 15 D. L. R. 578; 24 Man. L. R. —**CAN.**

Sect. 7.—Bars to relief: Sub-sect. 3, D. (h) ii., iii. & iv.]

the same in any manner whatever" :—*Held:* no bar to relief in a subsequent suit by the wife for the dissolution of marriage on the ground of the husband's subsequent adultery coupled with the former cruelty.—NORMAN *v.* NORMAN, [1908] P. 6; 77 L. J. P. 8; 98 L. T. 61; 24 T. L. R. 37.

3246. —— —— Deed repudiated by respondent.] —Where there was a deed of separation with a covenant not to sue for antecedent cause in an undefended suit for divorce proceeding in part on the ground of such antecedent cause, & resp. whose offence had thus been condoned by the deed had wholly repudiated the obligations of it :—*Held:* the deed did not debar petitioner from the right to divorce.—BALCOMBE *v.* BALCOMBE, [1908] P. 176; 77 L. J. P. 81; 99 L. T. 308.

3247. —— ——.]—By a clause in a deed of separation a husband & wife covenanted that "neither . . . shall be at liberty to take any legal proceedings against the other of them in respect of any matters which have hitherto occurred, & neither . . . shall be at liberty to take any proceedings in the future for a judicial separation or any proceedings whatsoever other than proceedings for a dissolution of marriage." The husband having subsequently to the execution of the deed committed adultery, the wife filed a petition for dissolution of marriage, coupling the adultery with the alleged cruelty anterior to the date of the deed :—*Held:* the deed was no bar to the wife relying upon the alleged cruelty being revived by the subsequent adultery.—EHLERS *v.* EHLERS (1915), 113 L. T. 1215.

3248. —— ——.]—WILSON *v.* WILSON (1916), 32 T. L. R. 484.

3249. —— —.]—A husband was guilty of cruelty to his wife, & this led to a separation by deed. The deed contained a covenant not to sue for any offence before the date of its execution, but with a proviso that this & all the other covenants should become void in the event of a judicial separation being pronounced. The husband committed adultery after the date of the deed, & the wife petitioned to have the marriage dissolved :—*Held:* it would not be just or reasonable to put petitioner to the expense, delay, & inconvenience of a second suit, based upon the same evidence of cruelty & adultery; & upon her present petition, founded upon adultery since the date of the deed, coupled with the previous cruelty, both of which offences were proved to the satisfaction of the ct. she was entitled at once to a decree *nisi*.—THOMPSON *v.* THOMPSON, [1916] P. 165; 85 L. J. P. 159; 114 L. T. 1211; 32 T. L. R. 507; 60 Sol. Jo. 512.

Annotation :—**Follд.** Lister *v.* Lister (1922), 91 L. J. P. 180.

3250. —— ——.]—By a deed of separation the wife covenanted not to take proceedings in respect of prior offences, but the deed contained a proviso that the covenants should be void if the parties should be judicially separated on the ground of the subsequent misconduct of either. After the date of the deed the wife brought a petition for divorce & proved that the husband had committed adultery after, & cruelty before, the date of the deed :—*Held:* the wife was entitled to a divorce without first obtaining a decree for judicial separation.—LISTER *v.* LISTER, [1922] P. 227; 91 L. J. P. 180; 127 L. T. 493; 38 T. L. R. 609.

3251. —— —— Deed not set up by respondent.] —A husband having been guilty of cruelty, he & his wife separated upon the terms of a deed by which they agreed that neither party should take proceedings against the other for dissolution of marriage or judicial separation on the ground of previous misconduct, but that the deed should be void in case the marriage should be dissolved or a judicial separation granted on the ground of subsequent misconduct by either. The husband afterwards committed adultery. He did not plead the deed in answer to his wife's petition. The ct. granted a decree *nisi* for the dissolution of the marriage.—DOWLING *v.* DOWLING, [1898] P. 228; 68 L. J. P. 8; 47 W. R. 272.

Annotations :—**Follд.** Bourne *v.* Bourne, [1913] P. 164. **Refd.** Lipman *v.* Lipman, [1916] P. 25.

3252. —— —— ——.]—A separation deed whereby husband & wife agree not to institute proceedings in respect of past matrimonial offences, & containing an express condonation of such offences, being valid, the clauses in such deed must be interpreted according to the ordinary rules of construction.

A husband & wife entered into a deed of separation, whereby (*inter alia*) they expressly & mutually agreed that any matrimonial offences which might have been committed by either of them before the execution of the deed were thereby condoned; but, by a subsequent clause, it was agreed (*inter alia*) that if the marriage should be dissolved or the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, then all the covenants & provisions contained in the deed should become void. The husband had been guilty of cruelty & adultery before the date of the deed, & it was proved that he had been guilty of adultery after the date of the deed :—*Held:* although it was doubtful whether the subsequent adultery revived, either by virtue of or apart from the deed, the offences which by the deed had been expressly condoned, yet, inasmuch as the subsequent adultery of the husband would entitle the wife to a judicial separation, &, thereupon, the covenants in the deed, including the condonation clause, would become void, & she might then in a subsequent proceeding obtain a dissolution of marriage, the ct. would not put her to such a circuitous mode of obtaining relief as would thereby be involved, but would at once grant a decree *nisi* dissolving the marriage.—BOURNE *v.* BOURNE, [1913] P. 164; 82 L. J. P. 117; 108 L. T. 1039; 29 T. L. R. 657.

Annotations :—**Follд.** Thompson *v.* Thompson, [1916] P. 165. **Refd.** Lipman *v.* Lipman, [1916] P. 25.

3253. —— —— ——.]—A husband & wife separated under a deed after, as subsequently proved, cruelty on his part. The deed contained (*inter alia*) a clause that no proceedings should be instituted relating to the relationship of husband & wife, & it also contained a proviso that if the marriage should be dissolved, or if the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, all the covenants & provisions thereof should be void. The husband subsequently committed adultery & the wife petitioned for dissolution of the marriage :—*Held:* although the deed was not set up by the husband, the suit being undefended, the ct. should take cognisance of its contents, & petitioner was therefore not entitled to a decree of dissolution of marriage upon her present petition; but inasmuch as the decree of judicial separation, which the ct. now pronounced on the ground of adultery put an end to the deed, by reason of the proviso therein contained, petitioner would, on a subsequent petition, be entitled to have her marriage dissolved on the ground of that adultery coupled with the antecedent cruelty.—LIPMAN *v.*

LIPMAN, [1916] P. 25; 85 L. J. P. 23; 114 L. T. 376; 32 T. L. R. 173; 60 Sol. Jo. 157.
Annotation:—**N.F.** Thompson *v.* Thompson, [1916] P. 165.

3254. Judicial separation—Cruelty—Subsequent adultery.]—GREEN *v.* GREEN, No. 3283, *post*.

iii. *Sufficiency of Offence to constitute Revival.*

3255. General rule.]—COOKE *v.* COOKE, No. 3173, *ante*.

3256. Conduct short of cruelty.]—WESTMEATH *v.* WESTMEATH, No. 3196, *ante*.

3257. ——.]—BRAMWELL *v.* BRAMWELL, No. 3205, *ante*.

3258. ——.]—SNOW *v.* SNOW, No. 3231, *ante*.

3259. —— Fear of repetition of original cruelty.]—EVANS *v.* EVANS, No. 3198, *ante*.

3260. —— Threats & abuse—Further cohabitation endangered.]—Acts of violence & cruelty which have been condoned may be revived, without actual violence, by threats of such a nature & so expressed as to satisfy the ct. that further cohabitation would be attended with danger to the party threatened. Where, after thirty years of married life, during which the parties had continually quarrelled, & the husband had been guilty of unjustifiable violence, & up to May, 1855, there was undoubted condonation, the wife left her husband's house in June, 1856, & brought a suit for divorce *a mensâ et thoro*, relying on threats alleged to have been uttered by the husband between Feb. & June, 1856, the ct., not being satisfied that the threats were such as to cause a reasonable apprehension of bodily injury, or that, in fact, the wife quitted her husband's house on that account, dismissed the suit.—BOSTOCK *v.* BOSTOCK (1858), 1 Sw. & Tr. 221; 27 L. J. P. & M. 86; 31 L. T. O. S. 331; 6 W. R. 868; 164 E. R. 701.

3261. —— —— Past acts of violence recalled—Fear of recurrence.]—Where there has been condonation of acts of legal cruelty, subsequent matrimonial offences not in themselves sufficient to constitute legal cruelty may support a decree for judicial separation, because in the case of cruelty it is impossible to dissociate recent from past conduct, & acts not so grievous in themselves may operate grievously on the mind of the sufferer, either a recalling past acts of violence or as causing fear of their recurrence.

A husband committed acts of legal cruelty at various dates up to Sept. 1912. The wife, however, continued to live with him until Nov. 1914, & there were acts of conjugal intercourse up to Mar. or Apr. 1914. In Nov. 1914, the wife left her husband, & in Feb. 1915, she commenced proceedings for a judicial separation. Acts of cruelty by the husband relied on after Sept. 1912, were first, his striking her & snatching her hat off her head, variously stated as happening in Nov. 1912, & Nov. 1913, & secondly various instances of abuse & threats & accusations of sexual immorality down to the time of parting:—*Held*: the original acts of legal cruelty had been condoned, but they had been revived by the subsequent matrimonial offences, although these offences did not in themselves amount to legal cruelty.

When an act of adultery has been condoned it is wiped out & can never be referred to again just as if it had never taken place; but it is not so in an action of separation on the ground of violence (*per* CUR.).—MOSS *v.* MOSS, [1916] P. 155; 85 L. J. P. 182; 114 L. T. 1147; 32 T. L. R. 468, C. A.

3262. —— Harsh & irritating conduct.]—MYTTON *v.* MYTTON, No. 2561, *ante*.

3263. Conduct short of adultery—Attempt to commit adultery.]—SNOW *v.* SNOW, No. 3231, *ante*.

3264. —— Conduct tending to adultery.]—*Semble*: condoned adultery may be revived, so as to found a sentence of dissolution, by subsequent misconduct & improprieties, short of, but tending to adultery.—WINSCOM *v.* WINSCOM & PLOWDEN (1864), 3 Sw. & Tr. 380; 33 L. J. P. M. & A. 45; 10 L. T. 100; 10 Jur. N. S. 321; 12 W. R. 535; 164 E. R. 1322.
Annotation:—**Mentd.** Redfern *v.* Redfern, [1891] P. 139.

3265. —— Familiarity with servant.]—RIDGWAY *v.* RIDGWAY, No. 3174, *ante*.

iv. *Revival of Condoned Adultery.*

By conduct falling short of adultery.]—*See* Sub-sect. 3, D. (*h*) iii., *ante*.

3266. By cruelty.]—WORSLEY *v.* WORSLEY, No. 3277, *post*.

PART XIII. SECT. 7, SUB-SECT. 3.—D. (h) iii.

3255 i. *General rule.*]—A lesser degree of cruelty is necessary to revive a condoned offence than to found an original charge.—THOMPSON *v.* THOMPSON (1911), I. L. R. 39 Calc. 395.—**IND.**

3255 ii. ——.]—Less is required to revive an offence previously condoned where petitioner is seeking a judicial separation than where the relief sought is a dissolution of marriage. In a suit for a judicial separation a condoned act of adultery was held to be revived by nine months' desertion.—MILLIKEN *v.* MILLIKEN, [1920] N. Z. L. R. 452.—**N.Z.**

3256 i. *Conduct short of cruelty.*]—*Held*: although an act of adultery will revive condoned acts of cruelty & *vice versâ*, yet the exclusion from the matrimonial home, deft. having offered to receive pltf. back, & the exclusion itself not being an act of cruelty, could not be relied upon as a matrimonial offence which had the effect of reviving the earlier offences.—GOULD *v.* GOULD (1921), 64 D. L. R. 621; 50 O. L. R. 622.—**CAN.**

3256 ii. ——.]—In an action of separation & aliment at the instance of a wife against her husband defender was of consent assoilzied & the spouses thereafter resumed cohabitation. The wife subsequently raised a second action of separation & aliment & founded [*inter alia*] upon the alleged acts of cruelty which had occurred prior to the first action:—*Held*: while pursuer was entitled to prove them in order to give colour to subsequent acts which might not in themselves be sufficiently gross to amount to cruelty she was not entitled to found another as separate & substantive grounds of separation.—SMEATON *v.* SMEATON (1900), 2 F. (Ct. of Sess.) 837; 37 Sc. L. R. 595; 7 S. L. T. 468.—**SCOT.**

j. —— *Violent & harsh treatment.*]—Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent & harsh treatment which would not originally of itself constitute a ground for separation, the ct. granted a separation to the wife.—TOWN *v.* TOWN (1900), 7 B. C. R. 122.—**CAN.**

3264 i. *Conduct short of adultery—Conduct tending to adultery.*]—By a separation agreement in 1910 a husband admtted desertion & cruelty & arranged for conveying certain property to his wife to enable her to live apart from him, each of the parties releasing the other from all claims incurred or accrued to the date of said agreement. In this action there was evidence of adultery by the husband in 1905 & of immoral associations by him subsequent to 1910, of which the wife swore she had no notice until recently:—*Held*: the separation agreement & release therein contained could not now avail the husband, & his wife was granted a decree for dissolution of marriage on the grounds of cruelty, desertion & adultery.—HOLLAND *v.* HOLLAND, [1919] 2 W. W. R. 966; 48 D. L. R. 26.—**CAN.**

3264 ii. —— ——.]—When a husband having received reasonably, probable information of his wife's adultery, has, by continuing cohabitation, condoned the offence, subsequent misconduct of the wife tending to, though falling short of, adultery, revives the condoned adultery.—PEREIRA *v.* PEREIRA & BOUNJOUR (1882), I. L. R. 5 Mad. 118.—**IND.**

k. ——.]—Admissions of undue familiarity short of adultery are sufficient to revive acts of adultery previously condoned.—HALLIGAN *v.* HALLIGAN (1910), 30 N. Z. L. R. 366.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 3.—D. (h) iv.

3266 i. *By cruelty.*]—THOMPSON *v.* THOMPSON (1911), I. L. R. 39 Calc. 395.—**IND.**

3266 ii. ——.]—Subsequent cruelty revives previous condoned adultery & entitles petitioner to a decree.—KING *v.* KING (1924), I. L. R. 47 All. 50.—**IND.**

3266 iii. ——.]—MAY *v.* MAY (1890), 8 N. Z. L. R. 763.—**N.Z.**

Sect. 7.—Bars to relief: Sub-sect. 3, *D.* (*h*) *iv., v. vi.; sub-sect.* 4, *A.*]

3267. -.]—DENT *v.* DENT, No. 3183, *ante.*

3268. Effect on petition claiming damages only.]—RAMSDEN *v.* RAMSDEN & LUCK, RAMSDEN *v.* RAMSDEN (1886), 2 T. L. R. 867.

Annotations:—**Consd.** Bernstein *v.* Bernstein, [1893] P. 292. **Refd.** Stocker *v.* Stocker, Brice & Patterson, [1917] P. 264.

3269. By adultery.]—B. received back his wife, after adultery by her committed, in May, 1856. In June, 1857, he left England for Australia, to ascertain his prospects in settling, leaving his wife in business in Devonport, close to her own mother. The wife, during his absence, committed adultery with co-resp. & sold off the stock-in-trade. The ct. dissolved the marriage, & condemned co-resp. in the costs.—WILTON *v.* WILTON & CHAMBERLAIN (1859), 1 Sw. & Tr. 563; 1 L. T. 243; 8 W. R. 160; 164 E. R. 861.

3270. —— Adultery with different paramour.]—Where a husband has condoned adultery committed with a co-resp., which has been revived by adultery committed by another person, costs will not be given against the co-resp. whose adultery was condoned.—NORRIS *v.* NORRIS, LAWSON & MASON (1861), 4 Sw. & Tr. 237; 30 L. J. P. M. & A. 111; 164 E. R. 1506.

Annotations:—**Distd.** Pomero *v.* Pomero (1884), 10 P. D. 174. **Consd.** Bernstein *v.* Bernstein, [1893] P. 292.

3271. —— Condoned incestuous adultery.]—A wife knowing that her husband had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, & would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father & brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause: "The agreement or contract binds me, the wife, only so long as you remain true to me in love & duty." After the date of the agreement the husband was guilty of adultery, but not of incestuous adultery:—*Held:* this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery. Condoned incestuous adultery is revived by subsequent adultery not incestuous.—NEWSOME *v.* NEWSOME (1871), L. R. 2 P. & D. 306; 40 L. J. P. & M. 71; 25 L. T. 204; 19 W. R. 1039.

Annotations:—**Refd.** Collins *v.* Collins (1882), 9 App. Cas. 209, n.; Blandford *v.* Blandford (1883), 8 P. D. 19; Cramp *v.* Cramp & Freeman, [1920] P. 158.

3272. —— Subsequent to condonation.]—By the law of Scotland full condonation of adultery, remission expressly or by implication in full knowledge of the acts forgiven, followed by cohabitation as man & wife, is a *remissio injuriæ* absolute & unconditional, & affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery, cohabitation following, be made conditional by any arrangement between the spouses. Although the condoned adultery cannot be founded on, condonation does not extinguish the guilty acts entirely, & they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation. A wife confessed to several acts of adultery with E. Her husband forgave her & resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances; but, admittedly no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct:—*Held:* to obtain a divorce he must prove adultery subsequent to the condonation & no less.

The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt & with free & deliberate intention to forgive it where that reconciliation is followed by living together as man & wife, the status of the couple ought to be the same as & not more precarious than if there was a new marriage (LORD BLACKBURN).

Assuming it to be now established English Law that any matrimonial offence though forgiven may be revived by any other matrimonial offence of which the cts. take cognisance, it is very modern law & not so obviously just & expectant that this House ought to infer that it either was or ought to have been introduced into the law of Scotland (LORD BLACKBURN).—COLLINS *v.* COLLINS (1884), 9 App. Cas. 205; 32 W. R. 501, H. L.

Annotations:—**Consd.** Rogers *v.* Rogers, [1894] P. 161; Moss *v.* Moss, [1916] P. 155. **Refd.** Moore *v.* Moore, [1892] P. 382; Gooch *v.* Gooch, [1893] P. 99; Braddock *v.* Braddock (1910), 27 T. L. R. 94; Price *v.* Price & Brown, [1911] P. 201; Cramp *v.* Cramp & Freeman, [1920] P. 158.

3273. By attempting to have adulterous intercourse.]—SNOW *v.* SNOW, No. 3231, *ante.*

3274. By desertion—For two years without reasonable excuse.]—Desertion for two years without reasonable excuse revives condoned adultery. Where a husband was guilty of incestuous adultery, which was condoned by the wife, & he was afterwards guilty of desertion:—*Held:* the desertion revived the condoned adultery, & the wife was entitled to a decree dissolving her marriage.

When judgment has been reserved the decree *nisi*, if pronounced, will not be antedated, but the ct. may allow the time for decree absolute to run from the date of the hearing.—HOUGHTON *v.* HOUGHTON, [1903] P. 150; 72 L. J. P. 31; 89 L. T. 76; 52 W. R. 272; 19 T. L. R. 505; 47 Sol. Jo. 548.

Annotations:—**Folld.** Copsey *v.* Copsey, [1905] P. 94. **Apld.** Price *v.* Price & Brown, [1911] P. 201. **Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3275. —— ——.]—Desertion for two years without reasonable excuse revives condoned adultery, whether petitioner be husband or wife.—COPSEY *v.* COPSEY, [1905] P. 94; 74 L. J. P. 40; 91 L. T. 363; 20 T. L. R. 728.

Annotations:—**Apld.** Price *v.* Price & Brown, [1911] P. 201. **Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3276. —— Non-compliance with decree for restitution.]—The matrimonial offence of desertion created by reason of non-compliance with a decree for restitution of conjugal rights revives condoned adultery.—PRICE *v.* PRICE & BROWN, [1911] P. 201; 80 L. J. P. 145; 105 L. T. 441; 27 T. L. R. 560; 55 Sol. Jo. 689.

Annotation:—**Refd.** Cramp *v.* Cramp & Freeman, [1920] P. 158.

3269 i. *By adultery.*]—Where a husband has condoned adultery committed with one co-resp., which has been revived by adultery committed with another co-resp., a decree *nisi* will be granted against both co-resps.—YOUD *v.* YOUD (1900), I. L. R. 28 Calc. —**IND.**

1. *By desertion.*]—Condoned adultery is revived by subsequent desertion, & may form the ground for a suit for dissolution of marriage.—HENDERSON *v.* HENDERSON (1885), 4 N. Z. L. R. 211 (S. C.).—**N.Z.**

m. ——.]—*Held:* petitioner was entitled to a decree *nisi*, the condoned adultery having been revived by the subsequent matrimonial offence of desertion.—STEWART *v.* STEWART, [1920] N. Z. L. R. 425.—**N.Z.**

v. *Revival of Condoned Cruelty.*

By conduct falling short of cruelty.]—*See* Sub-sect. 3, D. (*h*) iii., *ante*.

3277. By cruelty.]—After a reconciliation fresh acts of cruelty will revive acts of cruelty, & also of adultery.—WORSLEY *v.* WORSLEY (1730), 2 Lee, 572; 161 E. R. 444.

Annotations :—**Apld.** Durant *v.* Durant (1825), 1 Hag. Ecc. 733. **Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Collins *v.* Collins (1884), 9 App. Cas. 205.

3278. ——.]—A wife is not barred of her right to a separation by reason of cruelty, by cohabitation after the occurrence of the actual cruelty, when the subsequent conduct of the husband has been of the same tenor as during the time when the actual cruelty took place.—FRANKLIN *v.* FRANKLIN (1842), 7 Jur. 135.

3279. EVANS *v.* EVANS, No. 3198, *ante*.

3280. MOSS *v.* MOSS, No. 3261, *ante*.

3281. By desertion.]—Cruelty fully condoned is not revived by subsequent desertion. In order to revive condoned cruelty the acts must be *ejusdem generis*.—HART *v.* HART (1855), 2 Ecc. & Ad. 193; 164 E. R. 383.

Annotation :—**Apld.** Palmer *v.* Palmer (1860), 2 Sw. & Tr. 61.

3282. By adultery.]—PALMER *v.* PALMER, No. 3172, *ante*.

3283. Cruelty before judicial separation—Revival by adultery after decree.]—A woman, who has obtained a decree of judicial separation by reason of her husband's adultery, may afterwards institute a suit to dissolve the marriage on the ground of her husband's adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the cohabitation.—GREEN *v.* GREEN (1873), L. R. 3 P. & D. 121; 43 L. J. P. & M. 6; 29 L. T. 251; 21 W. R. 824.

Annotations :—**Apld.** Mason *v.* Mason (1883), 8 P. D. 21; Fullerton *v.* Fullerton (1922), 39 T. L. R. 46.

vi. *Revival of Condoned Desertion.*

3284. By adultery.]—BLANDFORD *v.* BLANDFORD, No. 3175, *ante*.

3285. —— **Statutory desertion.**]—Desertion by not complying with a decree for restitution of conjugal rights may, after condonation, be revived by adultery committed by the party who was guilty of the statutory desertion.—PAINE *v.* PAINE, [1903] P. 263; 73 L. J. P. 1; 89 L. T. 588; 52 W. R. 271; 20 T. L. R. 12.

Annotation :—**Refd.** Price *v.* Price & Brown, [1911] P. 201.

SUB-SECT. 4.—DISCRETIONARY BARS.

A. Discretion of Court Generally.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (repealing & re-enacting Matrimonial Causes Act, 1857 (c. 85), s. 31).

Exercise of discretion in particular instances.]—*See* Sub-sect. 4, B., C., D., E., *post*.

3286. Unfettered.]—BULLOCK *v.* BULLOCK, No. 3476, *post*.

3287. ——.]—POINTON *v.* POINTON & SUTTON, No. 3459, *post*.

3288. —— **Uniformity of decisions desirable.**]—(1) The discretion to be exercised under Matrimonial Causes Act, 1857 (c. 85), s. 31, must be a regulated discretion. The ct. cannot grant or withhold a divorce on the mere footing that petitioner's adultery is more or less pardonable or capable of excuse. There must be some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement & recognition, in order that the discretion may be fitly exercised in favour of a petitioner.

A loose & unfettered discretion of this sort upon matters of such grave import, is a dangerous weapon to entrust to any ct., still more so to a single judge. Its exercise is likely to be the refuge of vagueness in decision, & the harbour of half-formed thought. Under cover of the word "discretion" a conclusion is apt to be formed upon a general impression of facts too numerous & minute to be perfectly brought together & weighed, & sometimes not perfectly proved; while the result is apt to be coloured with the general prejudices, favourable or otherwise, to the person whose conduct is under review, which the course of the evidence has evoked. Upon such materials so used two minds will hardly ever form a judgment alike, & the same mind will often appear to others to form contradictory judgments on what seem to be similar facts. This invites public criticism, & shakes public confidence in the justice of the tribunal.

I hold, therefore, that the discretion to be exercised under sect. 31 of the statute should be a regulated discretion, & not a free option subordinated to no rules. It was probably reposed in the ct. because the legislature found it impossible to forsee & specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the ct. Past experience has already pointed out some classes of cases to which it fitly applied; & the future may probably furnish more. But the facts of this case present no definite features beyond more lapse of time to justify its exercise; & the ct. must refuse a decree (*per* CUR.).

(2) The wife, resp. in the suit, recriminated adultery, which she charged as having taken place with A. & B. At the trial no evidence was offered in support of the charge with B. The ct. ordered that the costs incurred by petitioner in respect of the charge of adultery with B. should be deducted from the sum paid into ct. to meet resp.'s costs of trial.—MORGAN *v.* MORGAN & PORTER (1869), L. R. 1 P. & D. 644; 38 L. J. P. & M. 41; 20 L. T. 588; 17 W. R. 688.

Annotations :—*As to* (1) **Apld.** M'Cord *v.* McCord, Ogle & Coxon (1875), L. R. 3 P. & D. 237; Grosvenor *v.* Grosvenor (1885), 34 W. R. 140. **Consd.** Story *v.* Story & O'Connor (1887), 57 L. T. 536; Whitworth *v.* Whitworth & Thomasson, [1893] P. 85; Symons *v.* Symons, [1897] P. 167; Constantinidi *v.* Constantinidi & Lance, [1903] P. 246; Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781; Wyke *v.* Wyke, [1904] P. 149; Evans *v.* Evans & Elford, [1906] P. 125; Hines *v.* Hines & Burdett, [1918] P. 364; Wickins *v.* Wickins, [1918] P. 265; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203; Tickner *v.* Tickner, [1924] P. 118. **Refd.** Noble *v.* Noble (1869), L. R. 1 P. & D. 691; Duplany *v.* Duplany, Cohen intervening (1891), 8 T. L. R. 169; Gooch *v.* Gooch, [1893] P. 99. *As to* (2) **Consd.** Waudby *v.* Waudby & Bowland, [1902] P. 85.

3289. —— ——.]—Though the discretion is unfettered, uniformity of decision is desirable, & the ct. will therefore exercise its discretion in a case clearly within the principles laid down in *Wilson* v. *Wilson*, No. 3448, *post*, but petitioner, even if a poor person, will be required to pay the costs of an intervention which his conduct has

PART XIII. SECT. 7, SUB-SECT. 3.—D. (h) v.

3277 i. *By cruelty.*]—Condonation by a wife of acts of cruelty & ill-treatment by the husband which would justify her leaving him & claiming alimony, is removed by subsequent ill-treatment & threats after condonation.—BAVIN *v.* BAVIN (1896), 27 O. R. 571.—**CAN.**

3277 ii. ——.]—Abusive language & threats after the resumption of cohabitation, having regard to earlier acts, constituted legal cruelty & were sufficient to revive the former acts sworn to, which were quite clearly matrimonial offences.—CHERRINGTON *v.* CHERRINGTON (1915), 32 W. L. R. 9 W. W. R. 146.—**CAN.**

Sect. 7.—Bars to relief: Sub-sect. 4, A. & B. (a)

occasioned.—ELLIOTT *v.* ELLIOTT & BOWERS (1921), 126 L. T. 28; 37 T. L. R. 834.

3290. —— Strict rules undesirable.]—WOLTERECK *v.* WOLTERECK & WALTERS, No. 3485, *post.*

3291. —— ——.]—HOLLAND *v.* HOLLAND, No. 5124, *post.*

3292. —— —— Not confined to matters connected with petitioner's offence.]—(1) No general rule can be laid down for the exercise by the judge of the Divorce Div. of the discretion vested in him by Matrimonial Causes Act, 1857 (c. 85), s. 31.

The Ct. of Appeal is not entitled to, & in any case ought not to, lay down a rule that in exercising the discretion under s. 31 the only facts & matters to which the judge may have regard are those bearing upon, or directly connected with, the matrimonial offence of which the party seeking dissolution of marriage may have been guilty. The discretion permitted by s. 1 should be left as free as the legislature has left it. The sect. does not prescribe or define limits within which alone it may be exercised, & having regard to the very varying circumstances of different cases, it would be very inexpedient for the Ct. of Appeal to attempt to do so.

(2) There is no distinction in meaning between the expressions "without reasonable cause" in sect. 5 of the Matrimonial Causes Act, 1884 (c. 68), & "without reasonable excuse" in sect. 31 of the Act of 1857.

A wife obtained a decree for restitution of conjugal rights. The husband not having complied with the decree, the wife presented a petition for dissolution of marriage on the ground of his adultery & desertion. The husband did not appear & the petition was set down as undefended. He subsequently obtained leave to file an answer, & put in an answer denying his adultery & alleging that petitioner had herself committed adultery & asking the Ct. to reject the prayer of the petition & to decree that his marriage might be dissolved. At the hearing the wife's adultery was proved & her petition was dismissed. The judge found as a fact that the husband had separated from his wife without any justification for doing so. He commented adversely on the conduct of the husband in allowing the petition in the first instance to remain unanswered although he was charged with adultery. The husband gave evidence denying the adultery, & there was no evidence that such adultery had been committed. Having regard to all the facts & circumstances of the case, the judge declined to exercise in favour of the husband the discretion vested in him under sect. 31 of the Act of 1857, & he dismissed the husband's cross-petition. On an appeal by the husband:—*Held:* the Ct. of Appeal would not interfere with the discretion exercised by the judge.—WICKINS *v.* WICKINS, [1918] P. 265; 119 L. T. 268; 87 J. P. 155; 34 T. L. R. 447; 62 Sol. Jo. 583, C. A.

Annotations:—*As to* (1) **Consd.** Hines *v.* Hines & Burdett, [1918] P. 364; Tickner *v.* Tickner, [1924] P. 118.

3293. —— Exercised with extreme care.]—The discretion given to the ct. by Matrimonial Causes Act, 1857 (c. 85), is unfettered, but it should be exercised with extreme care, not only with respect to the parties in the case, but also in the interests of public morality.—BROOKE *v.* BROOKE, [1912] P. 205, n.; 81 L. J. P. 147, n.; 107 L. T. 202; 28 T. L. R. 577.

Annotations:—**Apprvd.** Holland *v.* Holland, [1918] P. 273. **Consd.** Hines *v.* Hines & Burdett, [1918] P. 364; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3294. Judicial discretion.]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *post.*

3295. ——.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 3491, *post.*

3296. ——.]—The discretion of the ct. under the Matrimonial Causes Act, 1857 (c. 85), s. 31, to grant a decree of dissolution to a spouse who has been guilty of a matrimonial offence must be exercised in a judicial manner, & relief will hardly ever be given to those who have themselves been guilty of matrimonial infidelity.

The guiding rule is that the matrimonial offence of one spouse will not excuse the matrimonial offence of the other. Exceptional circumstances alone will lead the ct. to overlook the matrimonial default of petitioner, & this principle does not rest upon any such doctrine as those of compensation or recrimination, known to the former Ecclesiastical Cts. but is based on the requirements of public morality, & will not be enfeebled by an unduly sensitive regard to the hardship of particular cases.—HINES *v.* HINES & BURDETT, [1918] P. 364; 87 L. J. P. 220; 120 L. T. 126; 34 T. L. R. 480.

Annotations:—**Refd.** Bebb *v.* Bebb & Ross (1920), 123 L. T. 93; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814; Long *v.* Long (1920), 36 T. L. R. 398; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3297. Each case considered on its merits.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 3491, *post.*

3298. ——.]—BULLOCK *v.* BULLOCK, No. 3476, *post.*

—PRETTY *v.* PRETTY, No. 3458, *post.*

3300. .]—WOLTERECK *v.* WOLTERECK WALTERS, No. 3485, *post.*

3301. ——.]—HOOK *v.* HOOK & BROWN, No. 5123, *post.*

3302. Interests of society & public morality considered.]—EVANS *v.* EVANS & ELFORD, No. 3455, *post.*

3303. ——.]—BROOKE *v.* BROOKE, No. 3293, *ante.*

3304. ——.]—HINES *v.* HINES & BURDETT, No. 3296, *ante.*

3305. ——.]—HOLLAND *v.* HOLLAND, No. 5124, *post.*

3306. —— Circumstances mitigating petitioner's offence.]—PULLEN *v.* PULLEN & HOLDING, No. 3454, *post.*

3307. Exercised with due regard to consequences of refusal—Present & future.]—PRETTY *v.* PRETTY, No. 3458, *post.*

3308. Conduct of petitioner true criterion.]—MUNZER *v.* MUNZER & SWAIN, No. 3477, *post.*

3309. When petitioner's default will be overlooked—Exceptional circumstances.]—HINES *v.* HINES & BURDETT, No. 3296, *ante.*

3310. —— ——.]—The discretion given to the ct. by Matrimonial Causes Act, 1857 (c. 85), s. 31, to grant a decree *nisi* to a guilty petitioner should be exercised in special circumstances only.—BERLYN *v.* BERLYN & WATT (1919), 35 T. L. R. 237.

3311. Exercised stringently.]—WILSON *v.* WILSON, No. 3448, *post.*

B. Undue Delay.

(a) In General.

3312. Must be explained.]—Delay in instituting proceedings in a matrimonial cause to be accounted for.

PART XIII. SECT. 7, SUB-SECT. 4.—B. (a).

3312 i. *Must be explained.*]—Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the ct. looks to when the charge of adultery is preferred is, whether there has been such delay as to lead to the conclusion that petitioner had either connived at the adultery or was wholly indifferent to it; but any

Affidavit of the husband admitted to satisfy the ct. as to the reason of his delay in instituting proceedings.—BEST *v.* BEST (LADY) (1814), 2 Phillim. 161; 161 E. R. 1107.

Annotation :—**Refd.** Cood (otherwise Coode) *v.* Cood (otherwise Coode) (1838), 1 Curt. 755.

3313. —— Charge of adultery.]— (1) The first thing which the ct. looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, & known by the party; because if the interval be very long between the date & knowledge of the fact, & the exhibition of them to this ct., it will be indisposed to relieve a party, who appears to have slumbered in sufficient comfort over them; & it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full & satisfactory explanation of the delay (SIR WILLIAM SCOTT).

(2) It would be a pretty harsh injunction of law to compel a man, whether he would or no, to live with a wife who had acknowledged her infidelity to his bed (SIR WILLIAM SCOTT).—MORTIMER *v.* MORTIMER (1820), 2 Hag. Con. 310; 161 E. R. 753.

Annotations :—*As to* (1) **Consd.** Boulting *v.* Boulting (1864), 3 Sw. & Tr. 329. *Generally,* **Refd.** Noverre *v.* Noverre (1846), 1 Rob. Eccl. 428; Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Tucker *v.* Tucker (1847), 5 Notes of Cases, 458; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Hunt *v.* Hunt (1862), 4 De G. F. & J. 221; Williams *v.* Williams, [1921] P. 131.

3314. Delay on part of wife.]—POPKIN *v.* POPKIN, No. 2544, *ante*.

3315. Where separate subsequent offence proved.]—Failure to take action in respect of a separate matrimonial offence, though one of the same kind, is not delay as to the reasonableness of which the ct. has to decide on a petition which also alleges a separate subsequent offence, if the latter is proved, & is one which entitles petitioner to the relief claimed.—RUTTER *v.* RUTTER (1920), 123 L. T. 585.

(*b*) *In Suits for Dissolution of Marriage.*

See Supreme Court of Judicature (Consolidation Act, 1925 (c. 49), s. 178 (3) (*a*).

Excuses for delay.]—*See* Sub-sect. 4, B. (*f*), *post*.

3316. Nature of delay—Petitioner's insensibility to injury complained of.]—PELLEW *v.* PELLEW & BERKELEY, No. 3384, *post*.

3317. —— Must be culpable.]—The word "delay" in Matrimonial Causes Act, 1857 (c. 85), s. 31, means culpable delay, something in the nature of connivance or acquiescence.—RICKARD *v.* RICKARD & BOND (1921), 37 T. L. R. 511, C. A.

3318. Whether delay unreasonable—Exercise of judge's discretion as to—Not interfered with on appeal.]—Where there has been great delay in instituting proceedings for a divorce, the motive for commencing the suit may be taken into consideration when deciding whether there has been unreasonable delay in presenting the petition within Matrimonial Causes Act, 1857 (c. 85), s. 31, & where the judge in the exercise of his discretion under that sect. has refused to grant a divorce on the ground of unreasonable delay, the Ct. of Appeal will not interfere unless he has decided the case on some wrong principle of law.—PEARS *v.* PEARS (1912), 107 L. T. 505; 28 T. L. R. 568; 56 Sol. Jo. 720, C. A.

3319. —— —— ——.]— On a petition by a husband for divorce on the ground of his wife's adultery the judge at the trial refused a decree for the reason that petitioner had been guilty of three years' delay without any excuse :—*Held :* in the circumstances it was within the judge's discretion to hold that there had been unreasonable delay, & therefore the appeal must be dismissed.—HUGHES *v.* HUGHES & WILLIAMS (1915), 32 T. L. R. 62, C. A.

3320. —— Matters considered in ascertaining—Motive in commencing suit.]—PEARS *v.* PEARS, No. 3318, *ante*.

3321. What delay unreasonable—More than two years.]—If petitioner, with a full knowledge of the facts of the case, does not present his petition for two years, he must give some sufficient reason for the delay, otherwise his petition may be dismissed under Matrimonial Causes Act, 1857 (c. 85), s. 31.—NICHOLSON *v.* NICHOLSON (1873), L. R. 3 P. & D. 53; 29 L. T. 108.

Annotations :—**Consd.** Brougham *v.* Brougham, [1895] P. 288; Hughes *v.* Hughes & Williams (1915), 32 T. L. R. 62. **Refd.** Pears *v.* Pears (1912), 107 L. T. 26.

3322. —— ——.]—DIXON *v.* DIXON, No. 3333, *post*.

3323. —— Three years.]—HUGHES *v.* HUGHES & WILLIAMS, No. 3319, *ante*.

3324. —— Thirteen years.]—A husband & wife parted in 1871, & between that date & 1879 the wife had three illegitimate children. There was evidence that the husband knew of the wife's adultery as far back as 1880. In 1893 he presented a petition for dissolution, & obtained a decree *nisi*. On the intervention of the Queen's Proctor the ct. left the following questions to the jury: Did petitioner know or have reason to believe that his wife had been guilty of adultery two years before, he took action for a divorce? Were material facts withheld from knowledge of the ct.? On these questions being answered in the affirmative, the ct. rescinded the decree, & dismissed the petition with costs to the Queen's Proctor.—BROUGHAM *v.* BROUGHAM, [1895] P. 288; 64 L. J. P. 125; 11 R. 667.

Annotation :—**Refd.** Hughes *v.* Hughes & Williams (1915), 32 T. L. R. 62.

3325. —— Sixteen years.]—PEGG *v.* PEGG & GOWING (1904), 20 T. L. R. 353.

3326. —— Twenty years.]—In Aug. 1890, a wife presented a petition for a divorce upon the ground of adultery coupled with cruelty. The marriage had taken place in Dec. 1858; the only child of the marriage, a son, was born in 1866, & the parties separated by agreement in 1870. A separation deed was then executed by them, which contained the usual covenant by the husband that he would not molest the wife; & they had lived apart ever since. The wife never took any proceedings before the petition; the cruelty charged took place between 1861 & 1870, & the adultery charged was in 1889. No act of personal violence was alleged, & the cruelty charged against the husband was his conduct in living for many years with successive mistresses, & telling his wife of his infidelities & of his preference of other

---

presumption arising from apparent delay may always be rebutted by an explanation of the circumstances.—WILLIAMS *v.* WILLIAMS (1878), I. L. R. 3 Calc. 688.—**IND.**

3312 ii. ——.]—WIREMU TAURUA *v.* NIHO TAURUA (1900), 18 N. Z. L. R. 754.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 4.—B. (b).

3324 i. *What delay unreasonable—Thirteen years.*]—In an action of divorce on the ground of adultery, raised by the husband thirteen years after the acts of adultery relied on had come to his knowledge, the ct. dismissed the action, refusing to allow proof of the adultery before answer.—A. B. *v.* C. D. (1853), 15 Dunl. (Ct. of Sess.) 976; 25 Sc. Jur. 555; 2 Stuart, 600.—**SCOT.**

Sect. 7.—Bars to relief: Sub-sect. 4, B. (b), (c) (d) i.]

women to her. The suit was undefended; & the witnesses gave evidence that the wife's health was delicate, & that the husband's conduct had to his knowledge impaired it. The only explanation given by petitioner of her delay in taking proceedings was in effect that she did not wish to proceed until her son had grown up & she could ascertain his wishes, & the judge held that the husband's conduct did not amount to legal cruelty, & that the wife was not entitled to a divorce.

On appeal:—*Held:* even assuming legal cruelty to have been proved against the husband, the wife's delay of twenty years in taking proceedings had not been sufficiently explained, & was so unreasonable that the ct., in exercise of its discretion under the Divorce & Matrimonial Causes Act, 1857 (c. 85), s. 31, ought to refuse to decree dissolution of the marriage.—BEAUCLERK *v.* BEAUCLERK, [1891] P. 189; 60 L. J. P. 20; 64 L. T. 35; 7 T. L. R. 203, C. A.

Annotation:—**Consd.** Pears *v.* Pears (1912), 107 L. T. 26.

3327. —— —— Suit brought for collateral purpose.]—A wife instituted a suit for divorce against her husband on the grounds of desertion & adultery. The desertion was complete & the adultery had been committed seventeen or twenty years before the petition was filed. Petitioner stated that she did not wish to marry again, but had brought the proceedings in order that her husband might be free to marry the woman he was living with:—*Held:* as the wife had not brought the suit to protect herself or to get relief *a vinculo matrimonii*, but for a collateral purpose, the undue delay in bringing proceedings should prevent the ct. exercising its discretion in her favour.—PEARS *v.* PEARS (1912), 107 L. T. 26; 28 T. L. R. 475; 56 Sol. Jo. 596; *on appeal*, 107 L. T. 505, C. A.

3328. Petition on non-compliance with restitution order—Delay in presenting petition for restitution.]—BEAUCLERK *v.* BEAUCLERK, No. 3393,

(c) *In Suits for Judicial Separation.*

Excuses for delay.]—*See* Sub-sect. 4, B. (*f*), *post.*

3329. Undue delay alone—Not absolute bar.]—In a suit for judicial separation, brought by the wife, on the ground of cruelty:—*Held:* lapse of time, though not an absolute bar, yet taken in connection with other circumstances, *e.g.* a deed of separation, may show that the application was not made, *bonâ fide*, for the protection of the wife, but for some collateral purpose; & if the ct. was satisfied of this, the petition ought to be dismissed.—MATTHEWS *v.* MATTHEWS (1860), 3 Sw. & Tr. 161; 29 L. J. P. M. & A. 118; 2 L. T. 472; 6 Jur. N. S. 659; 8 W. R. 591; 164 E. R. 1235.

Annotations:—**Distd.** Cooke *v.* Cooke (1863), 3 Sw. & Tr. 126. **Consd.** Williams *v.* Williams (1866), L. R. 1 P. & D. 178. **Apld.** Besant *v.* Wood (1879), 12 Ch. D. 605. **Consd.** Williams *v.* Williams, [1921] P. 131. **Refd.** Green *v.* Green (1873), L. R. 3 P. & D. 121. **Mentd.** Mahoney *v.* M'Carthy (1891), 8 T. L. R. 97.

3330. —— ——.]—SMALLWOOD *v.* SMALLWOOD, No. 2551, *ante.*

3331. —— ——.]—COOKE *v.* COOKE, No. 3173, *ante.*

3332. —— ——.]—BOULTING *v.* BOULTING, No. 3075, *ante.*

3333. —— ——.]—The husband, a domiciled Englishman, contracted a valid marriage in Switzerland with a Swiss woman in 1872, & they thereupon came to England & lived together in lodgings in London. The marriage was never consummated, owing to the persistent refusal of the wife to submit to any marital intercourse. After remaining together for some months, they separated, & the wife returned to her parents in Switzerland. About two years later the husband contracted a bigamous marriage with another woman, & lived with her as his wife, & had children by her. About 1886 the wife, having heard rumours of her husband's bigamy & adultery, came to England to make inquiries, but took no proceedings thereupon, her reason being that she did not then ascertain sufficient details. In 1889 she obtained full knowledge of all the facts, but did not institute proceedings till 1891, when she filed her petition for a divorce, on the grounds of bigamy & adultery:—*Held:* this was unreasonable delay, & her refusal to allow the marriage to be consummated was misconduct on her part which had directly conduced to the subsequent adultery of her husband, & constituted a discretional bar to her suit for divorce, which was opposed by her husband & refused by the ct. But she was entitled to a judicial separation, inasmuch as neither wilful misconduct conducing to adultery, nor unreasonable delay, constituted any bar, discretional or absolute, under Matrimonial Causes Act, 1857 (c. 85), s. 31, to a prayer for judicial separation.—DIXON *v.* DIXON (1892), 67 L. T. 394.

3334. Effect of undue delay—Where deed of separation—Proof of applicant's bona fides necessary.]—MATTHEWS *v.* MATTHEWS, No. 3329, *ante.*

3335. —— —— Counterclaim by wife in action to enforce deed—Barred after five years.]—BESANT *v.* WOOD, No. 2490, *ante.*

3336. —— Petition on ground of cruelty—Apprehension of further violence.]—SMALLWOOD *v.* SMALLWOOD, No. 2551, *ante.*

3337. —— Court may require explanation—To be satisfied of petitioner's sincerity.]—BOULTING *v.* BOULTING, No. 3075, *ante.*

(d) *In Suits for Nullity.*

i. *On Ground of Impotence.*

Excuses for delay, *see* Sub-sect. 4, B. (*f*), *post.*

3338. General rule.]—(1) In a suit for declaration of nullity of marriage by reason of alleged impotence, the *onus* of proof is on complainant.

(2) The objection of delay in asking relief may be got over when the proof of impotence is complete; but not otherwise.

To open the door to lax & easy declarations of matrimonial nullity would be a grave public mischief; & it is therefore imperative to proceed only upon strict & thoroughly satisfactory proof (LORD SELBORNE, C.).

In 1863 the marriage took place. In 1868 the wife became aware, according to her own evidence, of the husband's impotency, but she continued co-habitation until 1870, when a deed of separation was executed. In 1871 she became aware of her remedy, & she instituted a suit for declaration of nullity. The medical evidence was not conclusive. Her own evidence & that of the husband were conflicting:—*Held:* looking at the evidence & considering the delay, she had failed to make out the charge of impotency. As she had separate property, the suit was dismissed with costs.—CUNO *v.* CUNO (1873), L. R. 2 Sc. & Div. 300; *sub nom.* MANSFIELD (FALSELY CALLED CUNO) *v.* CUNO, 42 L. J. P. & M. 65; 29 L. T. 316, H. L.; *affg.* S. C. *sub nom.* M. (FALSELY CALLED C.) *v.* C. (1872), L. R. 2 P. & D. 414.

Annotation:—**Consd.** Reynolds (otherwise Wilkins) *v.* Reynolds (1876), 45 L. J. P. 89.

3339. ·.]—(1) In a suit for nullity of marriage on the ground of impotency, there may be facts & circumstances proved, which so plainly imply on the part of the complaining spouse, a recognition of the existence & validity of the marriage, as to render it most inequitable & contrary to public policy, that he or she should be permitted to go on to challenge it with effect; but the doctrine designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions & that doctrine apart from "approbate" & "reprobate" has never been recognised by the law of Scotland.

(2) Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful but there is no definite or absolute bar arising from it. The canon law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seeks a decree of nullity on the ground of *propter impotentiam*, if there is no more evidence than that they have for a period of three years lived together in the same house & with ordinary opportunities of intercourse & it is clearly proved there has been no consummation, then if that is the whole state of the evidence inability on the part of the one or of the other will be presumed. On the other hand the presumption to be drawn from non-consummation after three years' cohabitation is capable of being rebutted. But every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given from which the same inference of inability may be drawn. G. & M. were married in 1877. They slept in the same bed for nineteen months, but during only two months & a half of that time did G., the husband, make any attempt to consummate the marriage. He desisted on account, he alleged, of his wife's increasing coldness & repugnance to him. It was admitted that the marriage had never been consummated. In 1879 the parties finally separated, the wife living on her own income with her relations, the husband not giving anything towards her support. In 1882 the wife gave birth to a child of which G. was not the father. G. instituted an action for divorce which M. defended, & she then raised this action of declarator of nullity of marriage on the ground of G.'s impotence. G. denied his impotence. He was personally examined & the medical evidence was that no malformation was apparent from his appearance:—*Held:* M. was not barred *personali exceptione* from insisting in this action, & G.'s impotence had been proved.

(3) Where an appeal involves a question of applt.'s status the House will allow it to be proceeded with notwithstanding the bkpcy. of applt. —G. *v.* M. (1885), 10 App. Cas. 171; 53 L. T. 398; *sub nom.* GORDON *v.* MERRICKS, 1 T. L. R. 326, H. L.

Annotations:—**Consd.** L. (otherwise B.) *v.* B., [1895] P. 274; S. (otherwise G.) *v.* S., [1907] P. 224; C. (otherwise H.) *v.* C., [1921] P. 399.

3340. Must be satisfactorily explained.]—A husband having been about eighteen years married, & having constantly cohabited with his wife for several years, instituted a suit for nullity by reason of the incurable malformation of the wife:—*Held:* (1) time alone will not, but coupled with other facts proving insincerity, will operate as a bar to such a suit; (2) lapse of time must be accounted for; (3) the evidence in the present case did not sufficiently account for lapse of time, but showed partial connection to have taken place between the parties, & the suit was instituted *alio intuitu;* (4) under the whole circumstances of the case, the husband was not entitled to a decree of nullity.—B——N *v.* B——N (1854), 1 Ecc. & Ad. 248; 23 L. T. O. S. 99; 164 E. R. 144, P. C.; *sub nom.* B——N *v.* M——E (FALSELY CALLING HERSELF B——N), 2 Rob. Eccl. 580.

Annotations:—*As to* (1) **Consd.** Anon. (1857), Dea. & Sw. 295. **Refd.** Matthews *v.* Matthews (1860), 3 Sw. & Tr. 161; Castleden *v.* Castleden (1861), 9 H. L. Cas. 186. *As to* (2) **Consd.** W. *v.* R. (1876), 1 P. D. 405. **Refd.** M. *v.* D. (1885), 10 P. D. 75. *As to* (4) **Consd.** Napier *v.* Napier (1915), 84 L. J. P. 177. *Generally*, **Refd.** Cavell *v.* Prince (1866), 15 L. T. 83; Scott *v.* Scott, [1912] P. 241.

3341. ——.]—Where a delay of some years occurs in bringing a suit of this nature the ct. will require an explanation of such delay.

In this case . . . the main fact is proved, but a delay of eleven years before the ct. was applied to requires to be explained (*per* CUR.).—E—— *v.* T—— (FALSELY CALLED E——) (1863), 3 Sw. & Tr. 312; 33 L. J. P. M. & A. 37; 12 W. R. 444; 164 E. R. 1295; *sub nom.* EWENS *v.* TYTHERLEIGH (FALSELY CALLED EWENS), 9 L. T. 421; 9 Jur. N. S. 1301.

3342. ——.]—LEWIS (FALSELY CALLED HAYWARD) *v.* HAYWARD, No. 2382, *ante.*

3343. ——.]—W. (FALSELY CALLED R.) *v.* R. (1876), No. 3351, *post.*

3344. Undue delay alone—Not absolute bar.]—B——N *v.* B——N (1854), No. 3340, *ante.*

3345. —— ——.]—Delay in instituting a suit for nullity of marriage on the ground of impotence is not an absolute bar to the suit, but renders it necessary that the evidence to support the suit should be of the clearest & most satisfactory kind.

Where, therefore, a woman who had married in 1834, lived with her husband till 1838, then separated from him, in 1853 caused him to be sued for her debts, obtained from him an allowance, which was continued till Oct. 1858, & in Nov. 1858, instituted a suit for nullity of marriage on the ground of incompetence:—*Held:* she was bound to give unequivocal proof of the truth of the allegation in the petition; & the Lords not being satisfied that the evidence was of that character, the decree of the ct. below, dismissing the petition, was confirmed.—CASTLEDEN *v.* CASTLEDEN (1861), 9 H. L. Cas. 186; 5 L. T. 164; 11 E. R. 701; *sub nom.* HALL *v.* CASTLEDEN, 8 Jur. N. S. 1; *sub nom.* H—— (FALSELY CALLED C——) *v.* C——, 31 L. J. P. M. & A. 103, H. L.

Annotations:—**Apld.** M—— (falsely called B——) *v.* B—— (1864), 3 Sw. & Tr. 550. **Consd.** W. (falsely called R.) *v.* R. (1876), 1 P. D. 405; M. (otherwise D.) *v.* D. (1885), 10 P. D. 75. **Refd.** Cavell *v.* Prince (1866), L. R. 1 Exch. 246; T. (falsely called D.) *v.* D. (1866), L. R. 1 P. & D. 127; G. *v.* M. (1885), 10 App. Cas. 171. **Mentd.** Serrell *v.* Serrell & Bamford (1862), 31 L. J. P. M. & A. 55.

3346. —— — ·.]—CUNO *v.* CUNO, No. 3338, *ante.*

3347. —— —— .]—M. (OTHERWISE D.) *v.* D. (1885), No. 3568, *post.*

3348. —— ——.]—S. *v.* B. (FALSELY CALLED S.) (1905), No. 2378, *ante.*

3349. Delay coupled with proof of petitioner's insincerity—Absolute bar.]—B——N *v.* B——N (1854), No. 3340, *ante.*

PART XIII. SECT. 7, SUB-SECT. 4.—B. (d) i.

3344 i. *Undue delay alone—Not absolute bar.*]—Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it.—G. *v.* M. (1885), 10 App. Cas. 171; 12 R. (Ct. of Sess.) 36; 22 Sc. L. R. 461, H. L.—**SCOT.**

Sect. 7.—Bars to relief: Sub-sect. 4, B. (d) i. & ii., (e)

3350. —— ——.]—M. married B. in Aug. 1853, & slept in the same bed with him for about two years, when, at his request, she occupied a separate room, but lived in his house till June, 1863, when she left it, & in the early part of the present year petitioned for a decree of nullity, by reason of B.'s impotence. The medical evidence showed her to be a virgin. B. did not submit himself to inspection:—*Held:* the lapse of time, coupled with indirect motives in bringing the suit (mentioned in the judgment), disentitled petitioner to the relief sought.—M—— (FALSELY CALLED B——) *v.* B—— (1864), 3 Sw. & Tr. 550; 33 L. J. P. M. & A. 203; 10 L. T. 847; 164 E. R. 1389; *sub nom.* MARRIOTT (FALSELY CALLED BURGESS) *v.* BURGESS, 10 Jur. N. S. 885.

Annotations:—**Refd.** G. *v.* M. (1885), 10 App. Cas. 174, n.; Scott *v.* Scott, [1912] P. 241.

3351. — — ——.]—In Aug. 1875, a wife, then aged 47, instituted a suit for a declaration of the nullity of a marriage contracted in May, 1849. There was evidence that petitioner was *virgo intacta*, & that resp. was incurably impotent. The petition was dismissed, the ct. being of opinion that there was no satisfactory explanation of the delay in taking proceedings, & that the proceedings had been taken partly in consequence of the disagreements & quarrels between petitioner & resp., & not with the single object of obtaining redress for the injury done to petitioner by resp.'s incapacity.—W. (FALSELY CALLED R.) *v.* R. (1876), 1 P. D. 405; *sub nom.* REYNOLDS (OTHERWISE WILKINS) *v.* REYNOLDS, 45 L. J. P. 89; *sub nom.* R. (FALSELY CALLED W.) *v.* W., 25 W. R. 25.

Annotation:—**Refd.** G. *v.* M. (1885), 10 App. Cas. 171.

3352. —— ——.]—A wife, seven years after her marriage, took proceedings for nullity on the ground that (as the fact was) the marriage had not been consummated owing to the impotence of her husband. It appeared that the impossibility of sexual intercourse had caused unhappy relations between petitioner & resp., in consequence of which they had separated, but that since the filing of the petition she had offered to return to him:—*Held:* the conduct of petitioner had not been such as to constitute an estoppel by reason of want of sincerity, & she was entitled to a decree of nullity.—L. (OTHERWISE B.) *v.* B., [1895] P. 274; 64 L. J. P. 121; 11 R. 673.

Annotation:—**Refd.** C. (otherwise H.) *v.* C., [1921] P. 399.

3353. — — — — Conduct not amounting to insincerity.]—M. (OTHERWISE D.) *v.* D. (1885), No. 3568, *post*.

3354. What is undue delay—Seven years.]—HARRIS (OTHERWISE BALL) *v.* BALL (1790), cited 3 Phillim. 155; 161 E. R. 1286.

Annotations:—**Expld.** Ferrers *v.* Ferrers (1791), 1 Hag. Con. 130. **Apld.** Norton *v.* Seton (1820), 3 Phillim. 147. **Consd.** Miles *v.* Chilton (1849), 1 Rob. Eccl. 684. **Dbtd.** B——n *v.* B——n (1854), 1 Ecc. & Ad. 248. **Refd.** Briggs *v.* Morgan (1820), 2 Hag. Con. 324.

3355. —— ——.]—GUEST *v.* SHIPLEY (FALSELY CALLING HERSELF GUEST), No. 3036, *ante*.

3356. —— Eleven years.]—E—— *v.* T—— (FALSELY CALLED E——) (1863), No. 3341, *ante*.

3357. —— Eight years.]—In a suit by a woman for nullity on the ground of the man's impotence, petitioner's evidence that the marriage had never been consummated was neither corroborated nor contradicted, the medical evidence being consistent both with consummation & non-consummation. It appeared that cohabitation had continued for eight years without complaint on the part of petitioner, & that the separation was caused by resp.'s ill-treatment of her. The ct. found that the charge was not sufficiently proved, & dismissed the petition.

(2) The wife's costs of the hearing of a suit of nullity instituted by her on the ground of the husband's impotence were ordered to be paid by the husband to the extent of the sum for which he had deposited security in the registry, although the petition was dismissed.—T. (FALSELY CALLED D.) *v.* D. (1866), L. R. 1 P. & D. 127; 14 L. T. 227; 12 Jur. N. S. 673; *sub nom.* TAVERNOR (FALSELY CALLED DITCHFIELD) *v.* DITCHFIELD, 35 L. J. P. & M. 51; 12 Jur. N. S. 344.

Annotation:—*As to* (1) **Refd.** G. *v.* M. (1885), 10 App. Cas. 174, n.

3358. —— Three years—After knowledge of respondent's impotency.]—CUNO *v.* CUNO, No. 3338, *ante*.

3359. Effect of undue delay—Strict proof rendered essential.]—CASTLEDEN *v.* CASTLEDEN, No. 3345, *ante*.

3360. — — ——.]—CUNO *v.* CUNO, No. 3338, *ante*.

ii. *On Ground of Minority.*

3361. General rule.]—Lapse of time offered no bar to a suit for nullity of marriage by licence by reason of minority & want of consent of the father.—DUINS *v.* DONOVAN (OTHERWISE DUINS) (1830), 3 Hag. Ecc. 301; 162 E. R. 1165.

(e) In Suits for Restitution of Conjugal Rights.

Excuses for delay.]—*See* Sub-sect. 4, B. (*f*), *post*.

3362. Whether bar to relief.]—MORDAUNT *v.* MORDAUNT (1794), 1 Hag. Con. 135, n.; 161 E. R. 502.

3363. ——.]—Delay is no bar to a suit for restitution of conjugal rights.—BEAUCLERK *v.* BEAUCLERK (1894), 71 L. T. 376; 59 J. P. 8; 6 R. 657; *subsequent proceedings*, [1895] P. 220.

3364. Twenty-five years' delay—Disorderly conduct after separation.]—DRAPER *v.* DRAPER, No. 3016, *ante*.

(f) Excuses for Delay.

i. *In General.*

3365. May be set out in affidavit.]—BEST *v.* BEST (LADY), No. 3312, *ante*.

3366. Few excuses for delay.]—CAMPBELL *v.* CAMPBELL, No. 4369, *post*.

ii. *Poverty.*

3367. General rule.]—A husband who, upon the discovery of his wife's adultery, commences a suit against her for divorce, but abandons such suit through want of funds to carry it on, is not thereby barred from seeking a divorce at a subsequent period.—COOD (OTHERWISE COODE) *v.* COOD (OTHERWISE COODE) (1838), 1 Curt. 755; 163 E. R. 262.

3368. ——.]—On the termination of an adulterous intercourse an agreement was entered into between the husband & the adulterer, officers in the same regiment, then stationed in India, that

PART XIII. SECT. 7, SUB-SECT. 4.—B. (f) i.

n. *Ignorance of fact.*]—Petitioner did not become aware of resp.'s adultery until shortly before instituting these proceedings:—*Held:* petitioner was not guilty of any laches.—FRASER *v.* FRASER, 21 C. L. T. 356.—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 4.—B. (f) ii.

3367 i. *General rule.*]—A delay of several years in instituting a suit will not disentitle petitioner to relief if the delay has arisen through want of means.—MAY *v.* MAY (1890), 8 N. Z. L. R. 763.—**N.Z.**

the latter should pay the expenses of the wife's return to England, & should allow her £100 a year, & should exchange into another regiment, the husband undertaking that the adulterer should be put to no expense by any proceedings to be taken for the purpose of obtaining a divorce. The adulterer fulfilled the agreement, with the exception of his promise to exchange into another regiment:—*Held:* (1) as the agreement was made not with a view to the continuation of the adulterous intercourse, but for the purpose of restoring the wife to her friends, it was no bar to a divorce; (2) the adulterer, as he had not fulfilled his promise, ought to be condemned in costs.

(3) A petitioner is not guilty of "unreasonable delay" in presenting his petition within Matrimonial Causes Act, 1857 (c. 85), s. 31, notwithstanding a long period may have elapsed since the adultery, if he is prevented by poverty from taking earlier steps to obtain a divorce.

(4) The ct. will not order a husband, who has obtained a decree of dissolution of marriage, to secure to the wife a gross or annual sum of money under sect. 32 of above Act unless proof of the husband's ability to pay it be given.

The plea of condonation entirely fails as the doctrine on this subject is now settled; for whatever Christian forgiveness petitioner may have been ready to extend to his wife after her fall, it is clear that he never intended nor gave her or any one else reason to believe that he intended to live with her again as his wife (LORD CAMPBELL, C.J.). —RATCLIFF *v.* RATCLIFF & ANDERSON (1859), 1 Sw. & Tr. 467; 29 L. J. P. M. & A. 171; 33 L. T. O. S. 262; 5 Jur. N. S. 714; 7 W. R. 726; 161 E. R. 816.

Annotations:—As to (1) **Refd.** Medley *v.* Medley (1882), 51 L. J. P. 74. *Generally,* **Mentd.** Niboyet *v.* Niboyet (1878), 4 P. D. 1; Regan *v.* Regan (1892), 67 L. T. 720.

3369. ——.]—PEARSON *v.* PEARSON, No. 2432, *ante.*

3370. Four years.]—A husband in 1878 obtained a judicial separation, & £50 damages against the co-resp., but he took no steps to recover the damages. The wife continued to cohabit with the co-resp., & in 1882 the husband petitioned for a dissolution of his marriage. The reason which he gave for the delay & for not enforcing the claim for damages was that he had no money, being only in receipt of weekly wages, & that he hoped his wife would come back & live with him: —*Held:* the delay was not unreasonable, & petitioner was entitled to a decree.—MASON *v.* MASON (1883), 8 P. D. 21; 52 L. J. P. 27; 48 L. T. 290; 31 W. R. 361; 2 T. L. R. 266, C. A.

3371. Eight years.]—A lapse of eight years from the discovery of the wife's adultery till the petition for a divorce was presented, sufficiently accounted for by the husband's inability to bear the expenses of a divorce bill.—*Re* BROOKS' DIVORCE BILL (1847), 1 H. L. Cas. 159; 9 E. R. 714, H. L.

3372. Nine years.]—A lapse of nine years from the admitted discovery, & of nineteen years from the fact, of the wife's adultery, was not a bar to petitioner's right to a divorce *a vinculo*, he having shown that he was not able, for want of funds, to apply to Parliament sooner.—*Re* LARDNER'S DIVORCE (1839), 6 Cl. & Fin. 569; 7 E. R. 812, H. L.

3373. ——.]—The husband, in 1881, found a letter in his wife's possession, & taxed her with adultery with a certain man. She admitted it, & he, the husband, left her. He was a journeyman jeweller, & had no means at that time to commence proceedings. He, about 1890, found that she was living with another man as his wife, by whom she had four children. The ct., finding that he was justified in leaving his wife upon her confession of adultery in 1881, & that his explanation of want of means was sufficient to explain the delay in taking proceedings to have his marriage dissolved, granted him a decree *nisi*.—FAULKES *v.* FAULKES & STAINTON (1891), 64 L. T. 834.

3374. Ten years.]—Petitioner married her husband in 1876 & lived with him till 1880, when he left her, & went to live with another woman. Upon the advice of resp.'s brother she instituted a suit for judicial separation on the ground of adultery, but abandoned it at his request, & entered into a deed, resp.'s brother allowing her £1 a week. In 1883 he returned to petitioner, & she forgave him, & lived with him for a short time, when he again left her, without notice, & had contributed nothing to the support of herself or their four children. She knew that he went back to the woman he had previously been living with, but, having no means, she was unable to take proceedings till now, when her mother lent her the money to do so: —*Held:* she had not been guilty of any misconduct disentitling her to a divorce upon the grounds of adultery & desertion.—BINNEY *v.* BINNEY (1893), 69 L. T. 498.

Annotations: —**Refd.** Houghton *v.* Houghton, [1903] P. 150; Copsey *v.* Copsey & Erney, [1905] P. 94.

3375. Fourteen years—After separation.]—MAXWELL'S DIVORCE BILL, [1911] W. N. 220.

3376. —— Poverty not proved—Petition dismissed.]—A husband discovered his wife in adultery in Sept. 1859, & separated from her, but did not present a petition for the dissolution of his marriage till July, 1873. He was a coal hauler, & admitted that, at the time when the petition was presented, he had stock-in-trade of the value of about £600, & nine horses, besides some cottages which he had purchased through a building society. The ct. refused to accept want of means as a sufficient explanation of the time which he allowed to elapse before taking proceedings, & dismissed the petition on the ground of unreasonable delay.—SHORT *v.* SHORT & BOLWELL (1874), L. R. 3 P. & D. 193.

Annotation:— **Refd.** Pears *v.* Pears (1912), 107 L. T. 26.

3377. Fifteen years.]—MAXWELL'S DIVORCE BILL, [1911] W. N. 220.

3378. Sixteen years.]—A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses, that they did not find him until three years after the discovery of the adultery, & petitioner was not able to pay the expenses of an action. A lapse of sixteen years from the adultery not made an objection to the application for divorce at the end of that time.—*Re* MARTIN'S DIVORCE (1847), 1 H. L. Cas. 79; 9 E. R. 681, H. L.

3379. Twenty years.]—The wife finally left her husband in 1844, who had been guilty of cruelty & adultery; no subsequent acts of adultery were proved; till shortly before the petition was filed, the wife had been without the means of proceeding in the Ecclesiastical or this ct.; the husband had led a wandering life, without any regular employment:—*Held:* the wife had not been guilty of unreasonable delay in presenting her petition.—HARRISON *v.* HARRISON (1864), 3 Sw. & Tr. 362; 33 L. J. P. M. & A. 44; 10 L. T. 138; 10 Jur. N. S. 371; 12 W. R. 808; 164 E. R. 1315.

3380. ——.]—The ct., in the circumstances,

3379 i. *Twenty years.*]—Continuous poverty a sufficient excuse for a delay of twenty years in the presenting of a petition for dissolution of marriage by a husband.—SNELLGROVE *v.* SNELLGROVE 13 N. Z. L. R. 150.—**N.Z.**

Sect. 7.—*Bars to relief: Sub-sect.* 4, *B.* (*f*) *ii. & iii., & C.* (*a*) *i. & ii.*]

granted a decree *nisi* for a dissolution of marriage, though a delay of twenty years had taken place.—EDWARDS *v.* EDWARDS & DONCASTER, [1900] 17 T. L. R. 38.

iii. *Other Excuses.*

3381. Illness.]—A husband, immediately after his wife's elopement, brought an action & obtained a verdict for damages against the adulterer, & also proceeded against the wife in the Ecclesiastical Ct. & obtained a divorce there, but did not for five years from the elopement apply for a divorce in Parliament:—*Held:* the delay was sufficiently accounted for by the absence of the wife in America, & by the inability of the husband, in consequence of his affliction, to attend to any business.—*Re* HEAVISIDE'S DIVORCE BILL (1845), 12 Cl. & Fin. 333; 8 E. R. 1435, H. L.

3382. Absence of respondent abroad.]—*Re* HEAVISIDE'S DIVORCE BILL, No. 3381, *ante*.

3383. Ignorance of co-respondent's whereabouts.]—*Re* MARTIN'S DIVORCE, No. 3378, *ante*.

3384. ——.]—F. married in 1851. In 1853 he took the command of the squadron in China, but returned to Europe in the summer of 1854. In Oct. his wife eloped with B. from Paris, with whom she had continued to live near Brussels. F. obtained a sentence of divorce *a mensâ et thoro*, & steps were also taken to obtain a divorce bill, but discontinued, in consequence of F. being unable to bring an action for crim. con. against B. who remained abroad. F. now petitioned for a dissolution of the marriage:—*Held:* there had been no such "unreasonable delay" in presenting the petition, as to raise a case for the discretion of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 31.

"Unreasonable delay" is delay from which it would appear that petitioner is insensible to the injury of which he complains.—PELLEW *v.* PELLEW & BERKELEY (1859), 1 Sw. & Tr. 553; 29 L. J. P. & M. 44; 2 L. T. 89; 164 E. R. 856.

3385. Ignorance of husband respondent's whereabouts.]—HARRISON *v.* HARRISON, No. 3379, *ante*.

3386. Mistake of law—Belief that foreign decree good in England—Opinions of counsel.]—B., a domiciled Englishman, intermarried with C., a Scotchwoman, at Gretna Green & at St. George's, Hanover Square, in Aug. 1837. B. & C. cohabited together in Wales, England & Scotland, but principally in the latter, till March, 1841, soon after which date C. eloped with P., whereupon B. obtained a sentence of divorce in the Ct. of Session in Scotland, on July 3, 1841. On July 26, 1841, C. intermarried with P. at Glasgow, & lived with him till his death in June, 1855. B. supposed the sentence of the Scotch ct. to be of universal operation, & that supposition was confirmed by opinion of counsel in 1846. In 1854 he obtained the opinions of two counsel, which were against the validity of the Scotch sentence in England; in consequence of which he presented a petition for leave to bring into the House of Lords a Bill, declaring his marriage with C. absolutely void since July 3, 1841, which petition was rejected. In 1858 B. petitioned the ct. for dissolution of marriage by reason of C.'s adultery in Apr. 1841, & at other times:—*Held:* there was no such lapse of time as to constitute unreasonable delay under Matrimonial Causes Act, 1857 (c. 85), s. 31.—TOLLEMACHE *v.* TOLLEMACHE (1859), 1 Sw. & Tr. 557; 30 L. J. P. M. & A. 113; 2 L. T. 87; 23 J. P. 679; 164 E. R. 858.

Annotations:—**Consd.** Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511. **Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Niboyet *v.* Niboyet (1878), 4 P. D. 1; Green *v.* Green, [1893] P. 89; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517.

3387. Belief that own adultery an absolute bar.]—POINTON *v.* POINTON & SUTTON, No. 3459, *post*.

3388. Ignorance of right to remedy.]—The parties were married in 1887, & the wife refused to consummate the marriage. The husband, three months afterwards, in the honest belief & being so advised that he could not obtain relief from the ct. as the marriage had taken place so recently, executed a separation deed. In 1905 he consulted other solrs. & filed a petition for nullity of marriage. Upon evidence, the ct. pronounced a decree *nisi*.—M. *v.* M. (OTHERWISE H.) (1906), 22 T. L. R. 719.

Annotation:—**Mentd.** Dickinson *v.* Dickinson (otherwise Phillips) (1913), 109 L. T. 408.

3389. Deference to parent's wishes.]—A wife separated from her husband in 1850, in consequence of his incestuous adultery with her sister; & in 1868 she presented a petition for a dissolution of marriage on the ground of that adultery. Her explanation of the delay which had occurred in presenting the petition was, that her mother was very anxious to avoid a public exposure of the scandal, & she yielded to her mother's urgent entreaties, & forbore to take proceedings until her mother's death:—*Held:* petitioner had been guilty of unreasonable delay, but not of such a character as to deprive her of her right to a decree.—NEWMAN *v.* NEWMAN (1870), L. R. 2 P. & D. 57; 39 L. J. P. & M. 36; 22 L. T. 552; 18 W. R. 584.

Annotation:—**Mentd.** Parry *v.* Parry, [1896] P. 37.

3390. ——.]—MAXWELL'S DIVORCE BILL, [1911] W. N. 220.

3391. Hope of wife's return.]—MASON *v.* MASON, No. 3370, *ante*.

3392. ——.]—Petitioner knew of his wife's adultery & the birth of an illegitimate child in Jan. 1914, & though his wife continued to live in adultery he delayed taking proceedings until July, 1917, as the idea of a divorce was against his religious scruples & as he had hopes until then that resp. would give up co-resp. The judge at the trial dismissed the petition on the ground of unreasonable delay in presenting it:—*Held:* there has been unreasonable delay & the judge had properly exercised his discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31.—COPPINGER *v.* COPPINGER & LUTWYCHE (1918), 34 T. L. R. 588, C. A.

Annotation:—**Refd.** Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511.

3393. Separation deed—Preventing petitioner from charging respondent with desertion—Until

PART XIII. SECT. 7, SUB-SECT. 4.—B. (f) iii.

3389 i. *Deference to parent's wishes.*]—Resp. deserted her husband, petitioner, in 1885. In 1887 petitioner presented a petition for divorce in Melbourne, but withdrew it on the representations of resp., so that it might not cause pain & annoyance to her mother. In 1903 resp. came to New Zealand & claimed to be his wife. Petitioner then presented another petition for divorce on the ground of desertion:—*Held:* petitioner's right to a divorce was not barred by the delay which had taken place, in the circumstances, nor by his own adultery, this not having induced or contributed to the misconduct of resp.—DUFF *v.* DUFF (1904), 23 N. Z. L. R. 674.—**N.Z.**

o. *Absence of petitioner abroad.*]—*Held:* a husband who whilst resident in Australia had been cognisant of his wife's adultery at home for 10 years before raising an action of divorce was not barred by *mora* since the adultery was continued till close on his return immediately after which the action was raised.

Mora as a bar to an action of divorce

after order for restitution.]—In a petition by a wife for the dissolution of her marriage, it appeared that her husband & she were married in 1858 but had lived voluntarily apart under a separation deed since 1870. In 1890 she had petitioned for a divorce on the ground of adultery coupled with cruelty but her petition had been dismissed on the ground of unreasonable delay. She afterwards wrote to her husband proposing that they should live together, & upon his refusal, sued in 1894 for restitution of conjugal rights. Her husband did not plead the deed of separation & she obtained a decree. Her husband did not comply with the decree, & had been guilty of adultery. The wife now claimed a divorce on the ground of adultery coupled with desertion under Matrimonial Causes Act, 1884 (c. 68), s. 5, it would have been impossible for her to prove a desertion before the refusal of her husband to resume cohabitation:—*Held:* as there was nothing to show when the husband became unable or unwilling to use the deed of separation as an answer to the suit for restitution of conjugal rights it was impossible to say that such suit was practicable before it was in fact instituted, & the ct. was therefore justified in holding that there had been no unreasonable delay, & in granting a decree *nisi* for the dissolution of the marriage.—BEAUCLERK *v.* BEAUCLERK, [1895] P. 220; 64 L. J. P. 102; 43 W. R. 655; 11 T. L. R. 379; 11 R. 654.

3394. Suit to free respondent to re-marry.]—Petitioner is of course entitled to his own opinions as to the morality & the legality of the decrees of this ct. but if he allows those opinions to render him indifferent to seeking for relief then he falls within what the law calls "undue delay." He says that in his opinion & belief a decree for divorce is useless to free either himself or his wife & yet he admits that the real inducement he had to file his petition was the fact that his wife had given birth to an illegitimate child. The real reason for this suit was that the wife might be released & put in a position to marry the co-resp. That is no excuse for "undue delay" (JEUNE, P.).—PUGHE *v.* PUGHE & OWEN (1897), 13 T. L. R. 465.

3395. Hope or expectation of respondent's death—Respondent becoming insane after adultery.]—The hope or expectation operating in the mind of a husband, that he may be released from the matrimonial tie by the death of his wife, who, after committing adultery, has become insane, may be accepted as a valid excuse & explanation of what would otherwise be "unreasonable delay" in taking proceedings for the dissolution of the marriage.—JOHNSON *v.* JOHNSON, [1901] P. 193; 70 L. J. P. 44; 84 L. T. 725.

Annotation:—**Consd.** Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511.

3396. Religious objections.]—COPPINGER *v.* COPPINGER & LUTWYCHE, No. 3392, *ante*.

must be such as to infer a *remissio injuriæ*.—HELLON *v.* HELLON (1873), 11 Macph. (Ct. of Sess.) 290; 45 Sc. Jur. 192.—**SCOT.**

p. *Uncertainty as to respondent's adul-*.]—BAKER *v.* BAKER, 21 C. L. T. .—**CAN.**

PART XIII. SECT. 7, SUB-SECT. 4.—C. (a) i.

3397 i. *How exercised—General rule.*]—On an appeal by a husband from the dismissal of a petition for divorce:—*Held:* the evidence warranted the trial judge in finding that petitioner by his wrongful treatment of his wife which culminated in driving her from her home, or at least justified her in leaving it, had conduced to her infidelity, & that, therefore, the refusal of the divorce had been a proper exercise of discretion.—TORGERSON *v.* TORGERSON, [1924] 3 W. W. R. 451; 4 D. L. R. 850.—**CAN.**

3397 ii. ——.] In a suit for dissolution of marriage the question whether petitioner's conduct has conduced or contributed to resp.'s misconduct is for the ct.; & the ct. can, where it is of opinion that petitioner's conduct has induced or contributed to the wrong complained of, dismiss the petition notwithstanding a finding by a jury to the contrary.—OWEN *v.* OWEN & PATIRA (1911), 31 N. Z. L. R. 93.—**N.Z.**

C. Conduct conducing to Adultery.

(a) In Suits for Dissolution of Marriage.

i. *Discretion of Court.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*d*); & Sect. 7, sub-sect. 4, A., *ante*.

3397. How exercised—General rule.]—As between the parties, two limitations have been fixed by authority on the exercise of the discretion given by Matrimonial Causes Act, 1857 (c. 85), s. 31, namely, that the ct. cannot give relief to a petitioner whose misconduct has conduced to the adultery of resp., or to a resp. whose misconduct has conduced to the adultery of petitioner. Within those limits & so far as the public interest is concerned the application of a well-known principle like that laid down in *Constantinidi* v. *Constantinidi*, No. 3491, *post*, namely, that the ct. should endeavour to promote virtue & morality, & to discourage vice & immorality, is more consistent with the statutory provision creating the discretion of the ct. than the determination of cases upon any classification laid down in advance.—TICKNER *v.* TICKNER, [1924] P. 118; 93 L. J. P. 39; 131 L. T. 159; 40 T. L. R. 367; 22 L. G. R. 692.

3398. —— On terms—Papers sent to King's Proctor.]—STEVENS *v.* STEVENS & FIELD, No. 3426, *post*.

3399. —— —— Maintenance of wife.]—LANDER *v.* LANDER, No. 5427, *post*.

3400. —— —— ——.]—EDWARDS *v.* EDWARDS & FRANCIS, No. 3412, *post*.

3401. ·.]—PARRY *v.* PARRY, No. 3433, *post*.

3402. —— Where petitioner not charged with wilful misconduct or neglect.]—If it appears to the ct., as the result of the evidence, that a petitioner has been guilty of such wilful neglect & misconduct as has conduced to the adultery, the ct., taking cognisance of it, may dismiss the petition, although no charge of such neglect or misconduct has been pleaded. Tacit acquiescence may amount to such neglect or misconduct.

Where, in a petition for divorce by the husband on the ground of his wife's adultery, it appeared that he had taken no steps beyond mere verbal remonstrances to terminate a course of conduct on the part of his wife & co-resp. which, if it did not bring about actual adultery at the time, eventually resulted in it:—*Held:* petitioner was not entitled to relief, & the petition should be dismissed.—ROBINSON *v.* ROBINSON & DEARDEN, [1903] P. 155; 72 L. J. P. 63; 89 L. T. 74.

ii. *"Wilful Neglect or Misconduct."*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*d*).

Where the parties have separated, *see* Sub-sect. 4, C. (*a*) iii., *post*.

3403. Failure to give wife security & comfort

PART XIII. SECT. 7, SUB-SECT. 4.—C. (a) ii.

3403 i. *Failure to give wife security & comfort—Of home & society.*]—A husband by throwing his wife aside & by wilful neglect of her, & by refusal to continue to act the part of a husband to her, & notwithstanding that she had ample money for her necessities:—*Held:* to have forfeited his right, in the discretion of the ct., to a divorce on the ground of her subsequent adultery.—KESLERING *v.* KESLERING & A.-G. FOR SASKATCHEWAN, [1921] 2 W. W. R. 967; 14 Sask. L. R. 367.—**CAN.**

3403 ii. ——.]—Where a husband has wilfully separated himself from his wife without reasonable excuse, &

Sccl. 7.—& iii.] *to relief: Sub-sccl. 4, C. (a) ii.*

Of home & society.]—(1) It is not however to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, & without consent, from the discharge of duties that belong to the very institution of marriage. . . . A husband is expected by the law to pay a due attention to the behaviour of his wife & to give her the benefit of some superintendence, where she is placed in dangerous situations (SIR WILLIAM SCOTT).

(2) A third plea of defence offered, but with less effect, is, that his treatment of his wife was, as it really appears to have been, marked with unkindness & disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this ct. for the protection of a separation by reason of cruelty: & if the ill treatment is not of that gross kind, against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind & person, but in the purity of her own conduct, & in a dignified submission to an undeserved, affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect where infidelity, on the part of the husband, is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his wife, & therefore more likely to be diverted to other less worthy objects (SIR WILLIAM SCOTT).—FORSTER *v.* FORSTER (1790), 1 Hag. Con. 144; 161 E. R. 504.

Annotations:—As to (1) **Apld.** Synge *v.* Synge, [1900] P. 180. **Consd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Chettle *v.* Chettle (1821), 3 Phillim. 507; Wily *v.* Wily, [1918] P. 1; Jackson *v.* Jackson, [1924] P. 19. *As to* (2) **Consd.** Eldred *v.* Eldred (1840), 2 Curt. 376. **Refd.** Cocksedge *v.* Cocksedge (1844), 3 Notes of Cases, 218. *Generally*, **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II., 679; Sopwith *v.* Sopwith (1860), 2 Sw. & Tr. 160; Everett *v.* Everett & McCullum, [1919] P. 298; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3404. ——— ———.]—The husband is bound to give the wife the security & comfort of his home & society so far as his position & business will admit, & if the ct. is satisfied that the husband has failed in this duty it will, in the exercise of its discretion, refuse to dissolve the marriage by reason of the wife's adultery.—JEFFREYS *v.* JEFFREYS & SMITH (1864), 3 Sw. & Tr. 493; 4 New Rep. 73; 33 L. J. P. M. & A. 84; 10 L. T. 309; 10 Jur. N. S. 572; 12 W. R. 809; 164 E. R. 1366.

3405. ——— Belief in private means of wife Petitioner entrapped into marriage.]—Petitioner, an officer of marines, when only twenty years of age, in Dec. 1883, married resp., relying upon statements made by her as to her having been previously entrapped into a ceremony of marriage with a man whom she afterwards found had a wife then living. Petitioner, soon after his marriage, found that his wife's statements as to the alleged bigamous marriage were false, & that she had, in fact, been guilty of pre-marital incontinence, & was in an advanced stage of pregnancy. Still believing, however, that her former statements, as to her being possessed of private means, were true, petitioner told her to go to her friends, & he never contributed to her support, & did not see her again for about seven years, being most of that time on service. During that time resp. committed adultery:—*Held:* petitioner's conduct did not disentitle him to relief.—KENNEDY *v.* KENNEDY & SCHURCH (1890), 62 L. T. 705.

3406. Breach of marital duty.]—CUNNINGTON *v.* CUNNINGTON & NOBLE, No. 3423, *post*.

3407. Conducing to respondent's first fall from virtue.]—The wilful neglect or misconduct which deprives a petitioner of his right to a decree under Matrimonial Causes Act, 1857 (c. 85), s. 31, is wilful neglect or misconduct which has conduced to resp.'s first fall from virtue. Conduct which would have amounted to wilful neglect & misconduct within the sect., if committed prior to resp.'s first act of adultery, but not amounting to connivance, will not deprive petitioner of his right to a decree when not committed until after an adulterous intercourse has been established between resp. & co-resp.—ST. PAUL *v.* ST. PAUL & FARQUHAR (1869), L. R. 1 P. & D. 739; 38 L. J. P. & M. 57; 21 L. T. 108; 17 W. R. 1111.

Annotations:—**Folld.** Millard *v.* Millard & Bastone (1898), 78 L. T. 471. **Refd.** Cox *v.* Cox (1893), 70 L. T. 200.

3408. ———.]—Where a wife has committed several acts of adultery with a co-resp., & the husband has been guilty of conduct conducing to some of these acts, the husband will not lose his right to a divorce if the first of these acts occurred prior to any such conduct.—MILLARD *v.* MILLARD & BASTONE (1898), 78 L. T. 471.

3409. Deliberate inducement to adultery.]—ALLEN *v.* ALLEN & D'ARCY, No. 3063, *ante*.

3410. Cruelty.]—PEARMAN *v.* PEARMAN & BURGESS, No. 3579, *post*.

3411. ———.]—BADHAM *v.* BADHAM & GORST, No. 3592, *post*.

3412. ———.]—Upon a petition by a husband for divorce on the ground of his wife's adultery, in which resp. countercharged cruelty & adultery, the jury found that resp. & co-resp. had committed adultery; that petitioner had not committed adultery, but that he had been guilty of cruelty towards his wife. There was no finding as to whether petitioner's cruelty had conduced to resp.'s adultery.

The ct., being of opinion that the adultery of resp. with co-resp. was not brought about by petitioner's cruelty, exercised its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, by pronouncing a decree *nisi*, at the same time directing that the decree should not be made absolute unless petitioner secured to his wife by deed, an allowance of £36 a year for her maintenance.

The ct. further ordered that the deed should contain a clause, providing that the allowance to the wife should only be payable so long as she should remain chaste & unmarried.—EDWARDS *v.* EDWARDS & FRANCIS, [1894] P. 33; 63 L. J. P. 62; 70 L. T. 39.

Annotations:—**Refd.** Parry *v.* Parry, [1896] P. 37; Tannam *v.* Tannam, Beeson & Ballard (1897), 13 T. L. R. 453; Pryor *v.* Pryor, Cowie & Macdonald, [1900] P. 157; Squire *v.* Squire & O'Callaghan (1904), 21 T. L. R. 41.

3413. ———.]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *post*.

3414. Disregard of dangerous intimacy—Between wife & co-respondent.]—DERING *v.* DERING & BLAKELEY, No. 5146, *post*.

has wilfully neglected her, such conduct may conduce to adultery by the wife & is a bar to the husband's right to divorce on the grounds of adultery.—S. *v.* S., [1922] 3 W. W. R. 462; 69 D. L. R. 311.—**CAN.**

3406 i. *Breach of marital duty.*]—Divorce refused a husband on the ground of neglect.—G. *v.* G. & M., [1922] 1 W. W. R. 463; 69 D. L. R. 770.—**CAN.**

3406 ii. ———.]—If a husband has wilfully neglected or ill-treated his wife & refused to act towards her as a husband should, he may be held to have forfeited his right to a divorce on the ground of her subsequent adultery.—L. *v.* L. & K. (1922), 62 D. L. R. 581; [1922] 1 W. W. R. 224.—**CAN.**

q. *Husband's conduct—Remotely conducing to wife's adultery—No bar.*]

3415. Mere verbal remonstrances.]—ROBINSON *v.* ROBINSON & DEARDEN, No. 3402, *ante*.

3416. Permitting co-respondent to pay frequent visits—Permitting wife to receive allowance from co-respondent—Receiving provisions from co-respondent.]—BROWN *v.* BROWN & ROBEY, No. 3080, *ante*.

3417. Flirtation by husband—Despite respondent's remonstrances.]—A husband petitioned for a divorce upon the ground of his wife's adultery. The wife, in her answer, denied the adultery, pleaded condonation, & alleged as follows: "That in & since the year 1887 petitioner had paid marked attention to an unmarried lady with whom petitioner & resp. were acquainted, & when resp. has remonstrated with him he has told her that he would not & could not give up his intimacy with the said lady, & he has invited the said lady to his house, & corresponded with her notwithstanding resp.'s repeated objections & remonstrances, & has made her presents, & that he has absented himself from resp.'s society in order to enjoy the society of the said lady, & has frequently told resp. that he has been fascinated by the said lady, & that he would have run away with her if she had consented; that in & since the year 1890, petitioner has paid marked attention to another lady, & has refused to give up his intimacy with her, notwithstanding resp.'s objections & remonstrances, & that he has been guilty of acts of undue familiarity with the said lady"; & that petitioner, by such wilful neglect & misconduct, had conduced to the adultery (if any) of resp. The following particulars were subsequently filed in respect of the statements: "The name of the unmarried lady was A., & the flirtation extended from the year 1887 to the filing of the petition. The name of the unmarried lady was B., & the flirtation extended from Nov. 12, 1892, to the filing of the petition; & the act of familiarity spoken of, petitioner putting his arm round her waist, & she sitting on his knee at . . . in the month of Dec. 1892, & his arm round her waist on Jan. 2":—*Held:* if the facts alleged were proved, it was not impossible that the judge might come to the conclusion that the husband had by his neglect conduced to the wife's adultery, & therefore the ct. would not order them to be struck out.—COX *v.* COX (1893), 70 L. T. 200, C. A.

3418. Tacit acquiescence.]—ROBINSON *v.* ROBINSON & DEARDEN, No. 3402, *ante*.

3419. Acquiescence in adultery—Intercourse after knowledge of guilt.]—HARE *v.* HARE & DAVIDSON (1920), 36 T. L. R. 331.

3420. Actively aiding respondent in obtaining foreign divorce decree—Adultery subsequent to decree.]—LANKESTER *v.* LANKESTER & COOPER, No. 3069, *ante*.

Adultery brought about by petitioner's agent.]—*See* Sub-sect. 3, B. (*b*) v., *ante*.

iii. *Where the Parties are Separated.*

Wilful neglect or misconduct generally, *see* Sub-sect. 4, C. (*a*) ii., *ante*.

3421. Small allowance to wife—Acquiescence in late hours.] A. shortly after his marriage was, with his wife, residing in the house of his mother. The wife, in consequence of some disagreement with her mother-in-law, insisted on leaving the house, & on her husband declining to do so, she, with his consent, left & took lodgings elsewhere, where she remained three months. During this time her husband continued to reside apart from her, allowing her a small sum weekly for her maintenance, & visiting her occasionally, but only passed the night with her three times. On calling at her lodgings he frequently found her absent as late as eleven & twelve o'clock at night, she having no occupation which necessitated her absence, but he made no inquiries as to the mode in which she spent her time, nor remonstrated with her on her absence from home. The wife having committed adultery whilst living apart from her husband, the ct., under Matrimonial Causes Act, 1857 (c. 85), s. 31, refused to dissolve the marriage at the suit of the husband, although his case was proved, on the ground that he had been guilty of wilful neglect, which had conduced to the adultery.—GROVES *v.* GROVES & TOMPSON (1859), 28 L. J. P. & M. 108.

3422. —— Separation by consent—Discovery of adultery after sixteen years.]—Petitioner & resp. separated by mutual consent shortly after the marriage, & only met once afterwards. Petitioner allowed her a small sum for her support, & sixteen years after the marriage discovered that she had committed adultery:—*Held:* in the circumstances, petitioner had conduced to the adultery. Petition dismissed.—HAWKINS *v.* HAWKINS (1885), 10 P. D. 177; 54 L. J. P. 94; 34 W. R. 47.

3423. Failure to support wife—Husband in prison.]—The "wilful misconduct" intended by Matrimonial Causes Act, 1857 (c. 85), s. 31, which, in a suit for dissolution of marriage, gives the ct. an option as to dissolving the marriage, although the case of petitioner may have been proved, if he has been guilty of "such wilful neglect or misconduct as has conduced to the adultery," is misconduct amounting to a breach of marital duty.

A., being a clerk in the Post Office, married in Sept. 1849; in Nov. 1850, he was apprehended & convicted of feloniously opening a letter, etc., & imprisoned. The wife was maintained by her relations but an affectionate correspondence subsisted between herself & A. In 1853 she, however, formed a connection with co-resp., & a child was born in Mar. 1854, of which she did not inform her husband till Mar. 1855. He was soon after liberated, & upon the passing of Matrimonial Causes Act, 1857 (c. 85), brought the present suit for dissolution of the marriage:—*Held:* although the adultery would in all probability never have taken place but for the absence of the husband it was not, under Matrimonial Causes Act, 1857 (c. 85), s. 31, such wilful neglect or misconduct as had conduced to the adultery so as to raise a case for the discretion of the ct.; such neglect or misconduct to come within the meaning of the sect. must be neglect of or misconduct towards the other spouse on the part of petitioner.—

—On a husband's petition for divorce on the ground of adultery evidence was given to show that the husband's conduct early in his married life was the cause of his wife's falling into drunken habits, & that this conduct induced the wrong complained of in the petition:—*Held:* the husband's conduct only remotely induced or contributed to the wife's adultery & a decree should not be refused.—TRINDER *v.* TRINDER (1914), 34 N. Z. L. R. 78.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 4.—C. (a) iii.

r. *Failure to support wife—Wife's drunken habits.*]—Where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation.—FORREST *v.* FORREST & MORTON (1901), 8 B. C. R. 19.—**CAN.**

s. *Petitioner's misconduct must induce the conduct complained of—For court to refuse discretion.*]—HALL *v.* HALL (1902), 21 N. Z. L. R. 231.—**N.Z.**

t. *Refusal to cohabit — Conducing*

Sect. 7.—Bars to relief: Sub-sect. 4, C. (a) iii., iv.

CUNNINGTON *v.* CUNNINGTON & NOBLE (1859), 1 Sw. & Tr. 475; 28 L. J. P. & M. 101; 34 L. T. O. S. 45; 8 W. R. 3: 164 E. R. 820.

Annotation:—**Expld.** Cox *v.* Cox (1893), 70 L. T. 200.

3424. —— Minor—Refusal of funds by guardian.]—A ward in Chancery who had no means of his own, at the age of sixteen, married clandestinely a prostitute of about the age of thirty-five. By an order of the Master of the Rolls made a month after the marriage, it was ordered that the husband should be delivered into the custody of his guardian, with liberty for the guardian to send him abroad, & that the wife should be restrained from holding any communication with him. In pursuance of this order, he was sent abroad against his will. The wife being left without means of support, she applied to her husband's guardian for money, but it was refused. For some months after the marriage she conducted herself properly, & then relapsed into her former course of life. In a suit by the husband for dissolution of marriage:—*Held:* as the separation was, on the husband's part, involuntary, & he had no means wherewith to contribute to his wife's support, he had not wilfully separated himself from her nor been guilty of such neglect or misconduct as had conduced to the adultery so as to give the ct. a discretionary power, under Matrimonial Causes Act, 1857 (c. 85), s. 31, to refuse to dissolve the marriage.—BEAVAN *v.* BEAVAN (1862), 2 Sw. & Tr. 652; 1 New Rep. 70; 32 L. J. P. M. & A. 36; 7 L. T. 435; 8 Jur. N. S. 1110: 11 W. R. 155; 164 E. R. 1151.

Annotations:—**Mentd.** Martin *v.* Martin, [1919] P. 283; Rutter *v.* Rutter, [1921] P. 136.

3425. —— Wife's drunken habits—No inquiries for eight years.]—(1) A decree of dissolution of marriage refused to a husband whose wife had been guilty of adultery, where, after living with her for eleven years, he had broken up the home in order to get rid of her because of her drunken habits, & had made no inquiries about her for eight years, when he discovered she had been cohabiting with another man during the interval, & five years after that he had filed his petition.

(2) By rule 62 of the Rules in Divorce & Matrimonial Causes, an application for the rehearing of a cause should be made to a Div. Ct.—HEYES *v.* HEYES & MASON (1887), 13 P. D. 11; 57 L. J. P. 22; 57 L. T. 815; 51 J. P. 775; *affd.* (1888), 36 W. R. 527, D. C.

3426. —— Husband abroad at work.]—Petitioner, who was a carpenter, went to New Zealand in 1875, with the object of improving his position. He asked his wife to accompany him, but she refused, & she & the two children of the marriage remained in England. On his arrival in New Zealand petitioner wrote to his wife asking her to go out to him & to take the children with her, & he offered to nominate her for a free passage. She again refused to go. Petitioner remained some years in New Zealand, earning during that period from £1 to £3 per week. He never sent any money whatever to his wife, nor contributed in any way to her support or that of the two children. In 1884, hearing that his wife was misconducting herself, he returned to England & subsequently instituted these proceedings. The ct. granted a decree *nisi*, but directed that the papers relating to the case should be sent to the Queen's Proctor, for the latter to make further inquiries & to take further proceedings if he should see fit.—STEVENS *v.* STEVENS & FIELD (1889), 61 L. T. 844.

3427. —— Separation through wife's debts.]—The husband & wife were married in 1876. The husband was employed on a railway, &, subsequently, as the driver of a locomotive engine at some lime works. His wages were about 24*s.* a week. Early in the year 1878 they separated, the wife going into domestic service. She shortly afterwards made the acquaintance of co-resp., &, later in the same year, went to live with him, & committed adultery with him. There was no suggestion of misconduct prior to the separation, save that she was a slatternly & thriftless woman, & ran her husband into debt. He made no inquiries as to his wife's mode of life after they separated, nor contributed in any way to her support:—*Held:* the fact of a woman running her husband into debt does not justify him in caring nothing as to her future; & the husband had been guilty of such misconduct as, in the discretion of the ct., barred him from relief.—STARBUCK *v.* STARBUCK & OLIVER (1889), 59 L. J. P. 20; 61 L. T. 876.

3428. Refusal to cohabit—Conviction of wife for criminal offence.]—WILLIAMSON *v.* WILLIAMSON, No. 3006, *ante*.

3429. Separation consequent upon medical advice—Payment of allowance made conditional on communications through solicitors.]—LANDER *v.* LANDER, [1891] P. 161; 60 L. J. P. 65; 64 L. T. 120; 55 J. P. 152; 39 W. R. 416.

Annotations:—**Consd.** Wood *v.* Wood (1891), 64 L. T. 586; Squire *v.* Squire, [1905] P. 4; Ollier *v.* Ollier, [1914] P. 240. **Refd.** Kettlewell *v.* Kettlewell, [1898] P. 138; Woodcock *v.* Woodcock & Codesido (1914), 111 L. T. 924.

iv. *Where the Wife is known to be frail.*

3430. Facile forgiveness—Of previous adultery.]—Adultery forgiven is no ground of separation, condonation bars sentence; but not necessarily where there is subsequent adultery, though it will induce the ct. to look with particular jealousy into the case; for if the adultery is forgiven with such extreme facility as to show no sense of injury, & no case is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct (SIR JOHN NICHOLL).—DUNN *v.* DUNN (1817), 2 Phillim. 403; *on appeal* (1818), 3 Phillim. 6.

Annotation:—**Refd.** Gipps *v.* Gipps (1864), 11 H. L. Cas. 1.

3431. Wilful separation—Failure to support.]—COULTHART *v.* COULTHART & GOUTHWAITE, No. 3613, *ante*.

3432. —— Exposure to temptation.]—(1) In answer to a husband's petition for dissolution of marriage, the wife pleaded that petitioner had separated from her without reasonable cause, & thereby conduced to her adultery. The ct. refused to examine petitioner under sect. 43 of Matrimonial Causes Act, 1857 (c. 85), as to the circumstances leading to the separation, having no power to examine resp. as to these circumstances.

to adultery—Court may exercise discretion.]—Although the refusal of a husband to live with his wife is conduct of a character likely to induce or contribute to the wife's adultery, the whole of the circumstances must be taken into account, including the husband's reason for refusal to cohabit with her; &, even though the ct. be of opinion that the conduct of the husband has conduced to the wife's adultery, it still has a discretion to grant a decree.—PATON *v.* PATON (1909), 28 N. Z. L. R. 840.—**N.Z.**

PART XIII. SECT. 7, SUB-SECT. 4.—C. (a) iv.

3431 i. *Wilful separation—Failure to support.*]—Where a man who had married a prostitute some years after suggested to her that she should return to her former mode of life & deserted her:—*Held:* he was barred by his conduct from insisting in an action of divorce for alleged adultery on her part.—MARSHALL *v.* MARSHALL (1881), 8 R. (Ct. of Sess.) 702; 18 Sc. L. R. 500.—**SCOT.**

A husband having married a woman of loose character, with whom he had previously cohabited, separated from her against her will shortly after the marriage, & sent her to live by herself in a place where she would be accessible to temptation, & where she was guilty of adultery. There was no evidence that there was any reasonable cause for the separation. The ct. was of opinion that this was conduct conducing to her adultery, & dismissed the petition.

(2) In a defended suit for dissolution of marriage, the ct. will not allow petitioner to be examined under sect. 43 of the Act, for the purpose of explaining his conduct, where the matter requiring explanation is one as to which resp., if a competent witness, would have been able to give evidence.—BAYLIS *v.* BAYLIS, TEEVAN & COOPER (1867), L. R. 1 P. & D. 395; 36 L. J. P. & M. 89, 130; 16 L. T. 613; 15 W. R. 1092.

3433. Enforced absence—Adequate allowance.]—On a petition by a husband for the dissolution of his marriage, adultery by the wife was admitted, but the jury found that petitioner had been guilty of "wilful neglect or misconduct conducing to the adultery" within sect. 31 of Matrimonial Causes Act, 1857 (c. 85).

It appeared that the parties were domestic servants. Resp. had had an illegitimate child by petitioner before the marriage. During their married life, between 1883 & 1894, petitioner was abroad for long periods with his master; & resp. meanwhile kept a lodging house, petitioner remitting to her regularly an adequate weekly allowance. The parties lived unhappily owing to the enforced separation. In 1894 a child was born, the result, as resp. admitted, of the adultery imputed to her in the petition. The ct., notwithstanding the verdict of the jury, pronounced a decree *nisi* for the dissolution of the marriage, but directed that it should not be made absolute until petitioner had secured to resp., by a proper deed, the annual sum of £20, payable in equal monthly instalments, commencing from the date of the decree *nisi*, during their joint lives, *dum sola et casta vixerit*.—PARRY *v.* PARRY, [1896] P. 37; 73 L. T. 759; 12 T. L. R. 126; *sub nom.* PARRY *v.* PARRY, MILLIS *v.* MILLIS & BROWN, 65 L. J. P. 35.

Annotations:—**Refd.** Tannam *v.* Tannam, Beeson & Ballard (1897), 13 T. L. R. 453; Millard *v.* Millard & Bastone (1898), 78 L. T. 471.

v. *Wife Conducing to Husband's Adultery.*

3434. Cruelty—Desertion.]—BOREHAM *v.* BOREHAM, No. 3439, *post*.

3435. Insolence & neglect—Withdrawal from cohabitation.]—In answer to a petition by a wife charging adultery & cruelty, resp. denied both those charges, & further alleged that petitioner had habitually treated him with insolence & neglect, & frequently absented herself from home, & refused to inform him where she had been, & constantly set his orders & wishes at defiance; & that she had withdrawn herself from cohabitation for two years without reasonable cause. The ct. refused to order those allegations to be struck out, being of opinion that resp. was entitled to give evidence of them, for the purpose of showing that his misconduct, if any, had been caused by that of petitioner.—HUGHES *v.* HUGHES (1866), L. R. 1 P. & D. 219; 35 L. J. P. & M. 94.

3436. Refusal to consummate marriage.]—DIXON *v.* DIXON, No. 3333, *ante*.

3437. Consenting to Jewish divorce—Mere assent to separation.]—PREGER *v.* PREGER, No. 3122, *ante*.

(*b*) *In Suits for Judicial Separation.*

3438. Whether a bar.]—DIXON *v.* DIXON, No. 3333, *ante*.

3439. —— Cruelty & wilful separation—By wife.]—In a wife's suit for dissolution the husband was proved to have been guilty of adultery, but of no other misconduct; & the wife was proved to have been guilty of cruelty, & of wilful separation from resp. before his adultery & without reasonable excuse, & of wilful neglect & misconduct conducing to his adultery. The ct. refused to grant a decree of judicial separation on the ground of the husband's adultery, & in the exercise of its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, dismissed the petition.—BOREHAM *v.* BOREHAM (1866), L. R. 1 P. & D. 77; 35 L. J. P. & M. 49; 14 W. R. 317.

Annotations:—**Consd.** Synge *v.* Synge, [1900] P. 180. **Refd.** Lempriere *v.* Lempriere (1868), L. R. 1 P. & D. 569; Mycock *v.* Mycock (1870), L. R. 2 P. & D. 98; Edwards *v.* Edwards, [1894] P. 33; Hodgson *v.* Hodgson, [1905] P. 233.

3440. —— Cruelty & adultery.]—(1) In a suit by a husband for dissolution of marriage, it was established that the wife was guilty of adultery, & the husband of cruelty & misconduct, conducing to her adultery. The ct. refused to amend the husband's petition by allowing a prayer for judicial separation to be substituted for the prayer for dissolution, & the petition was dismissed.

(2) It is doubtful whether, since the passing of the Divorce Act, a husband who has been guilty of cruelty & desertion can obtain a judicial separation on the ground of his wife's adultery.—LEMPRIERE *v.* LEMPRIERE & ROEBEL (1868), L. R. 1 P. & D. 569; 37 L. J. P. & M. 78; 19 L. T. 50; 16 W. R. 1192.

Annotation:—**Consd.** Edwards *v.* Edwards, [1894] P. 33.

3441. —— Desertion.]—HODGSON *v.* HODGSON & TURNER, No. 3629, *post*.

(*c*) *In Suits claiming Damages only.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189.

3442. Petitioner barred.]—WINTER *v.* HENN, No. 2822, *ante*.

D. Petitioner's Adultery.

(*a*) *In Suits for Dissolution of Marriage.*

i. *In General.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3).

3443. Adultery of wife—Not condoned.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante*.

3444. —— ——.]—OTWAY *v.* OTWAY, OTWAY *v.* OTWAY & HOFFER, No. 3539, *post*.

Petitioner's adultery condoned by respondent.]—*See* Sub-sect. 4, D. (*a*) v., *post*.

3445. Disclosure of petitioner's adultery—Duty of counsel & solicitor.]—Where petitioner has committed adultery it is the duty of his counsel & solr. to disclose the fact to the ct. if they are aware of it.—ABRAHAM *v.* ABRAHAM & HARDING (1919), 120 L. T. 672; 35 T. L. R. 371; 63 Sol. Jo. 411.

Adultery of respondent—As matrimonial offence.]—*See* Sect. 5, sub-sect. 3, *ante*.

ii. *Discretion of Court.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (repealing & re-enacting Matrimonial Causes Act, 1857 (c. 31).

Discretion of court, generally, *see* Sect. 7, sub-sect. 4, A., *ante*.

3446. Principle on which court acts.]—Petitioner, at the hearing of his petition, volunteered a

Sect. 7.—*Bars to relief: Sub-sect.* 4, *D.* (*a*) *ii.*

confession, that on one occasion, during a separation from his wife, & before her adultery, he had been guilty of an act of adultery. The ct. refused to exercise the discretion vested in it by Matrimonial Causes Act, 1857 (c. 85), s. 31, by granting a decree, & dismissed the petition.

One of the principles upon which this ct. proceeds, is that the persons who resort to it for relief must come with clean hands, & in accordance with this principle it is the daily practice of the ct. to refuse a divorce to a husband who has himself been guilty of adultery (*per* CUR.).—CLARKE *v.* CLARKE & CLARKE (1865), 34 L. J. P. M. & A. 94; 13 W. R. 848.

Annotations:—**Consd.** McCord *v.* McCord (1875), L. R. 3 P. & D. 237; Wain *v.* Wain & Eve (1909), 101 L. T. 815. **Refd.** Wilson *v.* Wilson (1872), 20 W. R. 891; Evans *v.* Evans & Elford, [1906] P. 125.

3447. ——.]—Though the ct. was more lenient now than it was formerly, people must understand that it was still the rule that petitioners should come to the ct. with clean hands & could not commit adultery with impunity (HORRIDGE, J.).—DEAN *v.* DEAN & HARGREAVES (1921), 37 T. L. R. 798.

3448. Factors governing exercise of.]—The discretion given to the ct. by the Matrimonial Causes Act, 1857 (c. 85), s. 31, to grant relief to petitioner who has been guilty of misconduct is not to be exercised readily but with stringency. When the guilty petitioner is the husband, & the ct. is convinced of his *bona fides*, the following facts may be taken into consideration: (*a*) the position & interests of his children; (*b*) the interest of the woman with whom he has misconducted himself, that she may be in a position to marry him; (*c*) the fact that the withholding of a decree will not be likely to reconcile husband & wife; (*d*) the interest of the husband himself that he may remarry & lead a respectable life.—WILSON *v.* WILSON, [1920] P. 20; 89 L. J. P. 17; 122 L. T. 223; 36 T. L. R. 91; 64 Sol. Jo. 133.

Annotations:—**Apld.** Bebb *v.* Bebb & Ross (1920), 123 L. T. 93; Long *v.* Long (1920), 36 T. L. R. 398. **Distd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203; Dean *v.* Dean & Hargreaves (1921), 37 T. L. R. 798. **Apld.** Elliott *v.* Elliott & Bowers (1921), 126 L. T. 28. **Distd.** Armistead *v.* Armistead (1922), 38 T. L. R. 626. **Consd.** Tickner *v.* Tickner, [1924] P. 118.

3449. ——.]—In this case petitioner petitioned on the ground of his wife's alleged adultery. He obtained leave to proceed under the Poor Persons' Rules, & the proceedings against his wife were initiated in 1919.

The married life had been an unhappy one, & there is evidence before me of repeated acts of irregularity on the part of petitioner's wife. The first act of adultery charged in the petition relates to the month of June, 1916. Petitioner became aware that his wife had committed adultery in 1916, but he did not commence proceedings against his wife until 1918 or 1919. The delay was considerable, but the circumstances of the war must be held to introduce some elasticity in the view one takes of delay. After becoming aware of the adultery of his wife, petitioner himself committed adultery, & became the father of an illegitimate child, of which a woman called R. was the mother. He met this woman in 1917, & has informed the ct. that he is desirous of marrying her. He appeared in the divorce proceedings, & did not acquaint the ct. of the fact of his own adultery. It is the duty of every petitioner in this ct. to place the facts of his or her case most fully before the ct., & the wholesome & well-established rule that on the intervention of the King's Proctor a decree may be rescinded, if there is a failure to deal with the ct. with the utmost good faith, is one that is not to be relaxed. But the decision in this ct. must be followed, & in particular it is laid down, & in my judgment reasonably laid down, that four considerations may be borne in mind, & may, although they need not necessarily, affect the discretion of the ct. The first point which may be considered is that of the position & interest of the children. I am favourably impressed in this case. so far as it is before me, by the record of the petitioner. His war record was meritorious, & I find that the care with which he discharged himself with regard to the maintenance of the four children of the marriage is to his credit, & it gives me a favourable impression of him in that respect.

The second circumstance is the interest of the woman with whom petitioner has misconducted himself, with special regard to the prospect that she may be in a position to marry him. I agree that this is a legitimate consideration, & one by which the discretion of the ct., if it thinks proper, may be influenced. Petitioner has told us that it is his wish & his intention to marry this woman, & I cannot conceive that I am forwarding any purpose of public justice by rescinding a decree which will make the regularisation of this union possible. The third element, which is proper to be considered, is whether the rescission of the decree in this matter would be likely to reconcile husband & wife. I see no prospect that such a rescission would produce such a condition, nor am I satisfied that it would be in the interest of any of the parties. The fourth circumstance which may properly be borne in mind in these circumstances is concerned with the interest of the husband himself. It is desirable that he should, if it be possible, remarry & lead a respectable life He is the father of the illegitimate child by the woman whom he has sworn he is ready & willing to marry, & I should be making a reasonable exercise of my discretion if I gave effect to these considerations.

Applying all these facts, I am of opinion that this is a proper case for the exercise of my discretion. I so exercise it, & will not rescind (LORD BIRKENHEAD, C.).—WILKINSON *v.* WILKINSON & SEYMOUR (1921), 126 L. T. 29, n.; 37 T. L. R. 835, n.

Annotations:—**Distd.** Armistead *v.* Armistead (1922), 38 T. L. R. 626. **Consd.** Tickner *v.* Tickner, [1924] P. 118.

3450. Exercised only in exceptional circumstances—Insufficient evidence of petitioner's guilt.]—In a suit for dissolution of marriage which was tried before the judge ordinary & a special jury, the jury found that resp. had committed adultery with the co-resp. & that petitioner had committed adultery also, but they declined to answer with whom or in what place, or whether or not it was with the knowledge & consent of resp. Co-resp. having obtained an order for a new trial the ct. signified that petitioner might also have a new trial on the question of his adultery, but he refused it. The ct. declined to exercise its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, on the ground that the evidence of petitioner's adultery was insufficient, & the verdict thereon unsatisfactory, & to make a decree *nisi* notwithstanding the verdict.—BARNES *v.* BARNES & BEAUMONT (1868), L. R. 1 P. & D. 572; 38 L. J. P. & M. 10; 19 L. T. 526; 17 W. R. 75.

Annotation:—**Refd.** Waudby *v.* Waudby, [1902] P. 85.

3451. —— **Circumstances of petitioner's adultery.**]—MORGAN *v.* MORGAN & PORTER, No. 3288, *ante*.

3452.]—— **Circumstances specially favouring petitioner.**]—The discretionary power given to the

ct. by Matrimonial Causes Act, 1857 (c. 85), s. 31, to pronounce a decree *nisi* in favour of petitioner who has been guilty of adultery, is to be exercised only under very exceptional circumstances In cross-petitions by the husband & wife for dissolution of marriage the jury found that the wife had committed adultery, & that the husband had committed adultery with the wife's sister & with another woman, & that the wife had condoned his adultery. The ct. in the circumstances refused to make any decree, & dismissed both petitions.—STOKER *v.* STOKER, SKIDMORE & MURRAY, STOKER *v.* STOKER (1889), 14 P. D. 60; 58 L. J. P. 40; 60 L. T. 400; 37 W. R. 576.

Annotations :—**Consd.** Symons *v.* Symons, [1897] P. 167. **Refd.** Boucher *v.* Boucher & Judd (1892), 9 T. L. R. 70; Gooch *v.* Gooch, [1893] P. 99; Edwards *v.* Edwards, [1894] P. 33; Hines *v.* Hines & Burdett, [1918] P. 364.

3453. —— In favour of guilty petitioner.]—HINES *v.* HINES & BURDETT, No. 3296, *ante*.

3454. —— Circumstances mitigating petitioner's offence.]—Though recent decisions have favoured an extension of the limits formerly recognised to the exercise of discretion, the test is still that circumstances must be proved which mitigate petitioner's offence, & enable the ct. to grant relief without offending the judicially established view of the interests of public morality: viz., that a spouse, who has himself been guilty of adultery, is *primâ facie* debarred from relief.—PULLEN *v.* PULLEN & HOLDING (1920), 123 L. T. 203; 36 T. L. R. 506.

3455. Exercised in interests of parties & public—Respondent responsible for separation prior to adultery—Insufficient to excuse petitioner's guilt.]—(1) The guiding principle on which the ct. will exercise its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, in favour of petitioner guilty of adultery, is that the ct. must have regard not only to the rights & liabilities of the matrimonial person wronged & the wrongdoer respectively, but also to the interests of society & public morality. It is insufficient to excuse the adultery of petitioner that a separation prior to such adultery was brought about by the conduct of resp.

(2) It is the duty of petitioner to place all material facts before the ct. To do otherwise is a fraud upon the ct.—EVANS *v.* EVANS & ELFORD, [1906] P. 125; 75 L. J. P. 27; 94 L. T. 616; 22 T. L. R. 322.

Annotations :—*As to* (1) **Consd.** Todd *v.* Todd (1907), 24 T. L. R. 28; Hines *v.* Hines & Burdett, [1918] P. 364; Pullen *v.* Pullen (1920), 123 L. T. 203; Tickner *v.* Tickner, [1924] P. 118. *As to* (2) **Refd.** Brooke *v.* Brooke (1912), 28 T. L. R. 314; Munzer *v.* Munzer (1912), 28 T. L. R. 596.

3456. —— Not where petitioner guilty of flagrant adultery—Though condoned.]—The ct. will act with great circumspection when there has been a suppression of material facts in a suit for divorce. The interests of public morality must receive consideration. When the admitted adultery of the petitioner has been of a flagrant character, the ct. will refuse to exercise its discretionary powers in his favour, even though the adultery has been condoned by a resumption of cohabitation between the parties.—WAIN *v.* WAIN & EVE (1909), 101 L. T. 815; 26 T. L. R. 131; 54 Sol. Jo. 119.

Annotation :—**Refd.** Munzer *v.* Munzer (1912), 28 T. L. R. 596.

3457. —— Birth of illegitimate child.]—SCHOFIELD *v.* SCHOFIELD, No. 3462, *post*.

3458. Sexes not treated on equal footing.]—In exercising the discretion conferred upon it by Matrimonial Causes Act, 1857 (c. 85), s. 31, the ct. ought to look at every aspect & circumstance of the case, including the consequences that would ensue, not only in the present but in the future, from a refusal to exercise that discretion in favour of petitioner.

In exercise of its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, the ct. is not bound by any rules but will consider each case entirely on its own merits, & this discretion will, under certain circumstances be exercised in spite of the fact that there had been an intervention on the part of the King's Proctor & that the finding of the ct. had been adverse to petitioner.

In exercising the discretion given it by Matrimonial Causes Act, 1857 (c. 85), s. 31, to pronounce a decree of dissolution at the instance of a petitioner guilty of adultery, the ct. does not treat the sexes on an equal footing. That which would not be excusable in the man may be excusable in the woman, & when her adultery has resulted from her husband's treatment she may retain a decree obtained on the ground of his misconduct, even although she has concealed her own fault from the ct., & committed perjury in denying it, provided that the ct. is of opinion on the facts that leniency towards the erring petitioner may result in her moral re-instatement.

A wife petitioner obtained a decree *nisi* for the dissolution of her marriage on the grounds of the adultery & cruelty of her husband. At the hearing of her petition, she was advised, in view of her denial of actual misconduct, that no disclosure was to be made of circumstances communicated by her to her solr., in consequence of which, on the subsequent hearing of an intervention by the King's Proctor, a jury, disbelieving her denial on oath, found her guilty of adultery & of suppression of material facts :—*Held :* nevertheless, that, having regard to her future in life, & to the fact that her misconduct had been brought about by the treatment of her husband, the case was one fit for the exercise of the discretion of the ct. in her favour. The ct. expressed disapproval of the course adopted at the original hearing.—PRETTY *v.* PRETTY, [1911] P. 83; 80 L. J. P. 19; 104 L. T. 79; 27 T. L. R. 169.

Annotations :—**Consd.** Brooke *v.* Brooke, [1912] P. 136. **Dbtd.** Belcher *v.* Belcher (1919), 35 T. L. R. 581.

3459. Undue delay caused by ignorance of law.]—The discretion conferred on the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 31, is an unfettered one. The ct. exercised its discretion in favour of petitioner who had been guilty of adultery with the same woman over a period of thirty years, & who had known of his wife's adultery for about twenty-eight years but had not instituted proceedings until 1922 because he thought that his own adultery would be a bar.—POINTON *v.* POINTON & SUTTON (1922), 38 T. L. R.

iii. *Petitioner guilty of Single Lapse.*

3460. Discretion exercised in favour of petitioner—Conduct otherwise good.]—Before the ct. will exercise the discretion which it possesses under Matrimonial Causes Act, 1857 (c. 85), s. 31, to dissolve the marriage, notwithstanding that petitioner has also been guilty of adultery, it must be shown that in all other respects he is free from

3453 i. *Exercised only in exceptional circumstances—In favour of guilty petitioner.*]—The ct. will not, unless in very exceptional circumstances of excuse or palliation, grant a divorce to a petitioner guilty of adultery.—A. *v.* A. & K. (1909), 14 B. C. R. 165.—**CAN.**

Sect. 7.—Bars to relief: Sub-sect. 4, D. (a)

blame, & that, with the exception of the particular lapse proved or confessed, he had been a good & faithful husband to his wife.

Where the husband, petitioner, confessed adultery on intervention of the Queen's Proctor, & where his conduct to his wife was blamable, the ct. reversed the decree *nisi* & dismissed the petition.—HUTCHINSON *v.* HUTCHINSON & BARKER (1866), 14 L. T. 338; 12 Jur. N. S. 491.

3461. —— Lapse unconnected with respondent's adultery.]—CONRADI *v.* CONRADI, WORRALL & WAY, No. 2764, *ante*.

3462. —— No condonation by reason of separation—Interests of mother & child.]—A husband, who had been living apart from his wife for some years, committed an isolated act of adultery, resulting in the birth of a child, & in an undefended suit obtained a decree *nisi* for dissolution of the marriage without disclosing the fact of his own adultery.

By reason of the separation, there had been no condonation by the wife of the husband's adultery.

The Ct., the King's Proctor showing cause, exercised its discretion in favour of petitioner upon the grounds of public morality & in the interests of the woman with whom the misconduct had been committed & of her child.—SCHOFIELD *v.* SCHOFIELD, [1915] P. 207; 84 L. J. P. 186; 112 L. T. 1000; 31 T. L. R. 236.

Annotations:—**Consd.** Hines *v.* Hines & Burdett, [1918] P. 364; Pullen *v.* Pullen (1920), 123 L. T. 203.

Condonation of single act of adultery.]—*See* No. 3485, *post*.

iv. *Prospect of Regularising Illicit Union.*

3463. Between petitioner & paramour—Whether ground for exercising discretion in petitioner's favour.]—In the special circumstances of the case, on the promise to marry her of the man with whom she had misconducted herself, a wife's decree for divorce was allowed to be made absolute, the ct. exercising its discretion in her favour in spite of the intervention of the King's Proctor on the grounds that petitioner had suppressed material facts & denied the misconduct on oath, being thereby guilty of perjury. The ct. intimated that in future the discretion would only be exercised in favour of petitioners making full disclosure. *Semble:* misconduct of a petitioner should not only be disclosed at the hearing, but also admitted in the petition.—HAMPSON *v.* HAMPSON, [1914] P. 104; 83 L. J. P. 53; 110 L. T. 992; 30 T. L. R. 392; 58 Sol. Jo. 474.

Annotation:—**Refd.** King *v.* King, [1915] P. 88.

3464. —— ——.]—A petitioning wife who had herself been guilty of adultery [after having been deserted & left destitute by resp.] was granted a decree *nisi* for divorce in the exercise of the discretion of the ct. upon evidence being given that a man with whom she had lived was willing to marry her.—HALE *v.* HALE (1915), 32 T. L. R. 53.

Annotation:—**Refd.** Ostick *v.* Ostick (1916), 33 T. L. R. 28.

3465. —— ——.]—WILSON *v.* WILSON, No. 3448, *ante*.

3466. —— ——.]—WILKINSON *v.* WILKINSON & SEYMOUR, No. 3449, *ante*.

3467. —— ——.]—The ct. refused to exercise its discretion in favour of a husband petitioner who admitted that he had committed adultery on two occasions with a woman whom he was willing to marry & who was anxious to marry him.—ARMISTEAD *v.* ARMISTEAD (1922), 38 T. L. R. 626.

v. *Petitioner's Adultery Condoned by Respondent.*

Condonation of respondent's adultery—Absolute bar to relief.]—*See* Sect. 7, sub-sect. 3, D., *ante*.

3468. Whether conclusive in favour of petitioner.]—(1) The adultery or cruelty of petitioner, though condoned, enable the ct. to exercise the discretionary power given to it by Matrimonial Causes Act, 1857 (c. 85), s. 31, & to dismiss the petition if it think fit, though the adultery of resp. is proved.

(2) If the petition against the wife be dismissed on any grounds she will be entitled to her full costs; & even although the adultery with the co-resp. be proved, he, the co-resp. will not be liable to costs under these circumstances.—GOODE *v.* GOODE & HAMSON (1861), 2 Sw. & Tr. 253; 30 L. J. P. M. & A. 105; 4 L. T. 122; 7 Jur. N. S. 317; 9 W. R. 552; 164 E. R. 992.

Annotations:—*As to* (1) **Consd.** McCord *v.* McCord (1875), L. R. 3 P. & D. 237. **Refd.** Gooch *v.* Gooch, [1893] P. 99; Symons *v.* Symons, [1897] P. 167.

3469. ——.]—On one occasion subsequent to his marriage petitioner had connection with a female with whom he had cohabited before marriage. The fact became known to resp. shortly afterwards, & was by her forgiven, & her cohabitation with her husband was continued for some considerable time:—*Held:* the condonation by resp. was not a fact to justify the ct. in exercising its discretion in favour of petitioner, & therefore it dismissed the petition.—MCCORD *v.* MCCORD, OGLE & COXON (1875), L. R. 3 P. & D. 237; 44 L. J. P. & M. 38; 33 L. T. 264; 23 W. R. 684.

Annotations:—**Consd.** Wildey *v.* Wildey & Ryder (1878), 26 W. R. 239. **Folld.** Grosvenor *v.* Grosvenor (1885), 34 W. R. 140. **Consd.** Story *v.* Story & O'Connor (1887), 12 P. D. 196. **Folld.** Boucher *v.* Boucher & Judd (1892), 9 T. L. R. 70. **Consd.** Wyke *v.* Wyke, [1904] P. 149. **Refd.** Gooch *v.* Gooch, [1893] P. 99; Symons *v.* Symons, [1897] P. 167; Waudby *v.* Waudby & Bowland, [1902] P. 85; Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781; Evans *v.* Evans & Elford, [1906] P. 125.

3470. ——.]—A husband had been guilty of cruelty. He & his wife separated under the provisions of a deed by which it was agreed that no proceedings should be taken by either party against the other in respect of any cause of complaint which had arisen before the date of the deed, & that every offence, if any, committed by either party against the other should be considered as condoned, & that in any proceedings by either party against the other in respect of any cause of complaint which might thereafter arise, no offence committed by either party before the deed should be pleaded or be admissible in evidence:—*Held:* (1) subsequent adultery by the husband did not revive the wife's right to complain of the cruelty committed before the deed, so as to enable her to obtain a decree for dissolution of the marriage.

(2) *Qu.:* whether adultery by a husband which has been condoned is a bar to his obtaining a dissolution on the ground of subsequent adultery of the wife.—ROSE *v.* ROSE (1883), 8 P. D. 98; 52 L. J. P. 25; 48 L. T. 378; 31 W. R. 573, C. A.

Annotations:—*As to* (1) **Distd.** Gooch *v.* Gooch, [1893] P. 99; Dowling *v.* Dowling, [1898] P. 228; Norman *v.* Norman, [1908] P. 6. **Consd.** Thompson *v.* Thompson, [1916] P. 165. **Refd.** Wood *v.* Wood (1887), 36 W. R. 33; Balcombe *v.* Balcombe, [1908] P. 176; Bourne *v.* Bourne, [1913] P. 104; Cramp *v.* Cramp & Freeman, [1920] P. 158. *Generally*, **Refd.** Bernstein *v.* Bernstein, [1893] P. 292.

3471. ——.]—In a suit by a husband for divorce on the ground of his wife's adultery with the co-resp. the jury found that the wife & the co-resp. had committed adultery, & assessed the damages at £300. The wife in her answer made a cross-petition of adultery committed by her husband in the house in which he resided with his wife with a domestic servant in their employment

five years before. The husband admitted the charge but pleaded & proved that his wife had condoned the offence & continued to live with him :—*Held :* (1) under the circumstances the husband's adultery disentitled him to a decree, & his petition being accordingly dismissed ; (2) he was not entitled to the damages.—STORY *v.* STORY & O'CONNOR (1887), 12 P. D. 196 ; 57 L. J. P. 15 ; 57 L. T. 536 ; 51 J. P. 680 ; 36 W. R. 190.

Annotations :—As to (1) **Consd.** Boucher *v.* Boucher & Judd (1892), 9 T. L. R. 70 ; Symons *v.* Symons, [1897] P. 167 ; Constantinidi *v.* Constantinidi & Lance, [1903] P. 246. **Refd.** Gooch *v.* Gooch, [1893] P. 99 ; Waudby *v.* Waudby & Bowland, [1902] P. 85 ; Wyke *v.* Wyke, [1904] P. 149. *As to* (2) **Apprvd.** Bernstein *v.* Bernstein, [1893] P. 292. **Refd.** Hyman *v.* Hyman & Goldman, [1904] P. 403 ; Stocker *v.* Stocker, Brice & Patterson, [1917] P. 264.

3472. ——.]—Upon a husband's petition for dissolution of marriage, the wife, in her answer, made cross-petitions of cruelty & adultery against her husband, who denied the alleged cruelty, but admitted that, while living apart from his wife, he had, for a considerable period, lived & cohabited with another woman, but that the adultery had been condoned. The condonation was admitted. At the trial, upon the opening by counsel for petitioner, the ct. intimated that relief would be refused, upon the ground of petitioner's adultery. Petitioner, notwithstanding this intimation insisted upon putting all the facts of the case before the jury :— *Held :* he could not be precluded from doing so.—BOUCHER *v.* BOUCHER & JUDD (1892), 67 L. T. 720 ; 9 T. L. R. 70 ; 1 R. 491.

3473. ——.] — Condonation of petitioner's adultery held, on the facts, not to justify the ct. in exercising its discretion in his favour.—MAGGS *v.* MAGGS & CREEDY (1896), 12 T. L. R. 509.

3474. ——.]—Where a wife, guilty of adultery which had been condoned, presented a petition for divorce against her husband, the ct. exercised its discretion by granting her a decree *nisi*.—HARDEN *v.* HARDEN (1919), 36 T. L. R. 121.

3475. ——.]—The ct. exercised its discretion by granting a decree *nisi* to a petitioning wife, who had been guilty of adultery, which had been condoned.—OWEN *v.* OWEN (1919), 35 T. L. R. 284.

3476. —— **Exercise of discretion influenced by —Propriety of conduct subsequent to condonation.**]—In the exercise of its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, the ct. is not bound by any rigid rules, but will consider every case entirely on its merits. I am, however, of opinion that this adultery has not only been condoned by resp., but also that the adultery has been actually conduced to by the previous desertion of the husband in 1893. I cannot see any reason, under the circumstances, why I should not exercise the discretion vested in me by Matrimonial Causes Act, 1857 (c. 85), s. 31, in favour of petitioner. It has been said that condonation in itself is not sufficient to permit the ct. to exercise its discretion. But I think it goes a long way towards it, especially when one assumes, as one is entitled to do here, proper conduct on the part of the person seeking relief, that is proper conduct subsequent to the condonation (EVANS, P.).—BULLOCK *v.* BULLOCK (1910), 103 L. T. 847.

3477. —— —— **Unless circumstances aggravating—Refusal in public interest.**]—(1) The conduct of petitioner is the right criterion upon which to decide whether the court should exercise the discretion given by Matrimonial Causes Act, 1857 (c. 85), s. 31 in his favour.

(2) Where the misconduct of petitioner had been fully forgiven & completely condoned by the other party, the ct. should exercise its discretion in petitioner's favour, unless there are special or aggravating circumstances in the case, or unless there are strong overriding public reasons existing for its refusal.

(3) The ct. declined to assist petitioner who had not disclosed the fact of his adultery on the hearing of his petition for dissolution of marriage, & who had denied it on oath after the King's Proctor had intervened.—MUNZER *v.* MUNZER & SWAIN (1912), 107 L. T. 203 ; 28 T. L. R. 596 ; 57 Sol. Jo. 45.

3478. Infection of wife with venereal disease.]—In a husband's suit for dissolution of marriage, the jury found that resp. had committed adultery with the co-resp. ; that petitioner had been guilty of adultery & cruelty, & had infected his wife with a venereal disease ; & that petitioner's misconduct had been condoned, & had not conduced to resp.'s adultery ; & they refused to award damages against the co-resp.

The ct., in the exercise of its discretion under the Matrimonial Causes Act, 1857 (c. 85), s. 31, dismissed the petition, & directed that the wife should have the general costs of the suit.—WILDEY *v.* WILDEY & RYDER (1878), 26 W. R. 239.

3479. Adultery under influence of liquor.]—In a husband's suit for dissolution the wife's adultery was proved, & the husband confessed to an act of adultery in the year 1874, which he alleged had been committed under the influence of liquor, & which had been condoned by the wife.

The ct., on the authority of *Morgan* v. *Morgan & Porter*, No. 3288, *ante*, dismissed the petition.—GROSVENOR *v.* GROSVENOR (1885), 34 W. R. 140 ; 2 T. L. R. 35.

Annotations :—**Consd.** Waudby *v.* Waudby & Bowland, [1902] P. 85. **Refd.** Symons *v.* Symons, [1897] P. 167 ; Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781 ; Evans *v.* Evans & Elford, [1906] P. 125.

3480. Flagrant adultery.]—WAIN *v.* WAIN & EVE, No. 3456, *ante*.

3481. Where adultery concealed.]—WAIN *v.* WAIN & EVE, No. 3456, *ante*.

3482. ——.]—BEBB *v.* BEBB & ROSS, No. 5133, *post*.

3483. After full disclosure.]—Circumstances in which the ct. will exercise its discretion in favour of guilty petitioner considered.

The evidence disclosed complete condonation of the husband. Petitioner had striven since that time to earn her own livelihood & to maintain herself & the children . . . Petitioner's own adultery had been condoned & it would be a hardship upon her if he (the President) were to refrain from exercising his discretion in her favour (EVANS, P.).—COVERDALE *v.* COVERDALE (1913), 30 T. L. R. 20.

3484. ——.]—Where, in a petition for dissolution of marriage by a husband who had been guilty of adultery during the marriage, the adultery was fully disclosed to the ct. & had also been disclosed to the wife & condoned by her, the ct. exercised its discretion in favour of the husband & granted him a decree.—HABRA *v.* HABRA & HABAL, [1914] P. 100 ; 83 L. J. P. 54 ; 110 L. T. 991 ; 30 T. L. R. 391.

Annotations :—**Distd.** Bebb *v.* Bebb & Ross (1920), 123 L. T. 93. **Refd.** Hampson *v.* Hampson, [1914] P. 104 ; King *v.* King (1915), 112 L. T. 1047.

3485. Single act of adultery—Complete condonation.]—The discretion conferred upon the Court by Matrimonial Causes Act, 1857 (c. 85), s. 31, is to be exercised according to the facts & circumstances of each particular case, & no strict rules ought to be laid down, fettering the discretion conferred upon the ct. by that sect.

Where a husband, resp. in previous proceedings, had been found guilty of cruelty &, after his wife had

left him, of a single act of adultery, & these offences had been condoned by subsequent cohabitation :—*Held :* as petitioner had given a straightforward & honest account of his matrimonial affairs & differences & as the wife had completely condoned his past offences, the ct. was acting in just accordance with the discretion it passed in granting him a decree *nisi*.—WOLTERECK *v.* WOLTERECK & WALTERS, [1912] P. 201 ; 81 L. J. P. 145 ; 107 L. T. 27 ; 28 T. L. R. 532 ; 56 Sol. Jo. 706.

Annotations :—**Distd.** Munzer *v.* Munzer & Swain (1912), 28 T. L. R. 596. **Consd.** Hines *v.* Hines & Burdett, [1918] P. 364.

3486. Coupled with discretion.]—In this undefended suit, in which the wife prayed for the dissolution of her marriage on the grounds of her husband's desertion & adultery, the ct. in the exercise of its discretion granted petitioner a decree notwithstanding that she had herself committed adultery.

Petitioner when her husband deserted her was left in a difficult position & the circumstances were such as to dispose the ct. to exercise its discretion in her favour. Further resp. with full knowledge of his wife's guilt had condoned her offence (BARGRAVE DEANE, J.).—MORTON *v.* MORTON (1916), 32 T. L. R. 484.

3487. Written permission by wife to commit adultery.]—The ct. refused to exercise its discretion by granting a decree *nisi* to a petitioning husband who had committed adultery & had obtained from his wife a document giving him permission to do so.—WINGFIELD *v.* WINGFIELD & WRIGHT-MOTION (1919), 36 T. L. R. 159 ; *on appeal* (1921), 37 T. L. R. 300, C. A.

3488. Exercise of discretion on terms—Allowance to wife respondent.]—On a divorce petition by a husband who had been guilty of adultery which had been condoned, the ct. granted a decree *nisi* on the terms that petitioner's father should entered into a deed making an allowance to the wife.—STRUTT *v.* STRUTT & HITCHING (1915), 31 T. L. R. 156.

3489. ——.]—The petitioning husband had been guilty of adultery, which had been condoned, & the ct. exercised its discretion in petitioner's favour on the terms that before the decree *nisi* was made absolute he should secure a weekly allowance to resp.—FREMANTLE *v.* FREMANTLE & BOIS (1915), 31 T. L. R. 180.

vi. *Respondent's Conduct Conducing to Petitioner's Adultery.*

Petitioner's conduct conducing to respondent's adultery, *see* Sect. 7, sub-sect. 4, C., *ante*.

3490. General rule.]—(1) The circumstances to be considered by the ct in exercising its discretion under Matrimonial Causes Act, 1857 (c. 85), s. 31, to grant a divorce to a wife who has been guilty of adultery, include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct.

A husband, who had treated his wife with great cruelty during cohabitation, finally deserted her & went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive, & without making inquiry, commenced to live with another man ; the cohabitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, & after the wife had ceased to live in adultery, her husband was convicted under the Criminal Law Amendment Act, 1885 (c. 69), of an aggravated offence on a young girl not amounting to rape :—*Held :* under the circumstances the wife's adultery did not disentitle her to a decree of dissolution of marriage.

(2) No order as to costs, the Queen's Proctor's intervention being thoroughly justifiable. —SYMONS *v.* SYMONS, [1897] P. 167 ; 66 L. J. P. 81 ; 77 L. T. 142 ; 13 T. L. R. 353.

Annotations :—*As to* (1) **Apld.** Burdon *v.* Burdon, [1901] P. 52. **Folld.** Constantinidi *v.* Constantinidi, [1903] P. 246. **Distd.** Shaw *v.* Shaw (1904), 20 T. L. R. 795. **Consd.** Wyke *v.* Wyke, [1904] P. 149 ; Evans *v.* Evans & Elford, [1906] P. 125. **Distd.** Todd *v.* Todd & Cunniam (1906), 23 T. L. R. 9 ; Tulk *v.* Tulk (1906), 23 T. L. R. 120. **Consd.** Tickner *v.* Tickner, [1924] P. 118. **Refd.** Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781 ; Constantinidi *v.* Constantinidi, [1905] P. 253 ; Hunter *v.* Hunter, [1905] P. 217 ; Brooke *v.* Brooke (1912), 28 T. L. R. 314 ; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3491. ——.]—In a husband's suit for dissolution of marriage upon findings of fact that petitioner & resp. had both committed adultery the Ct., finding as a further fact that the adultery of petitioner had not conduced to the adultery of resp., exercised in favour of petitioner the discretion conferred by the Matrimonial Causes Act, 1857 (c. 85), s. 31, & pronounced a decree *nisi*, dissolving the marriage.

Although the discretion conferred by s. 31 is a judicial & not an arbitrary discretion, the causes for, & the circumstances under, which the ct. may exercise its discretion in favour of a guilty petitioner are to be taken in combination & according to their several degrees of force ; & the list of such causes is not a closed book, but may be extended as occasion arises.

. . . No principles of justice in regard to this matter seem to me clear that these : first, that a petitioner who has been convicted of adultery should not be allowed to obtain a divorce if such adultery in any serious degree contributed to the misconduct of resp. ; & secondly, that resp. should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of petitioner for which the respondent was, himself or herself, in any serious degree responsible (JEUNE, P.).—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE. [1903] P. 246 ; 72 L. J. P. 82 ; 89 L. T. 340 ; 52 W. R. 190 ; 19 T. L. R. 699 ; 47 Sol. Jo. 739 ; *subsequent proceedings*, [1905] P. 253, C. A.

Annotations :—**Apld.** Coombs *v.* Coombs & Hopkins (1903), 73 L. J. P. 23. **Distd.** Wyke *v.* Wyke, [1904] P. 149. **Consd.** Pegg *v.* Pegg & Gowing (1904), 20 T. L. R. 353 ; Constantinidi *v.* Constantinidi & Lance, [1905] P. 253 ; Evans *v.* Evans & Elford, [1906] P. 125 ; Tulk *v.* Tulk (1906), 23 T. L. R. 120. **Dbtd.** Todd *v.* Todd & Cunniam (1907), 24 T. L. R. 28. **Consd.** Tickner *v.* Tickner, [1924] P. 118. **Refd.** Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781 ; Craven *v.* Craven & Robinson (1909), 26 T. L. R. 4.

3492. ——.]—Where a wife had obtained a decree *nisi* for a divorce on the ground of her husband's cruelty & adultery, & the King's Proctor, on the ground of the wife's adultery, intervened to show cause why the decree should not be made absolute but was satisfied that the husband's conduct had conduced to the wife's adultery, the ct. exercised its discretion in favour of petitioner & made the decree absolute.—FIRMAN *v.* FIRMAN (1915), 32 T. L. R. 50.

Annotation :—**Refd.** Hines *v.* Hines & Burdett, [1918] P. 364.

3493. Responsibility for petitioner's misconduct.]—In order that the ct. should exercise the discretion conferred by Matrimonial Causes Act, 1857 (c. 85), s. 31, in favour of petitioner guilty of adultery, it is not enough that petitioner's misconduct was more or less pardonable or capable of excuse, but the ct. must find, as a fact, that petitioner's misconduct was caused directly by

the matrimonial offence or offences of resp.—WYKE *v.* WYKE, [1904] P. 149; 73 L. J. P. 38; 90 L. T. 172; 20 T. L. R. 193.

Annotations :—**Apld.** Shaw *v.* Shaw (1904), 20 T. L. R. 795. **Consd.** Tulk *v.* Tulk (1906), 23 T. L. R. 120. **Apld.** Belcher *v.* Belcher (1919), 35 T. L. R. 581. **Refd.** Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781.

3494. ——.]—*Held :* petitioner had failed to show that her husband's misconduct had directly conduced to her adultery, & therefore she had failed to make out any ground which would justify the ct. in exercising its statutory discretion in her favour by granting a decree for a divorce.—SHAW *v.* SHAW (1904), 20 T. L. R. 795.

3495. ——.]—To enable the ct. to exercise its discretion in favour of a wife who is petitioning for a divorce & who has herself committed adultery, she must show that her adultery was the necessary & reasonable consequence of her husband's conduct.—TULK *v.* TULK (1906), 23 T. L. R. 120.

3496. ——.]—BELCHER *v.* BELCHER, No. 3541, *post*.

3497. Petitioner coerced into prostitution.]—In a suit by a wife for a dissolution of marriage it was proved that resp. had been guilty of adultery & of cruelty, & also that he had by threats & by personal violence coerced petitioner into leading a life of prostitution, & had lived upon the money which she obtained by prostitution. The ct. being satisfied that she had led this life contrary to her own will & desire, & in consequence of the coercion of resp. exercised the discretion given to it by Matrimonial Causes Act, 1857 (s. 85), s. 31 by dissolving the marriage notwithstanding her adultery.—COLEMAN *v.* COLEMAN (1866), L. R. 1 P. & D. 81; 35 L. J. P. & M. 37; 13 L. T. 684.

Annotations :—**Consd.** Morgan *v.* Morgan & Porter (1869), L. R. 1 P. & D. 644; Symons *v.* Symons, [1897] P. 167; Burdon *v.* Burdon, [1901] P. 52. **Refd.** McCord *v.* McCord, Ogle & Coxon (1875), L. R. 3 P. & D. 237; Wyke *v.* Wyke, [1904] P. 149; Barker *v.* Barker (1907), 24 T. L. R. 31.

3498. ——.]—Upon an intervention by the Queen's Proctor after petitioner had obtained a decree *nisi* for the dissolution of her marriage on the ground of the adultery & cruelty of her husband, it appeared that he had by his threats & illtreatment forced her to prostitute herself for his pecuniary benefit, & that she, after she had left him on account of his continued illtreatment, resorted to other acts of prostitution to supplement her insufficient means of livelihood, & also cohabited for a period of three years with a certain man as his wife :—*Held :* all her subsequent acts were the outcome of her husband's conduct & she was entitled to have the decree which she had obtained made absolute; the three years' cohabitation & some other facts, very material to be considered by the ct. & such as ought not to have been withheld at the hearing of the petition, being insufficient to bar the wife's claim to have her marriage dissolved on the grounds of her husband's adultery & cruelty, though amply sufficient to warrant & justify the intervention of the Queen's Proctor.

As the case was one in which the intervention was not merely justified but was the natural consequence of the Queen's Proctor investigations, there will be no order as to costs (GORELL BARNES, J.).—BURDON *v.* BURDON, [1901] P. 52; 69 L. J. P. 118.

Annotations :—**Consd.** Hunter *v.* Hunter, [1905] P. 217. **Apld.** Marven *v.* Marven & Turner (1919), 122 L. T. 227. **Refd.** Tulk *v.* Tulk (1906), 23 T. L. R. 120; Barker *v.* Barker (1907), 24 T. L. R. 31; Brooke *v.* Brooke (1912), 28 T. L. R. 314.

3499. ——.]—Discretion exercised in favour of a wife of the labouring class, whose adultery had been caused & procured in the first instance by the husband & though continuing was held to be still fairly attributable to his conduct.—MARVEN *v.* MARVEN & TURNER (1919), 122 L. T. 227; 36 T. L. R. 106; 64 Sol. Jo. 177.

3500. —— Prostitution after separation—Means of livelihood.]—Petitioner was an actress, & was at the time of her marriage sixteen years old & an orphan. Resp. seduced her & afterwards married her; he took her to various places & compelled her to obtain money by prostitution, he taking the money & ill-treating her. After about two years she ran away, & while away occasionally obtained money by prostitution, as she was destitute :—*Held :* the facts of the case justified it in pronouncing a decree in petitioner's favour, notwithstanding her adultery.—DODSON *v.* DODSON (1905), 54 W. R. 220.

3501. —— No further adultery after separation.]—A wife was, by the violence & threats of her husband, coerced into committing adultery on three occasions in order to provide him with money, & the husband took from her the money she obtained thereby. Subsequently she left him, & since that time she did not commit adultery. The wife having filed a petition for dissolution of marriage :—*Held :* the ct. would exercise the discretion given to it by Matrimonial Causes Act, 1857 (c. 85), s. 31, by granting her a decree *nisi* for dissolution of marriage, notwithstanding her adultery.—BARKER *v.* BARKER (1907), 24 T. L. R. 31.

3502. —— Subsequent bigamous marriage.]—Circumstances in which the ct. exercised its discretion & granted decree of divorce to petitioner, the wife, notwithstanding the fact that she had been guilty of bigamy.—NORTHOVER *v.* NORTHOVER (1910), 26 T. L. R. 224.

3503. Desertion by respondent.]—SYMONS *v.* SYMONS, No. 3490, *ante*.

3504. ——.]—BULLOCK *v.* BULLOCK, No. 3476, *ante*.

3505. —— No excuse for petitioner's adultery.]—Where a wife left her husband & some years afterwards he committed adultery with another woman, the ct. affirmed the order of the judge, who, on the husband's petition for dissolution of marriage on the ground of his wife's adultery, in the exercise of his discretion in the circumstances of the case refused to make a decree & dismissed the petition.—TODD *v.* TODD & CUNNIAM (1907), 24 T. L. R. 28, C. A.

Annotations :—**Refd.** Barker *v.* Barker (1907), 24 T. L. R. 31; Brooke *v.* Brooke (No. 2) (1912), 107 L. T. 202; Munzer *v.* Munzer & Swain (1912), 28 T. L. R. 596; Hines *v.* Hines & Burdett, [1918] P. 364.

3506. —— ——.]—Where a wife petitioner, who had been deserted & left destitute with two children by her husband, had herself committed adultery three years afterwards, the ct. refused to exercise its discretion in her favour, being of opinion that though the husband's conduct might have conduced to the adultery it ought not to have done so.—GODDARD *v.* GODDARD (1915), 113 L. T. 1063; 31 T. L. R. 616.

3507. —— Petitioner rendered desperate.]—Where the ct. was of opinion that the desertion by a wife caused her husband to be absolutely desperate, it exercised the discretion given by Matrimonial Causes Act, 1857 (c. 85), s. 31, in his favour notwithstanding his own adultery on two occasions.

I think that petitioner's adultery was the direct result of his wife's conduct towards him (HORRIDGE, J.).—CLUTTERBUCK *v.* CLUTTERBUCK & LUCE (1915), 113 L. T. 1063; 31 T. L. R. 614.

Annotation :—**Refd.** Hines *v.* Hines & Burdett, [1918] P. 364.

Sect. 7.—Bars to relief: Sub-sect. 4, D. (a) vi., vii., viii., ix. &

3508. —— Petitioner destitute.]—HALE *v.* HALE, No. 3464, *ante.*

3509. ——.]—MORTON *v.* MORTON, No. 3486,

3510. Conduct causing petitioner to leave home.]—EVANS *v.* EVANS & ELFORD, No. 3455, *ante.*

3511. ——.]—PRETTY *v.* PRETTY, No. 3458, *ante.*

3512. Gross misconduct.]—Decree granted in favour of wife notwithstanding her adultery, on the ground that her husband's gross misconduct had caused her fall.—CLELAND *v.* CLELAND, CLELAND *v.* CLELAND & MCLEOD (1913), 109 L. T. 744; 30 T. L. R. 169; 58 Sol. Jo. 221.

3513. Wilful neglect—Drunken habits.]—BARBOUR *v.* BARBOUR (1920), 37 T. L. R. 139.

vii. *Adultery not Admitted by Petitioner.*

See Sect. 20, sub-sect. 3, B. (*b*), *post.*

viii. *Adultery in Ignorance of Law or under Mistake of Fact.*

3514. Ignorance of law — General rule.]—Where petitioner acts purely in ignorance of the law, & has no intention to commit adultery, being in fact unaware that what he is doing amounts to adultery, the discretion conferred upon the ct. by Matrimonial Causes Act, 1857 (c. 85), s. 31, should be exercised in his favour.—SNOOK *v.* SNOOK & WOOLACOTT (1892), 67 L. T. 389.

3515. —— Decree nisi to dissolve previous marriage—Belief that marriage dissolved.]—After a decree *nisi* in a suit for dissolution of marriage, but before such decree had been made absolute, petitioner went through a form of marriage, & cohabited, with a female, the ct. being satisfied that he did so in ignorance of the law, & in the *bonâ fide* belief that his first marriage was finally dissolved, determined that it was a case in which it could exercise the discretion given to it by Matrimonial Causes Act, 1857 (c. 85), s. 31, & made the decree absolute, notwithstanding such adultery of petitioner.—NOBLE *v.* NOBLE & GODMAN (1869), L. R. 1 P. & D. 691; 38 L. J. P. & M. 52; 20 L. T. 1016.

Annotations:—**Apld.** Snook *v.* Snook & Woolacott (1892), 67 L. T. 389. **Consd.** Whitworth *v.* Whitworth, [1893] P. 85. **Refd.** Moore *v.* Moore, [1892] P. 382; Lankester *v.* Lankester & Cooper (1925), 94 L. J. P. 71.

3516. —— —— ——.]—W. obtained in 1868 a decree *nisi* for dissolution of her marriage, & in 1871, believing that the decree had been made absolute, she married again. The ct., the Queen's Proctor not opposing, made the decree absolute.—WICKHAM *v.* WICKHAM (1880), 6 P. D. 11; 49 L. J. P. 70; 43 L. T. 445.

3517. —— —— ——.]—In a petition by the wife for a divorce on the ground of adultery & cruelty, a decree *nisi* was pronounced; but no steps were taken to make it absolute. Petitioner believing that the marriage was dissolved at the end of six months, went through a form of marriage with a man with whom she cohabited for some years until he died. She then resumed cohabitation with resp.; but he was guilty of cruelty towards her, & she left him after living with him a year & nine months. Upon an application by petitioner to make the decree *nisi* absolute, the Queen's Proctor intervening:—*Held:* there was nothing in the circumstances to prevent the cruelty of which resp. had been guilty during the second cohabitation from reviving the matrimonial offences on the ground of which the decree *nisi* had been pronounced, & inasmuch as it must be taken that she went through the form of marriage with another person in the honest belief that her marriage with resp. was dissolved, the ct. was entitled to make the decree *nisi* absolute.—MOORE *v.* MOORE, [1892] P. 382; 62 L. J. P. 10; 67 L. T. 530; 8 T. L. R. 704; 1 R. 488.

Annotations:—**Consd.** Rogers *v.* Rogers, [1894] P. 161. **Refd.** Whitworth *v.* Whitworth, [1893] P. 85; Braddock *v.* Braddock (1910), 27 T. L. R. 94.

3518. —— —— ——.]—SPILSBURY *v.* SPILSBURY (1892), 8 T. L. R. 456.

Annotation:—**Refd.** Moore *v.* Moore (1892), 8 T. L. R. 704.

3519. —— —— ——.]—SNOOK *v.* SNOOK & WOOLACOTT, No. 3514, *ante.*

3520. —— Agreement to dissolve previous marriage—Belief in validity.]—A husband & wife separated & signed an agreement by which each of them agreed that the other should be at liberty to marry again. The husband, believing that his marriage was legally dissolved, went through the ceremony of marriage with another woman, & cohabited with her; but, being advised that the agreement which he had signed was worthless, he left her, & resumed cohabitation with his wife, who was afterwards guilty of adultery with co-resp. The husband then presented a petition for divorce on the ground of his wife's adultery:—*Held:* as petitioner acted as he did in the *bonâ fide* belief that the agreement which he had signed constituted a legal dissolution of the marriage, the ct. was justified in the exercise of its discretion in granting him a divorce.—WHITWORTH *v.* WHITWORTH & THOMASSON, [1893] P. 85; 62 L. J. P. 71; 68 L. T. 467; 41 W. R. 592; 9 T. L. R. 229; 1 R. 509.

3521. —— Bigamy by respondent—Belief that marriage automatically dissolved.]—DURRANT *v.* DURRANT (1895), 12 T. L. R. 76.

3522. Mistake of fact—Belief that respondent dead.]—A husband believing that his wife, who had eloped from him & was living in adultery, was dead, married another woman & committed adultery with her.

The ct. in the exercise of the discretion vested in it by Matrimonial Causes Act, 1857 (c. 85), s. 31, granted the husband a divorce notwithstanding his adultery.—JOSEPH *v.* JOSEPH & WENTZELL (1865), 34 L. J. P. M. & A. 96; 13 W. R. 872.

Annotations:—**Apld.** Potter *v.* Potter (1892), 67 L. T. 721. **Refd.** Morgan *v.* Morgan (1869), L. R. 1 P. & D. 644; McCord *v.* McCord (1875), L. R. 3 P. & D. 237; Whitworth *v.* Whitworth, [1893] P. 85; Pegg *v.* Pegg & Gowing (1904), 20 T. L. R. 353; Wyke *v.* Wyke, [1904] P. 149.

3523. —.]—A husband believing that his wife was dead married again, & subsequently discovered that his wife was alive & had committed adultery:—*Held:* notwithstanding the bigamy, he was entitled to a dissolution of his marriage.—FREEGARD *v.* FREEGARD, COWPER & LUCAS (1883), 8 P. D. 186; 52 L. J. P. 100; 32 W. R. 95.

Annotations:—**Apld.** Potter *v.* Potter (1892), 67 L. T. 721. **Refd.** Symons *v.* Symons, [1897] P. 167.

3524. —— ——.]—The wife petitioned for a divorce. She married resp. in 1870, & he deserted her in 1873. She, believing him to be dead, contracted a bigamous marriage with T., in 1889, & lived with him as his wife until June, 1892, when she heard that resp. was alive. She thereupon separated from T. & commenced this suit, which was undefended:—*Held:* she was entitled to a decree dissolving her marriage with resp.—POTTER *v.* POTTER (1892), 67 L. T. 721; 1 R. 499.

3525. —— —— Disappearance for four years.]—A wife, not having seen her husband for about four years, married again, while her husband was still

alive. The wife subsequently petitioned for a divorce on the grounds of his desertion & adultery, & his adultery was proved:—*Held:* in the circumstances petitioner had lost her right to ask the ct. to exercise its discretion in her favour & the petition must be dismissed.—CRESWICK *v.* CRESWICK (1916), 32 T. L. R. 677.

3526. —— —— Adultery continued after knowledge of respondent's existence—Warning by solicitors.]—HYNES *v.* HYNES & LAKE (1904), 20 T. L. R. 781.

3527. —— —— —— Delay in bringing suit.]—PEGG *v.* PEGG & GOWING (1904), 20 T. L. R. 353.

ix. *Proof of Adultery.*

3528. Less than to support petition.]—LEICESTER (LORD) *v.* LEICESTER (LADY) (1737), cited 1 Hag. Con. at p. 153; 161 E. R. 508.

Annotations:—**Refd.** Astley *v.* Astley (1828), 1 Hag. Ecc. 714; Sopwith *v.* Sopwith (1860), 2 Sw. & Tr. 160; Hodgson *v.* Hodgson (1905), 53 W. R. 623.

3529. Whether proof of solicitation sufficient.] — In a suit for adultery, solicitation of chastity not proved by the adverse party; & if proved might be doubtful whether it could be considered as a bar to a sentence of divorce.—CHETTLE *v.* CHETTLE (1821), 3 Phillim. 507; 161 E. R. 1399.

Annotations:—**Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90.

x. *Other Cases.*

3530. Adultery with full knowledge of offence.]—The ct. will not exercise its discretion in favour of a husband who is petitioning for a divorce, & who has himself committed adultery, if petitioner's misconduct was committed by him with full knowledge that he was committing adultery.—CRAVEN *v.* CRAVEN & ROBINSON (1909), 26 T. L. R. 4.

3531. —— Before & after King's Proctor's intervention.]—Where petitioner has not only committed adultery prior to the King's Proctor's intervention, but has also committed adultery subsequent to the King's Proctor's plea & after he (or she) knew that it was wrong to do so, the ct. will not exercise its discretion in petitioner's favour & grant a decree under Matrimonial Causes Act, 1857 (c. 85), s. 31.—LINGHAM *v.* LINGHAM (1919), 64 Sol. Jo. 117.

3532. Adultery after filing of petition.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante*.

3533. Adultery after decree for judicial separation.]—Matrimonial Causes Act, 1857 (c. 85), s. 29, imposes on the ct. of the judge ordinary the obligation to inquire into any countercharge made against any person petitioning for a divorce.

Adultery, alleged to have been committed by petitioner at any time during the marriage, in which term is included the period between a decree for a divorce *a mensâ et thoro*, & the actual dissolution of the marriage, is a countercharge into which the ct. is so bound to inquire.

If such adultery has been committed between the time when a decree for a divorce *a mensâ et thoro*, under the old law, was pronounced, & the time when a petition under Matrimonial Causes Act, 1857 (c. 85), was presented, praying for a dissolution of the marriage, the judge ordinary, on being duly informed thereof, is "not bound" under sect. 31 to dissolve the marriage. *Qu.:* whether he may, in his discretion, dissolve it.

The Queen's Proctor under Matrimonial Causes Act, 1860 (c. 144), can only intervene in his official capacity in a case of collusion, & where no case of collusion has been made out he merely appears to show cause against the decree *nisi* as one of the public, & the ct. has no jurisdiction to award him costs.—LAUTOUR *v.* QUEEN'S PROCTOR (1864), 10 H. L. Cas. 685; 33 L. J. P. M. & A. 89; 10 L. T. 198; 10 Jur. N. S. 325; 12 W. R. 611; 11 E. R. 1193, H. L.; *varying* S. C. *sub nom.* LATOUR *v.* LATOUR & WESTON (1861), 2 Sw. & Tr. 524.

Annotations:—**Consd.** Pullen *v.* Pullen (1920), 123 L. T. 203; Tickner *v.* Tickner, [1924] P. 118. **Refd.** Gipps *v.* Gipps (1864), 11 H. L. Cas. 1; Masters *v.* Masters (1864), 4 New Rep. 200; Clarke *v.* Clarke & Clarke (1865), 3 L. J. P. M. & A. 94; Wilson *v.* Wilson (1866), L. R. 1 P. & D. 180; Conradi *v.* Conradi (1867), L. R. 1 P. & D. 391; Dering *v.* Dering (1868), L. R. 1 P. & D. 531; Morgan *v.* Morgan & Porter (1869), 38 L. J. P. & M. 41; Vivian *v.* Vivian (1870), L. R. 2 P. & D. 100; Hudson *v.* Hudson (1875), 1 P. D. 65; Symons *v.* Symons, [1897] P. 167; Evans *v.* Evans & Elford, [1906] P. 125; Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151; Hines *v.* Hines & Burdett, [1918] P. 364.

3534. Adultery after decree nisi—Before decree absolute.]—HULSE *v.* HULSE & TAVERNOR, No. 5097, *post*.

3535. Adultery with respondent—Before previous marriage dissolved.]—In 1878 the husband obtained a decree *nisi* against his first wife. Before decree absolute he married the present resp. The Queen's Proctor not opposing, the decree was afterwards made absolute. Petitioner & resp. subsequently went through a fresh ceremony of marriage. Upon a petition by the husband:—*Held:* he was entitled to have this marriage dissolved by reason of his wife's adultery, & his claim to relief was not barred by reason of his adultery committed prior to the final dissolution of the first marriage.—STYLES *v.* STYLES & JACKSON (1890), 62 L. T. 613.

3536. Adultery found in previous suit—Whether conclusive.]—CONRADI *v.* CONRADI, WORRALL & WAY, No. 2764, *ante*.

3537. —— —— Petitioner cited as co-respondent in previous proceedings.]—(1) Where petitioner presented his petition for dissolution of marriage & it was pleaded that he had been cited as a co-resp. in a previous suit & found guilty by a jury of adultery & cast in damages, it was held that petitioner in his own suit was entitled to deny that adultery, the finding of which, in the previous suit, was not conclusive against him in his own.

(2) Where it may not be in the interests of anybody to put the evidence of such adultery before the ct. in the second suit, the ct. will communicate with the King's Proctor, who can intervene in that suit if he so desires.—PARTINGTON *v.* PARTINGTON & ATKINSON, [1925] P 34; 94 L. J. P. 49; 132 L. T. 495; 41 T. L. R. 174; 69 Sol. Jo. 294.

3538. —— Condonation by cohabitation—Respondent convicted for rape.]—A husband obtained a decree *nisi* for a dissolution of marriage, on the ground of his wife's adultery; but, upon the intervention of the Queen's Proctor, the decree *nisi* was rescinded, on the ground of the adultery & cruelty of petitioner. The parties afterwards resumed cohabitation, & the husband committed fresh acts of cruelty. He was afterwards sentenced to ten years' penal servitude for a rape upon a girl under twelve years of age. The ct., in the exercise of its discretion, pronounced a decree *nisi* for dissolution of the marriage on the wife's petition, notwithstanding her previous adultery.—COLLINS *v.* COLLINS (1884), 9 P. D. 231; 53 L. J. P. 116; 33 W. R. 170.

Annotations:—**Refd.** Boucher *v.* Boucher & Judd (1892), 67 L. T. 720; Symons *v.* Symons, [1897] P. 167.

(*b*) *In Suits for Judicial Separation.*

Adultery of respondent—As matrimonial offence.]—*See* Part XIII., Sect. 5, sub-sect. 3, *ante*.

Sect. 7.—Bars to relief: Sub-sect. 4, D. (b) & (c).]

3539. General rule.]—(1) A judicial separation can only be granted where petitioner comes to the ct. with a pure character, & is free from all matrimonial misconduct. Accordingly where a husband & wife had both been found guilty of adultery, & the husband had also been found guilty of cruelty:—*Held:* the ct. had no jurisdiction to make a decree of judicial separation on the ground of such cruelty, however aggravated its character might be.

(2) A husband & wife who were married before 1882, presented cross-petitions for dissolution of marriage, the wife's petition being presented before that of her husband. They were both found guilty of adultery, & the husband was also found guilty of cruelty of an aggravated character. The judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, & gave her her costs. The husband having appealed, the Ct. of Appeal discharged the order for judicial separation:—*Held:* the wife was entitled, notwithstanding her adultery, to her costs both in the ct. below & on the appeal. *Semble:* if the wife had been herself applt., & had been unsuccessful, she would not have had her costs of the appeal. *Qu.:* whether the Rules of the Divorce Ct. as to the wife's costs are applicable to women married since Married Women's Property Act, 1882 (c. 75).—OTWAY *v.* OTWAY, OTWAY *v.* OTWAY & HOFFER (1888), 13 P. D. 141; 57 L. J. P. 81; 59 L. T. 153; 4 T. L. R. 523, 534, C. A.

Annotations:—As to (1) **Distd.** Duplany *v.* Duplany, [1892] P. 53. **Consd.** Gooch *v.* Gooch, [1893] P. 99; Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Folld.** Everett *v.* Everett & McCullum, [1919] P. 298. **Refd.** Stoker *v.* Stoker, Skidmore & Murray, Stoker *v.* Stoker (1889), 60 L. T. 400; Dixon *v.* Dixon (1892), 67 L. T. 394; Synge *v.* Synge, [1900] P. 180; Constantinidi *v.* Constantinidi & Lance, [1903] P. 246. *As to* (2) **Apld.** Earnshaw *v.* Earnshaw, [1896] P. 160. **Refd.** Hall *v.* Hall, [1891] P. 302; Ash *v.* Ash, [1893] P. 222; Betton-Bright *v.* Betton-Bright, [1920] P. 338; Abrahams *v.* Buckley, [1924] 1 K. B. 903.

3540. ——.]—A wife living in an adulterous alliance, even though brought about by the procurement or connivance of her husband, cannot maintain against him a suit for judicial separation. The husband's connivance does not take such a case out of the general rule laid down in *Otway* v. *Otway*, *Otway* v. *Otway & Hoffer*, No. 3539, *ante*.

A husband petitioned for divorce on the ground of his wife's adultery. The adultery was admitted, but the wife pleaded condonation, connivance & conduct conducing, & she brought counter charges of cruelty, & prayed for judicial separation. At the date of the petition she was still living in adultery. The judge found that the wife's charges of cruelty against the husband were proved, & dismissed the petition. He granted judicial separation to the wife on the ground of the husband's connivance:—*Held:* the case must be decided on principles & rules as nearly as may be conformable to those on which the old Ecclesiastical Cts. would have acted, & that those Cts. would never have given relief to a wife under such circumstances.—EVERETT *v.* EVERETT & MCCULLUM, [1919] P. 298; 88 L. J. P. 130; 121 L. T. 503; 35 T. L. R. 613; 63 Sol. Jo. 682, C. A.

Annotation:—**Refd.** Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

3541. Whether adultery a bar—Petition on ground of cruelty—Adultery since commencement of suit.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante*.

3542. —— —— **Petitioner without need of court's protection.**]—The ct. refused to grant a decree of judicial separation on the ground of the husband's cruelty in a case where the wife had committed adultery, being of opinion that she did not require the protection of the ct. *Qu.:* whether the ct. can in any case grant a decree of judicial separation on the ground of cruelty to a wife who has been guilty of adultery.—GROSSI *v.* GROSSI (1873), L. R. 3 P. & D. 118; 42 L. J. P. & M. 69; 28 L. T. 371; 21 W. R. 551.

Annotation:—**Consd.** Everett *v.* Everett & McCullum, [1919] P. 298.

3543. —— —— **Aggravated cruelty.**]—OTWAY *v.* OTWAY, OTWAY *v.* OTWAY & HOFFER, No. 3539, *ante*.

3544. —— **No conducement to adultery.**]—Where petitioning wife has committed adultery & resp. husband has been guilty of adultery & cruelty, the ct. should not exercise its discretion by granting a decree *nisi* for divorce unless the wife's conduct was caused directly by the husband's cruelty & adultery, but it may, with the wife's assent, grant a decree of judicial separation.—BELCHER *v.* BELCHER (1919), 35 T. L. R. 581.

3545. —— **When condoned—Gross adultery by respondent.**]—A suit for restitution of conjugal rights being commenced by the wife, the husband pleaded her adultery in bar, & prayed a separation; the wife then charged the husband with adultery, & prayed a separation. The ct. being of opinion that the wife had been guilty of very gross adultery, & that the husband's adultery with one person long anterior had been fully condoned, pronounced for a separation, at the prayer of the husband.—ANICHINI *v.* ANICHINI (1839), 2 Curt. 210; 163 E. R. 387.

Annotations:—**Consd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II., 665; Hope *v.* Hope (1858), 1 Sw. & Tr. 91. **Folld.** Seller *v.* Seller (1859), 1 Sw. & Tr. 482. **Expld.** Goode *v.* Goode & Hamson (1861), 2 Sw. & Tr. 253. **Consd.** Lautour *v.* Her Majesty's Proctor (1864), 10 H. L. Cas. 685; Morgan *v.* Morgan (1869), L. R. 1 P. & D. 644; McCord *v.* McCord (1875), L. R. 3 P. & D. 237; Symons *v.* Symons, [1897] P. 167; Everett *v.* Everett & McCullum, [1919] P. 298; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203. **Refd.** Gooch *v.* Gooch, [1893] P. 99; Evans *v.* Evans & Elford, [1906] P. 125; Wain *v.* Wain & Eve (1909), 101 L. T. 815; Munzer *v.* Munzer & Swain (1912), 28 T. L. R. 596; Woltereck *v.* Woltereck & Walters, [1912] P. 201.

3546. Cohabitation after previous decree.]—A wife petitioned for judicial separation by reason of her husband's adultery, setting forth in the petition a sentence of divorce *a mensâ et thoro* obtained by the husband in 1833 by reason of her adultery, after which the parties were reconciled & cohabited together. On demurrer to this petition:—*Held:* the adultery of petitioner having been condoned was no bar to her present suit.—SELLER *v.* SELLER (1859), 1 Sw. & Tr. 482; 28 L. J. P. & M. 99; 34 L. T. O. S. 46; 23 J. P. 471; 5 Jur. N. S. 686; 8 W. R. 5; 164 E. R. 823.

Annotations:—**Consd.** Everett *v.* Everett & McCullum, [1919] P. 298. **Refd.** Bernstein *v.* Bernstein, [1893] P. 292; Gooch *v.* Gooch, [1893] P. 99.

3547. —— —— **Continued to & existing at date of proceedings.**]—EVERETT *v.* EVERETT & MCCULLUM, No. 3540, *ante*.

3548. —— —— **Covenant in separation deed not to sue for antecedent offences.**]—A husband & wife had separated in 1886 under a deed which contained the following clause: "No proceedings

PART XIII. SECT. 7, SUB-SECT. 4.—D. (b).

3539 i. *General rule.*]—A guilty party in a matrimonial suit cannot obtain relief by way of judicial separation.—HILL *v.* HILL (1923), I. L. R. 47 Bom. 657.—IND.

shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or has arisen before the date of these presents." In 1890 the wife presented a petition for judicial separation on the ground of adultery committed in the years 1889 & 1890, & the husband in his answer charged his wife with adultery committed in the years 1884 & 1885. At the trial both parties were found guilty of adultery:—*Held:* the covenant in the deed of separation was not equivalent to condonation, & it did not preclude the husband from pleading in answer to his wife's petition adultery committed by her before the date of the deed.—GOOCH *v.* GOOCH, [1893] P. 99; 62 L. J. P. 73; 68 L. T. 462; 41 W. R. 655; 9 T. L. R. 303; 1 R. 516.

Annotation:—**Refd.** Everett *v.* Everett & McCullum, [1919] P. 298.

3549. — Where not condoned—Petitioner's adultery subsequent to respondent's.]—Divorce, by reason of adultery, barred by the *compensatio criminis*, committed even after the adultery of deft. Recrimination sustained.—PROCTOR *v.* PROCTOR (1819), 2 Hag. Con. 292; 161 E. R. 747.

Annotations:—**Apld.** Astley *v.* Astley (1828), 1 Hag. Ecc. 714. **Consd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II., 665; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Everett *v.* Everett & McCullum, [1919] P. 298. **Refd.** Drummond *v.* Drummond (1861), 30 L. J. P. M. & A. 177; Otway *v.* Otway (1888), 13 P. D. 141; Symons *v.* Symons, [1897] P. 167; Constantinidi *v.* Constantinidi, [1903] P. 246; Hodgson *v.* Hodgson & Turner (1905), 53 W. R. 623; Evans *v.* Evans & Elford, [1906] P. 125; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80.

3550. —— When adultery connived at.]—EVERETT *v.* EVERETT & MCCULLUM, No. 3540, *ante*.

3551. Suit by husband—Cruelty by wife.]—A suit having been instituted by a husband for a judicial separation from his wife on the ground of her cruelty, the latter, besides traversing the charge, pleaded that the husband had been guilty of adultery. On an application to the ct. by petitioner's counsel on motion to strike out so much of resp.'s answer as contained the recriminatory charge, it was refused, the proper course being to demur to the plea.—HALL *v.* HALL (1863), 2 New Rep. 85; 32 L. J. P. M. & A. 117; 11 W. R. 810.

(*c*) *In Suits for Restitution of Conjugal Rights.*

Defences to suit for restitution of conjugal rights, *see* Part XIII., Sect. 5, sub-sect. 1, F., *ante*.

3552. Whether adultery a bar.]—SAVILE'S CASE (1740), cited in 1 Add. at p. 412; 162 E. R. 146.

Annotations:—**Consd.** Best *v.* Best (1823), 1 Add. 411. **Refd.** Clowes *v.* Jones (falsely called Jones) (1843), 3 Curt. 185.

3553. ——.]—DENNISS *v.* DENNISS (1808), 2 Rob. Eccl. 268, n.; 3 Hag. Ecc. 348, n.; 163 E. R. 1313.

Annotations:—**Refd.** Phillips *v.* Phillips (1846), 4 Notes of Cases, 523; Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Connelly *v.* Connelly (1850), 2 Rob. Eccl. 201. **Mentd.** Chambers *v.* Chambers (1810), 1 Hag. Con. 439.

3554. ——.]—MORTIMER *v.* MORTIMER, No. 3313, *ante*.

3555. ——.]—BARLEE *v.* BARLEE, No. 2463, *ante*.

3556. ——.]—GEILS *v.* GEILS, No. 2464, *ante*.

3557. —— Where both parties guilty of offence.]—NAYLOR *v.* NAYLOR (1777), cited 1 Hag. Ecc. 722; 162 E. R. 731.

Annotations:—**Distd.** Astley *v.* Astley (1828), 1 Hag. Ecc. 714. **Consd.** Hope *v.* Hope (1858), 1 Sw. & Tr. 94. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. App. II., 665.

3558. ——.]—ANICHINI *v.* ANICHINI, No. 3545, *ante*.

3559. —— Doctrine of compensatio criminis not applicable.]—The doctrine of the canon law that, where husband & wife have both been guilty of adultery, there is a *compensatio criminum* & both are restored to the position of innocent parties, is not part of the law of England. Therefore, a suit for restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery.—HOPE *v.* HOPE (1858), 1 Sw. & Tr. 94; 27 L. J. P. & M. 43; 31 L. T. O. S. 138; 22 J. P. 308; 4 Jur. N. S. 515; 6 W. R. 585; 164 E. R. 644.

Annotations:—**Consd.** Seller *v.* Seller (1859), 1 Sw. & Tr. 482; Wilson *v.* Glossop (1887), 19 Q. B. D. 379. **Folld.** Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80. **Refd.** Everett *v.* Everett & McCullum, [1919] P. 298.

3560. —— —— ——.]—A wife petitioned for restitution of conjugal rights. The husband in his answer alleged adultery against her. In reply the wife denied the charge, & further pleaded that the husband had been guilty of adultery. A summons was taken out by the husband asking that the paragraphs in the reply relating to the allegations of adultery against him should be struck out as irrelevant:—*Held:* the paragraphs must be struck out, as a decree for restitution would not be granted to a wife guilty of adultery, & the principle of *compensatio criminis* would not be adopted by the ct.—BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS, [1913] P. 80; 82 L. J. P. 57; 108 L. T. 397; 29 T. L. R. 288, C. A.; *affg.* S. C. *sub nom.* P. *v.* P. (1912), 107 L. T. 721.

Annotation:—**Refd.** Wickins *v.* Wickins (No. 2), [1918] P. 282.

3561. —— No acquiescence by respondent.]—BURGESS *v.* BURGESS (1817), 2 Hag. Con. 223; 161 E. R. 723.

Annotation:—**Distd.** Grover *v.* Grover (1836), 5 Notes of Cases, 463.

3562. — — Not condoned or concealed.]—(1) To a suit for restitution of conjugal rights brought by the wife, the husband pleaded in a responsive allegation the adultery of the wife. The acts pleaded were in substance & form the same as had been previously alleged by the husband in a suit for divorce, in which the libel was rejected:—*Held:* the defence being one which the husband had a right to set up in bar to the wife's suit, & the acts charged being sufficiently specific to entitle him, if not condoned or concealed, to allege them as grounds for a charge of divorce in such a suit, he was entitled to plead them by way of responsive allegation.

(2) *Semble:* if the acts of adultery charged are sufficiently circumstantial to admit of proof, it is not necessary to specify time & place.—MOORE *v.* MOORE (1840), 3 Moo. P. C. C. 84; 13 E. R. 39, P. C.

Annotations:—*As to* (1) **Consd.** Sopwith *v.* Sopwith (1860), 2 Sw. & Tr. 160. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Stace *v.* Stace (1868), 37 L. J. P. & M. 51; Russell *v.* Russell, [1895] P. 315.

3563. —— Adultery subsequent to separation.]—In a wife's suit for restitution of conjugal rights, the husband pleaded that he had been induced to marry her on a false representation that she was pregnant by him; that she had, since their separation, committed adultery; & that he was not able to maintain her. The ct. ordered the first plea to be struck out, & allowed the second to stand. The charge of adultery it directed to be pleaded in the usual manner with particulars.—GREEN *v.* GREEN (1869), 21 L. T. 401.

3564. Suspicion of adultery.]—BURROUGHS *v.* BURROUGHS, No. 2457, *ante*.

Sect. 7.—Bars to relief: Sub-sect. 4, D. (d) & (e), E. (a) & (b).]

(d) In Suits for Nullity of Marriage.

Marriage voidable for impotence.]—*See* Part XIII., Sect. 3, sub-sect. 2, *ante.*

3565. Whether adultery a bar.]—(1) The husband brought a suit of nullity of marriage, by reason of impotency, against the wife, who pleaded in answer matters in contradiction to the husband's case & also the adultery of the husband:—*Held:* it was not competent to the wife to plead the husband's adultery at that stage of the cause.

(2) [Counsel] pressed the ct. not to order an inspection. I am very sensible how painful this must be to any lady, & certainly would make no such order save *ex debito justitiae.* If the allegation had pleaded merely matters in bar, not putting in issue the malformation, I might have deliberated whether I would not have delayed ordering the inspection until publication had passed as to the plea in bar, for if that plea were good & proved there would have been an end of the suit; but this allegation puts in issue the malformation & all the facts to prove the contrary: how is it possible I could receive evidence on one side, & not legal evidence on the other? . . . There is still an additional reason. Deft. has brought with reference to this very question of malformation a most serious charge against pltf. She has charged him with having caused an appearance of malformation, by giving her the venereal disease. Surely it would be against all justice to allow that article to go to proof & not permit pltf. by the only possible process to rebut that charge & prove his original case (DR. LUSHINGTON).—ANON. (1857), Dea. & Sw. 295; 5 W. R. 750; 164 E. R. 581.

Annotation:—Generally, **Refd.** M. (otherwise D.) *v.* D. (1885), 10 P. D. 75.

3566. ——.]—A plea to a petition for a decree of nullity of marriage on the ground of the impotence of resp., that petitioner had committed adultery is irrelevant & will be struck out.—TAVERNER (FALSELY CALLED DITCHFIELD) *v.* DITCHFIELD (1864), 4 New Rep. 28; 33 L. J. P. M. & A. 105.

Annotation:—**Refd.** G. *v.* M. (1885), 10 App. Cas. 174, n.

3567. ——.]—G. *v.* M. (1885), No. 3339, *ante.*

3568. —— **Sincerity.**]—At the end of seven years' cohabitation a marriage had not been consummated, through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, & upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him & he a suit for dissolution of marriage against her:—*Held:* the proof of impotence being clear her conduct did not show such a want of sincerity as to deprive her of her right to have the marriage annulled.

(2) When the impotence is undoubted, mere delay is not sufficient to disentitle the injured party to relief.—M. (OTHERWISE D.) *v.* D. (1885), 10 P. D. 75; 54 L. J. P. 68; 33 W. R. 657.

3569. —— ——.]—(1) In order to raise the question of insincerity in a suit for nullity, it is necessary that the answer should specifically allege it.

(2) Adultery may be alleged, &, if established, is material matter for consideration on the question of petitioner's insincerity.

(3) Petitioner is, however, not bound to answer questions tending to establish adultery.—S. (OTHERWISE G.) *v.* S., [1907] P. 224; 76 L. J. P. 118: 23 T. L. R. 460; 51 Sol. Jo. 430.

Annotation:—As to (3) **N.F.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

(e) In Suits claiming Damages only.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 48), s. 189.

3570. Petitioner barred—Unless discretion exercised in his favour.]—COX *v.* COX & WARDE, No. 2815, *ante.*

E. Petitioner's Cruelty.

(a) In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*b*).

Cruelty of respondent—As matrimonial offence.]—*See* Part XIII., Sect. 5, sub-sect. 2, *ante.*

3571. Whether pleadable in bar to charge of adultery.]—FORSTER *v.* FORSTER, No. 3403, *ante.*

3572. ——.]—MOORSOM *v.* MOORSOM, No. 3082, *ante.*

3573. ——.]—Cruelty is not a bar to a charge of adultery, but may be pleaded as introductory to the history of an adulterous intercourse.—ARKLEY *v.* ARKLEY (1821), 3 Phillim. 500; 161 E. R. 1397.

Annotations:—**Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376; Cocksedge *v.* Cocksedge (1844), 3 Notes of Cases, 218.

3574. ——.]—(1) Cruelty cannot be pleaded by the wife in bar of a charge of adultery.

The wife having failed in a charge of adultery & a recriminating plea having been proved by the husband cruelty & the introduction of the wife to a female of loose character (the wife's guilt not being connected with such introduction) form no bar to his prayer for divorce.

(2) Where the wife is charged with adultery her conduct & declarations on a confession of guilt by the alleged *particeps criminis* being communicated to her are admissible evidence on behalf of the husband.—HARRIS *v.* HARRIS (1829), 2 Hag. Ecc. 376; 162 E. R. 894; *affd.*, 2 Hag. Eccl. 511.

Annotations:—As to (1) **Folld.** Dillon *v.* Dillon (1842), 3 Curt. 86, 96. **Consd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Otway *v.* Otway (1888), 57 L. J. P. 81. *As to* (2) **Refd.** Graves *v.* Graves (1842), 3 Curt. 235. *Generally,* **Refd.** Russell *v.* Russell (1897), 66 L. J. P. 122.

3575. —— **Coupled with plea of adultery.**]—In a suit for divorce by reason of the wife's adultery, an allegation on her behalf, pleading cruelty by the husband, coupled with a charge of adultery, as a foundation for a prayer of separation against the husband, admitted.

There can be no doubt that cruelty is not pleadable as a bar to adultery; but it is not clear that cruelty, coupled with other circumstances, may not be pleaded as a foundation for a sentence of separation (SIR H. JENNER).—ELDRED *v.* ELDRED (1840), 2 Curt. 376; 163 E. R. 445.

Annotation:—**Folld.** Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90.

3576. ——.]—DILLON *v.* DILLON, No. 4008, *post.*

3577. ——.]—COCKSEDGE *v.* COCKSEDGE, No. 3598, *post.*

Cruelty as bar to relief—In petitions for dissolution of marriage.]—*See, now,* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178; Part XIII., Sect. 7, sub-sect. 4, E. (*b*), *post.*

(b) In Suits for Dissolution of Marriage.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178.

3578. Discretionary bar.]—A remaining charge is that of cruelty. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty. I am inclined to think, that she would not. It is certain, that the wife has a right to say, "You shall not have a sentence against me

for adultery, if you are guilty of the same offence yourself." The received doctrine of compensation would have that effect, because both parties are *in eodem delicto ;* but this is not so in recrimination of cruelty ; the *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know, that she would be barred by a recrimination of that species ; for the consideration would be very different ; the ct. might not oblige her to cohabitation, which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, & I take the general doctrine to be, " that a wife cannot plead cruelty as a bar to divorce, for her violation of the marriage-bed " (SIR WILLIAM SCOTT).—CHAMBERS *v.* CHAMBERS (1810), 1 Hag. Con. 439 ; 161 E. R. 610.

Annotations :—**Consd.** Eldred *v.* Eldred (1840), 2 Curt. 376. **Folld.** Dillon *v.* Dillon (1842), 3 Curt. 86, 96. **Consd.** Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90. **Refd.** Otway *v.* Otway (1888), 13 P. D. 141 ; Hodgson *v.* Hodgson & Turner (1905), 53 W. R. 623 ; Everett *v.* Everett & McCullum, [1919] P. 298.

3579. By what cruelty petitioner barred —Cruelty conducing to respondent's misconduct.]—The jury having found on the issues submitted to them in a suit for dissolution of marriage by the husband against the wife that resp. was guilty of adultery, & petitioner guilty of cruelty to resp. brought on by her drunkenness, the ct. made a decree dissolving the marriage.

Semble : the cruelty contemplated by Matrimonial Causes Act, 1857 (c. 85), s. 31, will in most cases be taken to mean such cruelty as has led to the adultery alleged in the petition.—PEARMAN *v.* PEARMAN & BURGESS (1860), 1 Sw. & Tr. 601 ; 29 L. J. P. M. & A. 54 ; 1 L. T. 415 ; 8 W. R. 274.

Annotations :—**Consd.** Edwards *v.* Edwards, [1894] P. 33 ; Symons *v.* Symons, [1897] P. 167 ; Pryor *v.* Pryor, [1900] P. 157 ; Wickins *v.* Wickins, [1918] P. 265. **Refd.** Parry *v.* Parry, [1896] P. 37.

3580. —— ——.]—Decree dissolving the marriage pronounced in favour of a husband who had been convicted by justices of an aggravated assault upon his wife, & against whom a separation has been thereupon made.

The rule with reference to cruelty has been, that if it should appear that the conduct of the husband has been such as to conduce to the wife's fault, then that has been sternly visited upon him. In other cases where that has not been so plain, a decree has been made with some provision for the guilty wife. . . . I think on the whole that I can pronounce this decree. It is quite true that the magistrate seems to have convicted this man of what appears to be an aggravated assault. It is also true that the magistrate was obliged to so convict him, in order to grant a separation to the wife. The petitioner seems to have paid the allowance regularly, until he found out his wife's adultery (JEUNE, J.).—SERGENT *v.* SERGENT & WEAVER (1891), 64 L. T. 236.

3581. —— ——.]—The discretion conferred upon judges of the Divorce Court by Matrimonial Causes Act, 1857 (c. 85), s. 31, is not an absolute or arbitrary, but a judicial discretion, & is intended to be exercised in conformity with the former practice of the House of Lords. Cruelty on the part of petitioner, in order to bar a claim for a divorce, must either have led to the adultery of the resp., or be entirely wanton & unprovoked in its character.

In considering what terms should be imposed upon petitioner who has been found guilty of cruelty towards resp. the ct. takes into consideration all the facts of the particular case before it, & considers the interests not merely of the parties, but of the child or children, if any, of the marriage.

Where the means of petitioner, the husband, were very small & uncertain, & resp.'s parents, whose character & goodwill were unquestioned, had offered to look after the only child of the marriage, the ct. in granting a decree, assented to an arrangement which had been arrived at between the parties subsequently to the verdict, whereby the formal custody of the child was given to resp. & no allowance was ordered against petitioner.—PRYOR *v.* PRYOR, COWIE & MACDONALD, [1900] P. 157 ; 69 L. J. P. 99.

Annotation :—**Consd.** Squire *v.* Squire, [1905] P. 4.

3582. —— ——.]—(1) In order that the ct. should exercise its discretionary power under Matrimonial Causes Act, 1857 (c. 85), s. 31, to deprive a husband, petitioning for a divorce on the ground of his wife's adultery, of his decree, on the ground that he has himself been guilty of cruelty, it is not of itself a material circumstance that the conduct of petitioner caused the separation of the parties antecedent to the adultery of the wife. The cruelty of the husband must conduce to, if it does not cause, the adultery of the wife ; & if that adultery is, in the opinion of the ct., brought about by other causes than the cruelty of the husband, for example, the habits & inclination of the wife, the husband who has been guilty of cruelty is nevertheless entitled to his decree.

(2) The object of the ct. in ordering a provision for a guilty wife is that she should be protected from temptation & lead a respectable life ; at the same time, a husband should not be called upon to support a wife who is leading an immoral life, & on this ground, as well as for the protection of the wife, the provision for her should be limited *dum casta.*

In the view I take of this class of case, it is material that the *dum casta* clause should be inserted. The wife should know & should be made to feel that her livelihood depends upon her leading a chaste life in the future. In cases where the wife has not been proved to have committed adultery I should be slow to insert the *dum casta* clause.

Although I do not lay so much stress upon the *dum sola* clause, I think that, too, ought to be inserted, & that the husband ought not to be called upon to contribute to the support of his divorced wife if she should become the wife of another man (JEUNE, P.).—SQUIRE *v.* SQUIRE & O'CALLAGHAN, [1905] P. 4 ; 74 L. J. P. 1 ; 92 L. T. 472 ; 21 T. L. R. 41.

Annotations :—*As to* (2) **Apld.** Woodcock *v.* Woodcock & Codesido (1914), 111 L. T. 924. **Refd.** Ollier *v.* Ollier, [1914] P. 240.

3583. —— **Cruelty not serious.**]—Decree *nisi* granted to a husband, although the jury found that he had been guilty of cruelty.—TANNAM *v.* TANNAM, BEESON & BALLARD (1897), 13 T. L. R. 453.

3584. —— **Wanton & unprovoked cruelty.**]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *ante.*

3585. —— **Not cruelty causing separation—Anterior to adultery.**]—SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante.*

3586. Respondent's conduct conducing to petitioner's cruelty—Drunken habits.]—PEARMAN *v.* PEARMAN & BURGESS, No. 3579, *ante.*

3587. —— ——.]—FORRESTER *v.* FORRESTER (1884), *Times*, May 19.

Annotation :—**Refd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

3588. —— ——.]—Upon a husband's petition for divorce on the ground of his wife's adultery, where the adultery is fully established against her, but where she cross-petitions cruelty as having

Sect. 7.—*Bars to relief: Sub-sect.* 4, *E.* (*b*), (*c*) *&* (*d*), *& F.*

been committed by her husband towards her, & where it appears that the wife is a woman of drunken habits, & that what she alleges as violence has been used upon her in consequence of her drunkenness, the ct. requires a very strong case to be made out against the husband in order to bar his right to relief from the marriage tie. Unless it is proved that he has been guilty of such gross violence towards her as the ct. cannot allow to be excused on the ground that he was provoked to it by her intemperance, the decree in his favour should not be withheld.—FORSYTH *v.* FORSYTH, ECCLES & FOSTER (1890), 63 L. T. 263.

3589. —— —— Respondent found in flagrante delicto.]—SMITH *v.* SMITH (1901), 45 Sol. Jo. 467.

3590. Where cruelty condoned by respondent—Whether discretion exercised in petitioner's favour—Communication of venereal disease.] WILDEY *v.* WILDEY & RYDER, No. 3478, *ante*.

3591. —— —— Honest & straightforward account by petitioner.]—WOLTERECK *v.* WOLTERECK & WALTERS, No. 3485, *ante*.

3592. Sufficiency of proof of petitioner's cruelty—Former decree for judicial separation.]—The wife obtained in Mar. 1887, a decree for a judicial separation on the ground of cruelty, & was given the custody of her only child. On May 4, 1888, the husband was ordered to pay permanent alimony at the rate of £80 a year from the date of the decree. This he did not pay, although he had the means. On Sept. 17, 1888, a deed was executed by the husband & wife, by which the latter relinquished the custody of the child & all her right to alimony, in consideration of a lump sum of £75 then paid to her by her husband. Some little time after that deed was signed the husband became aware that his wife was committing adultery with the co-resp., with whom she went to live. The husband then filed his petition, asking for the dissolution of his marriage:—*Held:* as the cruelty on the part of the husband was not of such a nature as would induce the ct. to withhold a decree, & as the deed of release was executed by the wife with her eyes open, the husband should not be refused the relief prayed, & a decree *nisi* should accordingly be pronounced in his favour.—BADHAM *v.* BADHAM & GORST (1890), 62 L. T. 663.

Annotations:—**Consd.** Edwards *v.* Edwards, [1894] P. 33. **Refd.** Parry *v.* Parry, [1896] P. 37.

3593. —— Conviction for aggravated assault—Conviction necessary to grant separation.]—SERGENT *v.* SERGENT & WEAVER, No. 3580, *ante*.

3594. Exercise of discretion on terms—Allowance to wife.]—SERGENT *v.* SERGENT & WEAVER, No. 3580, *ante*.

3595. —— ——.]—EDWARDS *v.* EDWARDS & FRANCIS, No. 3412, *ante*.

3596. —— —— Custody of child to respondent.]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *ante*.

3597. —— —— Dum sola et dum casta clause.]—SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante*.

(*c*) *In Suits for Judicial Separation.*

3598. On ground of adultery—Whether cruelty a bar.]—Cruelty is not pleadable by a wife in bar to a separation prayed by the husband by reason of her adultery; but cruelty is pleadable by her in conjunction with a cross-petition of adultery against the husband.

Qu.: whether if the proof of adultery fails on both sides, the wife will be entitled to a sentence of separation in the same suit, provided she prove cruelty.—COCKSEDGE *v.* COCKSEDGE (1844), 1 Rob. Eccl. 90; 3 Notes of Cases, 218; 163 E. R. 975; *sub nom.* COXSEDGE *v.* COXSEDGE, 8 Jur. 935.

3599. —— ——.] LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante*.

(*d*) *In Suits for Restitution of Conjugal Rights.*

Defences for suit for restitution, *see* Part XIII., Sect. 5, sub-sect. 1, F., *ante*.

3600. By what cruelty petitioner barred—Sufficient to found petition for judicial separation.]—In a suit for restitution of conjugal rights, no facts are sufficient to bar the proceeding, except such as would be sufficient to have entitled the party to a divorce on an original suit.

"I was of opinion nothing could be offered in bar to her living with her husband, but such facts as would entitle her to a divorce, in case she had brought a suit against him to be separated for cruelty" (SIR GEORGE LEE).—HOLMES *v.* HOLMES (1757), 2 Lee, 116; 161 E. R. 283.

Annotation:—**Consd.** Russell *v.* Russell, [1897] A. C. 395.

3601. —— Not accidental injuries in course of wrongful resistance—On minor acts.]—OLIVER *v.* OLIVER, No. 2574, *ante*.

3602. —— Personal violence or manifest danger—Not mere unkindness or unfounded fears.]—BARLEE *v.* BARLEE, No. 2463, *ante*.

3603. —— Conduct rendering cohabitation unsafe.]—To the wife's petition for restitution of conjugal rights, the husband answered alleging violence of language & conduct on her part, & that he could not, without danger to his health, renew the cohabitation, but setting out no facts amounting to *primâ facie* cruelty.

The ct., it being the husband's answer & the suit at his expense, declined to determine, until it had heard the evidence, whether the conduct attributed to petitioner amounted to legal cruelty, & held the answer sufficient.—STACE *v.* STACE (1868), 37 L. J. P. & M. 51; 18 L. T. 740; 16 W. R. 1176.

Annotation:—**Consd.** Russell *v.* Russell, [1895] P. 315.

3604. —— ——.]—In a suit by a wife for restitution of conjugal rights the husband alleged that petitioner drank to excess, &, further, that she had been guilty of cruelty towards him. The jury found that petitioner had been guilty of physical violence to resp., but not of cruelty; that petitioner drank to excess; that it was not unsafe at the time resp. left petitioner for the parties to live together:—*Held:* a decree of restitution of conjugal rights should be refused.—BUTLAND *v.* BUTLAND (1913), 29 T. L. R. 729.

Annotation:—**Refd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

3605. —— Charging respondent with unnatural offence.]—RUSSELL *v.* RUSSELL, No. 2661, *ante*.

3606. Cruelty condoned—Not subsequently revived.]—GEILS *v.* GEILS, No. 2464, *ante*.

F. Petitioner's Desertion or Wilful Separation without Reasonable Excuse.

(*a*) *In Suits for Dissolution of Marriage.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*c*).

Respondent's desertion—As matrimonial offence.]—*See* Part XIII., Sect. 5, sub-sect. 3, *ante*.

3607. "Without reasonable excuse"—General rule.]—The ct. will not dissolve a marriage on the ground of the wife's adultery when satisfied that before the date of the adultery complained of, the husband deserted her without reasonable excuse.—

YEATMAN *v.* YEATMAN (1870), L. R. 2 P. & D. 187; 39 L. J. P. & M. 77; 23 L. T. 283; 18 W. R. 1088.

3608. —— Equivalent to "without reasonable cause"—Separation without justification.]—WICKINS *v.* WICKINS, No. 3292, *ante*.

3609. —— Respondent submitting to indecent liberties with men.]—(1) Where the case of petitioner, in a suit for dissolution of marriage on the ground of adultery, has been proved, & the ct. do not find that he has been accessory to or conniving at the adultery, or that there had been condonation or connivance, they are bound to pronounce a decree dissolving the marriage, unless it is established affirmatively that petitioner has been guilty of one of the acts which, under the proviso to Matrimonial Causes Act, 1857 (c. 85), s. 31, give the ct. a discretionary power to refuse to dissolve the marriage.

(2) Where it appears doubtful on the evidence in the suit whether or not the conduct of petitioner has been such as to give the ct. such discretionary power, the ct. will, for the purpose of satisfying their minds, examine petitioner adversely under sect. 43, but will not in a suit instituted on the ground of adultery examine him or permit him to be examined for the purpose of proving his own case. After the ct. has examined petitioner adversely, his counsel will be permitted to suggest questions to petitioner for the purpose of clearing up what the ct. may have elicited adversely to the case.

(3) *Semble:* "deserted," in the proviso to sect. 31 is equivalent to "left destitute."

(4) In a suit for a dissolution of marriage, on the ground of the wife's adultery, it appeared from the evidence in support of the petition, that the husband had "wilfully separated himself from his wife" shortly after the marriage; but it was doubtful whether or not he did so "without reasonable excuse," the only evidence as to the cause of the separation being a statement made by the wife, that "her husband had left her because he had caught her with a young man." The ct., thinking that petitioner might not have had reasonable excuse for leaving her, examined him, when it appeared that he had found her submitting to indecent liberties, & had immediately broken off all intercourse with her:—*Held:* as, under these circumstances, it did not appear affirmatively that there was not reasonable excuse for the separation, the ct. had no discretionary power, but were bound to dissolve the marriage.—HASWELL *v.* HASWELL & SANDERSON (1859), 1 & Tr. 502; Sea. & Sm. 32; 29 L. J. P. & M. 21; 1 L. T. 69; 23 J. P. 825; 8 W. R. 76; 164 E. R. 832.

Annotations:—*As to* (4) **Consd.** Yeatman *v.* Yeatman (1868), L. R. 1 P. & D. 489; Wickins *v.* Wickins, [1918] P. 265. **Refd.** Oldroyd *v.* Oldroyd, [1896] P. 175; Harriman *v.* Harriman, [1909] P. 123; Fisk *v.* Fisk (1920), 122 L. T. 803.

3610. —— Clandestine marriage of young girl—Petitioner sent abroad on discovery of respondent's unsuitability.]—A., being only sixteen years of age, was privately married to B., aged thirty-six, without the consent of her family. On its being discovered that B. was an unsuitable husband for her, A. was removed to the Continent, & never saw him again. He made no attempts to procure cohabitation with her; & subsequently contracted a bigamous marriage:—*Held:* there had been a reasonable excuse for the separation, & dissolved the marriage, on the ground of B.'s bigamy & adultery.—DU TERREAUX *v.* DU TERREAUX (1859), 1 Sw. & Tr. 555; 28 L. J. P. & M. 95; 23 J. P. 647; 164 E. R. 857.

3611. Marriage to prostitute—Separation at father's instigation—Allowance to respondent.] Petitioner, the son of a clergyman, & having taken his degree at Cambridge, married a woman who had been living as a prostitute in Cambridge, on June 13, 1863. Nothing in the nature of continuous cohabitation took place. In Oct. 1863, petitioner's father became aware of the fact, & in Dec. 1863, a deed of separation, under which resp. was to receive £1 a week, was executed. The adultery took place in the early part of 1864. Petitioner was dependent on his father:—*Held:* the separation, if wilful, was not without reasonable excuse, & made a decree *nisi*.—PROCTOR *v.* PROCTOR & SMITH & PITMAN (1865), 4 Sw. & Tr. 140; 34 L. J. P. M. & A. 99; 12 L. T. 505; 11 Jur. N. S. 531; 13 W. R. 963; 164 E. R. 1469.

3612. —— Respondent's inability to consummate marriage—Bonâ fide belief.]—OUSEY *v.* OUSEY & ATKINSON, No. 3004, *ante*.

3613. "Wilfully separated"—Marriage to prostitute—Petitioner going abroad to avoid unhappiness—Failure to maintain.]—In a suit for dissolution of marriage, on the ground of the wife's adultery, it appeared that petitioner, a draper's assistant, then twenty-one years of age, married in 1853 a woman whom he well knew to be a prostitute. A month after the marriage they removed from the lodgings to the house of petitioner's father, from which, after a stay of a few weeks, they were compelled to remove in consequence of the wife exhibiting bad temper & making herself disagreeable to the family. Ten days afterwards, the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means of subsistence & supplying her with none during an absence of four years. After he left, his family had given the wife a small pittance on one occasion, & had promised to give her further assistance, but in consequence of her annoying them, all intercourse with her was broken off. The wife, after her husband left, returned to her former way of life. The ct., under these circumstances, held that there was a wilful separation of the husband from the wife before the adultery complained of, & that it was without reasonable excuse; & in exercise of the discretion given them by Matrimonial Causes Act, 1857 (c. 85), s. 31, refused to decree the dissolution of the marriage.—COULTHART *v.* COULTHART & GOUTHWAITE (1859), 28 L. J. P. & M. 21; 32 L. T. O. S. 394.

Annotation:—**Refd.** Beavan *v.* Beavan (1862), 11 W. R. 155.

3614. —— Separation ordered by court—Clandestine marriage of ward of court.]—BEAVAN *v.* BEAVAN, No. 3424, *ante*.

3615. —— Separation necessitated by petitioner's employment.]—Where a husband & wife were living together in service, & the husband left the wife & accepted another situation, & the wife subsequently committed adultery, such a separation by the husband from the wife will not be deemed a "wilful separation" such as under Matrimonial Causes Act, 1857 (c. 85), s. 31, would justify the ct. in refusing to dissolve the marriage on proof of the wife's adultery.—DAVIES *v.* DAVIES & HUGHES (1863), 3 Sw. & Tr. 221; 1 New Rep. 406; 32 L. J. P. M. & A. 111; 8 L. T. 703; 9 Jur. N. S. 828; 11 W. R. 402; 164 E. R. 1258.

3616. —— Voluntary separation by wife.]—CUFLEY *v.* CUFLEY & LOVECK, No. 2884, *ante*.

3617. —— Ante-nuptial agreement to live apart—Discontinuance of allowance on discovery of adultery.]—A husband, without reasonable excuse, obtained from his wife an agreement that they

Sect. 7.—*Bars to relief: Sub-sect.* 4, *F.* (*a*), (*b*) & (*c*). *Sect.* 8: *Sub-sect.* 1, *A.*, *B.* & *C.* (*a*) & (*b*).]

should live apart from each other, which they accordingly did, & she subsequently committed adultery:—*Held:* under the circumstances he had deserted her, & a petition by him for dissolution of the marriage must be dismissed.—DAGG *v.* DAGG (1882), 7 P. D. 17; 51 L. J. P. 19; 47 L. T. 132; 30 W. R. 431.

Annotation:—**Refd.** Piper *v.* Piper, [1902] P. 198.

3618. "Deserted"—Respondent left destitute.]—HASWELL *v.* HASWELL & SANDERSON, No. 3609, *ante*.

3619. Statutory desertion—Discretionary bar.]—The ct. will exercise its discretion in favour of petitioner in a divorce suit, even though guilty of statutory desertion.—MULLEY *v.* MULLEY & SHAW (1909), 53 Sol. Jo. 469.

Annotation:—**Apld.** Stone *v.* Stone & Osborne, [1917] P. 125.

3620. —— —— Desertion not conducing to respondent's adultery—No active steps taken to enforce restitution decree.]—The statutory desertion arising under the Matrimonial Causes Act, 1884 (c. 68), by reason of the failure of a spouse to comply with a decree for restitution of conjugal rights, is only a discretionary bar to his or her claim for relief on the ground of subsequent adultery of the other spouse.

Where the ct. is satisfied that the statutory desertion has not conduced to the adultery & that the deserted spouse took no active steps to enforce the decree for restitution, the ct. may exercise its discretion by granting relief in respect of the subsequent adultery, in spite of the statutory desertion of which the complaining spouse has been guilty.—STONE *v.* STONE & OSBORNE, [1917] P. 125; 86 L. J. P. 101; 117 L. T. 156; 33 T. L. R. 319; 61 Sol. Jo. 461.

3621. Conviction for desertion—Under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—Where a husband, who presents a petition for a dissolution of his marriage, has been previously convicted of desertion under above Act, the ct. will exercise its discretion as to granting a decree dissolving his marriage. The mere fact of conviction will not be sufficient to establish a bar. The whole circumstances of the case will be considered, & if the ct. is of opinion that petitioner acted upon reasonable grounds, he will not be deprived of the relief prayed for.—LLOYD *v.* LLOYD (1901), 84 L. T. 728; 45 Sol. Jo. 556.

3622. Exercise of discretion—Where petitioner's default established by affirmative evidence.]—HASWELL *v.* HASWELL & SANDERSON, No. 3609, *ante*.

3623. —— On terms—Allowance to wife.]—The ct. while allowing an intervention by the King's Proctor, exercised its discretion in favour of petitioner, who had been guilty of desertion, but ordered him to pay a weekly sum to resp., with liberty to apply to rescind or vary that order.—FREEMAN *v.* FREEMAN & FREEMAN (1911), 105 L. T. 383; 27 T. L. R. 523.

3624. —— Not interfered with on appeal.]—WICKINS *v.* WICKINS, No. 3292, *ante*.

Discretion of court generally.]—*See* Part XIII., Sect. 7, sub-sect. 4, A., *ante*.

(*b*) *In Suits for Judicial Separation.*

Respondent's desertion.]—*See* Part XIII., Sect. 5, sub-sect. 8, *ante*.

3625. On ground of adultery—Whether petitioner barred.]—The mere desertion of a wife by the husband though a malicious desertion will not bar a sentence of divorce [*a mensâ et thoro*] at the suit of the husband on proof of adultery committed by the wife.—SULLIVAN *v.* SULLIVAN (1824), 2 Add. 299; 162 E. R. 303.

Annotations:—**Apld.** Morgan *v.* Morgan (1841), 2 Curt. 679. **Consd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Clowes *v.* Jones (falsely calling herself Clowes) (1845), 4 Notes of Cases, 1; Gandy *v.* Gandy (1882), 51 L. J. P. 41; Fearon *v.* Aylesbury (1884), 14 Q. B. D. 792; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203. **Mentd.** Steward *v.* Bateman (1842), 3 Curt. 201.

3626. —— ——.]—Divorce [*a mensâ et thoro*] by reason of adultery committed by the wife, is not barred by a previous wilful desertion of the wife by the husband.

During the absence of the husband, by the law of England, the wife has no direct remedy, she may pledge his credit for necessaries, but she cannot resort to a ct. for a direct remedy; but although left destitute of aid, it does not follow that she has a licence to commit adultery.

I find, from my own notes, that on the admission of the allegation in *Reeves* v. *Reeves* (1813), 2 Phill. 125, SIR JOHN NICHOLL expressly declared that a wilful desertion of a wife was no bar to a suit against her for adultery; & in *Sullivan* v. *Sullivan*, No. 3625, *ante*, the doctrine is repeated; he says, "I am still to learn that even a malicious desertion of the wife by the husband is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife" (DR. LUSHINGTON).—MORGAN *v.* MORGAN (1841), 2 Curt. 679; 1 Notes of Cases, 23; 163 E. R. 548.

Annotations:—**Consd.** Duplany *v.* Duplany (1891), 66 L. T. 267; Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Dillon *v.* Dillon (1842), 3 Curt. 86; Clowes *v.* Jones (falsely calling herself Clowes) (1845), 4 Notes of Cases, 1.

3627. —— ——.]—LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante*.

3628. —— —— Practice of Ecclesiastical Courts followed.]—The wife petitioned for a divorce upon the grounds of cruelty & adultery. The husband pleaded (*inter alia*) that she wilfully separated herself from him without reasonable excuse. At the trial it was admitted that the husband had committed adultery at a date some months after the final separation, & after all the subsequent negotiations for a deed of separation had gone off. The case was most strenuously fought upon the question of cruelty, &, in the result the jury found that the husband was not guilty of that offence. This was taken to imply a finding that the wife had wilfully separated herself from her husband, without just cause, at a date anterior to his admitted adultery. Thereupon, counsel for the wife applied for a decree of judicial separation with costs, & the custody of the child. The husband opposed the application:—*Held:* (1) inasmuch as desertion was first constituted a matrimonial offence by the Divorce Act, 1857 (c. 85), & would not prior to that Act have been a bar, discretionary or otherwise, to any suit in the Ecclesiastical Ct., in which relief was claimed upon the ground of adultery; & inasmuch as desertion was made by the Act a discretionary bar in suits for divorce, & further, that where the Act was silent, the old ecclesiastical practice was to still prevail, the ct. could not now take upon itself to supply any suggested omission in the Act, & as a matter of law, the wife's claim was not barred.

(2) If the desertion were a bar it could at most be a discretional bar: & in the exercise of his discretion the judge would grant the wife the decree she now asked; but, as each party had been partially successful, & as each had separate property, each would pay their own costs.—

DUPLANY *v.* DUPLANY, [1892] P. 53 ; 61 L. J. P. 49 ; 66 L. T. 267 ; 8 T. L. R. 169.
Annotations :—As to (1) **Apld.** Synge *v.* Synge, [1900] P. 180. **Distd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. *As to* (2) **Refd.** Cox *v.* Cox (1893), 70 L. T. 200.

3629. —— —— —— Desertion conducing to adultery of respondent.]—In considering to what extent desertion, not a matrimonial offence in the Ecclesiastical Cts. is to be held now to be a bar to relief, the ct. will especially have regard to the question whether it has conduced to the misconduct of the other spouse, the principles on which the Ecclesiastical Cts. acted having been apparently to refuse relief to petitioner found guilty of conduct conducing to the misconduct of resp.

Where the ct. found that desertion by petitioner had conduced to the adultery of resp. :—*Held :* petitioner was not entitled to a decree of judicial separation.—HODGSON *v.* HODGSON & TURNER, [1905] P. 233 ; 74 L. J. P. 140 ; 93 L. T. 446 ; 53 W. R. 623 ; 21 T. L. R. 601.
Annotations :—**Consd.** Tulk *v.* Tulk (1906), 23 T. L. R. 120. **Refd.** Everett *v.* Everett & McCullum, [1919] P. 298.

3630. —— —— —— Refusal by wife of marital relations.]—To the wife's petition for judicial separation, on the ground of the husband's cruelty & adultery, an allegation on his part that the wife had wilfully withdrawn herself from his bed, & refused him conjugal rights, is no answer.—ROWE *v.* ROWE (1865), 4 Sw. & Tr. 162 ; 34 L. J. P. M. & A. 111 ; 12 L. T. 639 ; 11 Jur. N. S. 568 ; 13 W. R. 1048 ; 164 E. R. 1478.
Annotations :—**Refd.** Duplany *v.* Duplany (1891), 66 L. T. 267 ; Synge *v.* Synge, [1900] P. 180.

3631. —— —— Desertion without reasonable excuse for two years—Adultery committed subsequently.]—(1) A wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, & is herself in such circumstances guilty of desertion without reasonable cause.

(2) Desertion without reasonable excuse for two years & upwards is no bar to a petition for judicial separation on the ground of subsequent adultery.—SYNGE *v.* SYNGE, [1901] P. 317 ; 70 L. J. P. 97 ; 85 L. T. 83 ; 17 T. L. R. 718, C. A.
Annotations :—As to (1) **Apld.** Davis *v.* Davis, [1918] P. 85. **Refd.** Frowd *v.* Frowd, [1904] P. 177 ; Jackson *v.* Jackson, [1924] P. 19 ; Russell *v.* Russell, [1924] A. C. 687. *As to* (2) **Consd.** Constantinidi *v.* Constantinidi, [1903] P. 246 ; Hodgson *v.* Hodgson, [1905] P. 233. **Refd.** Evans *v.* Evans & Elford, [1906] P. 125 ; Todd *v.* Todd & Cunniam (1906), 23 T. L. R. 9 ; Hines *v.* Hines & Burdett, [1918] P. 364.

(c) *In Suits for Restitution of Conjugal Rights.*

Defences to suit for restitution, *see* Part XIII., Sect. 5, sub-sect. 1, F., *ante.*

3632. Whether petitioner barred—Facts short of matrimonial offence.]—HOLMES *v.* HOLMES, No. 3600, *ante.*

3633. —— Desertion for less than two years—Injury to respondent's health.]—It is not a sufficient answer by a husband to a suit for restitution of conjugal rights that his wife had left the home for a less period than two years, had neglected her children, & that resp.'s health had suffered in consequence of her conduct.—WEST *v.* WEST (1910), 55 Sol. Jo. 48.

SECT. 8.—INSTITUTION AND DEFENCE OF PROCEEDINGS.

SUB-SECT. 1.—PETITIONS AND CONTENTS THEREOF.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 1, 2 ; Appendix 1.

3634. Domicil of wife—Whether necessary to plead.]—It is sufficient, under Divorce Rule 220 of 1905, to insert in a petition the domicil of the husband without stating that of the wife, unless petitioner is asserting a domicil for the wife different from that of the husband.—*Re* CLARK (1905), 75 L. J. P. 7 ; 22 T. L. R. 158.

3635. Communication of venereal disease—Must be specially pleaded.]—Where a petitioner relies upon a charge of wilfully communicating a venereal disease, it should be specifically pleaded in the petition.—WALKER *v.* WALKER (1912), 107 L. T. 655 ; 57 Sol. Jo. 175.

Whether petition must contain prayer for custody.]—*See* No. 4779, *post.*

B. Indorsement of Notice to Appear.

See Matrimonial Causes Rules, 1924, r. 2.

C. Petitions for Restitution of Conjugal Rights.

(a) *In General.*

See Matrimonial Causes Rules, 1924, rr. 1, 2 ; Appendix 1.

3636. Contents of—Age of parties need not be pleaded—When lawful solemnisation of marriage alleged.]—In a libel in a cause for the restitution of conjugal rights, it is not necessary to plead specifically, that the parties were of twenty-one years of age ; provided it is pleaded that the marriage was lawfully solemnised in consequence of a licence duly obtained.—POOL *v.* POOL (1813), 2 Phillim. 119 ; 161 E. R. 1095.

3637. Motives of petitioner—Immaterial to court.]—SIMMONS *v.* SIMMONS, No. 2797, *ante.*

3638. Preliminary steps—Previous separation order by justices—Must be discharged.]—A wife who has been deserted by her husband & has obtained from the magistrates an order against him for maintenance under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), in which order a clause has been inserted, without her knowledge or approval, that he "be no longer bound to cohabit with her," must, before filing her petition for restitution of conjugal rights, apply to the magistrates under sect. 7 of same Act for the discharge of such order.—NILAND *v.* NILAND (1913), 108 L. T. 50 ; 57 Sol. Jo. 248.

(b) *Preliminary Demand for Cohabitation.*

See Matrimonial Causes Rules, 1924, r. 3 (A) ; Sect. 5, sub-sect. 1, D., *ante.*

PART XIII. SECT 7, SUB-SECT. 4.—F. (c).

a. *Petitioner imposing unreasonable conditions.*]—Deft. left the home because of the wayward conduct & disobedience of the daughter, but was willing, & offered to make a home for his wife elsewhere. Pltf., however, distinctly declined to live with her husband without the daughter :—*Held :* pltf. was imposing a condition which she had no right to impose, & her action was dismissed.—BIRD *v.* BIRD, [1923] 1 D. L. R. 528 ; 52 O. L. R. 1.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 1.—A.

b. *Bill for alimony — Refusal of husband to receive wife—Must be pleaded.*]—A bill for alimony should allege that the husband has refused to receive his wife. It is not sufficient to allege merely that they are living apart. —WALSH *v.* WALSH (1864), 1 Ch. Ch. 234.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 1.—C. (a).

c. *Contents of—Inclusion of alternative claim for alimony.*]—A wife may make an alternative claim for alimony ; such claim may be allowed by amendment.—O'LEARY *v.* O'LEARY, [1923] 1 D. L. R. 949 ; 19 Alta. L. R. 224 ; [1923] 1 W. W. R. 501.—**CAN.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 1, *D., E. &*

D. Petitions for Judicial Separation.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3639. What should be pleaded—Not non-residence in parish where banns published.]—BROWN *v.* BROWN, No. 2698, *ante.*

Publication of banns.]—*See* Part II., Sect. 7, sub-sect. 1, *ante.*

3640. —— Want of age.] —BROWN *v.* BROWN, No. 2698, *ante.*

3641. —— Not non-consummation—Suit based on adultery.]—BROWN *v.* BROWN, No. 2698, *ante.*

3642. Suit based on cruelty—Acts constituting legal cruelty should be alleged—As briefly as possible.]—SUGGATE *v.* SUGGATE, No. 2641, *ante.*

3643. Two petitions filed—First not served—Appearance entered to second—Priority of second petition.]—A petition was filed & a citation issued on the part of a wife for a judicial separation on the ground of cruelty; neither this petition nor citation was served. The wife's solr., in consequence of fresh instructions, afterwards filed a second petition for judicial separation, on the ground of adultery coupled with cruelty, & a citation issued thereon. The husband was served & entered an appearance in the second suit. The ct. directed the second suit to proceed.—TURNER *v.* TURNER (1862), 2 Sw. & Tr. 426; 31 L. J. P. M. & A. 134; 5 L. T. 849; 10 W. R. 292.

E. Petitions for Nullity of Marriage.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3644. Fact of marriage—Whether petition must establish—Where parties to marriage are parties to suit.]—In a cause of nullity of marriage, the alleged fact of marriage, of the legal nullity of which, a declaratory sentence is prayed, must be duly proved, in which part of his case if pltf. fails, it is the duty of the ct. to withhold its declaratory sentence of nullity; how clearly soever all the several facts may be established in evidence, upon which, had the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded. This, at least, is the rule where pltf. & deft. respectively are the alleged contracting parties.—NOKES *v.* MILWARD (FALSELY CALLING HERSELF NOKES) (1824), 2 Add. 386; 162 E. R. 336.

3645. —— ——.]—G. *v.* G. (FALSELY CALLED K.) (1908), No. 2360, *ante.*

3646. —— Bigamous ceremony—Petitioner must plead & admit.]—(1) Allegation on behalf of a woman, responsive to a libel of nullity of marriage by reason of bigamy, pleading deception, fraud & cognisance by the man of the existence of the husband of the first marriage at the date of the second fact of marriage, rejected.

(2) Misconduct, however gross, of a party proceeding, by reason of bigamy, is no bar to a sentence of nullity.

(3) A wife *de facto*, as a fact of marriage, is necessarily pleaded to such a suit, is entitled *pendente lite* to alimony.

(4) The party proceeding, who is asking the ct. to pronounce the second marriage null is of necessity bound to admit & plead the fact of that second marriage (DR. LUSHINGTON).

(5) There is a very strong distinction in the different suits of nullity, nullity by reason of impotency, nullity by reason of statutable enactment, & nullity at common law, where there has been a husband or wife living at the date of the second marriage (DR. LUSHINGTON).—MILES *v.* CHILTON (FALSELY CALLING HERSELF MILES) (1849), 1 Rob. Eccl. 684; 6 Notes of Cases, 636; 163 E. R. 1178.

Annotations: As to (1) **Refd.** Bonaparte *v.* Bonaparte, [1892] P. 402. *As to* (3) **Refd.** Foden *v.* Foden, [1894] P. 307; Bateman *v.* Bateman (otherwise Harrison) (1898), 78 L. T. 472. *Generally*, **Refd.** Halpin (otherwise Boddington) *v.* Boddington (1881), 29 W. R. 444; Andrews *v.* Ross (1888), 14 P. D. 15; Moss *v.* Moss, [1897] P. 263.

3647. Who may present—Father of wife.]—(1) The service of a citation sufficient to constitute pendency of suit.

The *contestatio litis* is not necessary to constitute a *lis pendens*; there may be a "suit depending in the Ecclesiastical Ct." before the *contestatio litis* & the *lis pendens* commences with the extracting & service of the citation; & if not, by analogy with other cts., on the return of the citation, whenever it may be (SIR HERBERT JENNER).

(2) The father, *qua* father, has sufficient interest to enable him to a suit in the civil form, for the purpose of annulling the marriage of his daughter, when of age.

(3) The interest of Mr. R. [the father] in the legitimacy or illegitimacy of the issue of his daughter is sufficient to entitle him in these cts. to maintain a suit for annulling her marriage (SIR HERBERT JENNER).—RAY *v.* SHERWOOD & RAY (1836), 1 Curt. 193; 163 E. R. 65; *affd. sub nom.* SHERWOOD *v.* RAY (1837), 1 Moo. P. C. C. 353, P. C.

Annotations: As to (1) **Refd.** Sanders *v.* Head (1842), 3 Curt. 32; Ditcher *v.* Denison (1857), 11 Moo. P. C. C. 324; The Helenslea, The Catalonia (1881), 7 P. D. 57. *As to* (2) **Consd.** Bevan M'Mahon (1859), 2 Sw. & Tr. 58. **Refd.** Wells *v.* Cottam (1863), 3 Sw. & Tr. 364. *Generally*, **Refd.** Brook *v.* Brook (1861), 9 H. L. Cas. 193; Lowe *v.* Lowe (1899), 80 L. T. 575. **Mentd.** Harrison *v.* Sparrow (1842), 3 Curt. 1; Brookes *v.* Cresswell (1846), 4 Notes of Cases, 429; Fenton (or Livingstone) *v.* Livingstone (1856), 27 L. T. O. S. 18; Martin *v.* Mackonochie, Flamank *v.* Simpson (1868), L. R. 2 A. & E. 116; Sheppard *v.* Bennett (1869), L. R. 2 A. & E. 335; Winchester (Bp.) *v.* Wix (1869), L. R. 3 A. & E. 19; Elphinstone *v.* Purchas (1870), L. R. 3 P. C. 245; Fagg *v.* Lee (1873), L. R. 4 A. & E. 135; R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525.

F. Petitions for Dissolution of Marriage.

(a) In General.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3648. Addressed to what court—"Court for Divorce & Matrimonial Causes."]—A petition for dissolution of marriage should be addressed "To the Ct. for Divorce & Matrimonial Causes."—EVANS *v.* EVANS (1858), 1 Sw. & Tr. 78; 27

PART XIII. SECT. 8, SUB-SECT. 1.—E.

d. *Malformation of respondent—Plea that intercourse impossible.*]—In order to support a decree of nullity of marriage on the ground of the malformation of resp. the petition must allege that the malformation is such that intercourse between the parties of an ordinary & complete character is not attainable & that such intercourse as has taken place has been substantially imperfect.—A. *v.* A. (1915), 34 N. Z. L. R. 1039.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 1.—F. (a).

e. *Contents of—Particulars as to issue of marriage—Domicil.*]—Where there are issue of the marriage their names & the dates of their births should be set out. This requirement is not complied with by stating their ages in general terms. The petition should also contain a statement as to domicil, especially where the wife is resp. & is resident abroad.—PARSONS *v.* PARSONS (1913), 32 N. Z. L. R. 723.—**N.Z.**

f. —— *Petitioner's change of domicil.*]—When a man marries abroad & subsequently changes his domicil to New Zealand, leaving his wife still resident in the place of his former domicil, resp., when the husband seeks

L. J. P. & M. 31; 30 L. T. O. S. 369; 6 W. R. 356; 164 E. R. 637.

3649. Second petition filed—After first dismissed on appeal—Refusal of court to proceed.]—A suit, for cruelty & adultery, brought by the wife was appealed from the Consistory Ct. of London to the Arches, & in 1828 was there alleged to be agreed, & the husband dismissed; but the inhibition to the Consistory was not relaxed. In 1831 a suit, for cruelty & adultery, was again brought by the wife in the Consistory; the husband appeared under protest; the judge, having directed the wife's libel, which referred to & prayed leave to invoke the proceedings in the former suit, & also pleaded new facts, to be brought in, overruled the protest; but, on the ground that the inhibition was still in force, did not assign the husband to appear absolutely, nor did it dismiss him, nor admit or reject the libel. The wife appealed: that appeal was dismissed for irregularity, & the cause remitted: the judge below, as still inhibited, refused to proceed: the wife again appealed:—*Held:* the agreement & consequent dismissal of the husband put an end to the former suit, & consequently to the inhibition, & the judge of the Consistory Ct. was bound to proceed in the cause. SMYTH *v.* SMYTH (1831), 4 Hag. Ecc. 509; 162 E. R. 1534.

3650. Contents of—Grounds for relief—Must be distinctly set out.]—A petition for dissolution of marriage by reason of the husband's adultery & desertion, directed to be amended by a distinct averment of the fact of desertion; some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded.—PYNE *v.* PYNE (1858), 1 Sw. & Tr. 80; 30 L. T. O. S. 370; 22 J. P. 180; 6 W. R. 507; 164 E. R. 637.

3651. ——— ——— ———.]—(1) A petition for a divorce on the ground of adultery must allege adultery in distinct terms. A petition by a husband for dissolution of marriage contained an inferential, but not a distinct, charge of adultery at a specified time & place. Personal service on resp. had been dispensed with. Neither resp. nor co-resp. appeared. At the hearing, adultery at the said time & place having been proved, the ct. allowed the petition to be amended by adding a distinct charge of adultery without requiring the petition to be re-served.

(2) If at the hearing the ct. gives leave to amend the petition to meet the case proved, petitioner being in ct., it may be then amended & a decree *nisi* may be pronounced; but if leave to amend is only granted at a subsequent date after taking time to consider, & petitioner fails to move for a decree until some considerable time after the amendment has been made, the decree must bear date on the day when pronounced, & cannot be ante-dated.—AMBLER *v* AMBLER & HOGHTON (1862), 32 L. J. P. M. & A. 6; 7 L. T. 339; 11 W. R. 111.

Annotations:—As to (1) **Refd.** Wallace *v.* Wallace, Guiter & Macnamara (1862), 32 L. J. P. M. & A. 47; Forman *v.* Forman & Davis (1863), 11 W. R. 401.

3652. ——— ——— ———.]—(1) Adultery as the ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information & belief of petitioner that resp. has committed adultery.

(2) When leave to amend such a petition is granted, where there has been no appearance, it must be re-served.—SPILSBURY *v.* SPILSBURY (1863), 3 Sw. & Tr. 210; 32 L. J. P. M. & A. 126; 9 L. T. 23; 164 E. R. 1254.

3653. ——— Particulars of charge of adultery—Sufficiency.]—FOSTER *v.* FOSTER & THOMAS (1862), 32 L. J. P. M. & A. 64, n.

Annotation:—**Refd.** Higgs *v.* Higgs & Hopkins (1862), 32 L. J. P. M. & A. 64.

3654. ——— ——— ———.]—KING *v.* KING & DENT (1862), 32 L. J. P. M. & A. 64, n.

3655. ——— ——— ———.]—FORMAN *v.* FORMAN & DAVIS, No. 3746, *post.*

3656. ——— ——— ———.]—A petition for divorce by a husband in para. 3 alleged that resp., since Oct. 8, 1846, had on divers occasions committed adultery; & in para 4 that resp. had, since Apr. 1864, up to the date of the petition, been habitually visited at her residence at, etc., by A., & had on divers of such occasions, & particularly on the night of Aug. 31, 1864, committed adultery with A.:—*Held:* (1) it was not sufficient to give particulars of the dates when, places where, & persons with whom, the adultery alleged in para. 3 was committed; but the petition must be amended by setting out such particulars; (2) resp. was not entitled to particulars of the adultery charged in para. 4.—PORTER *v.* PORTER & JAGGARD (1861), 3 Sw. & Tr. 596; 33 L. J. P. M. & A. 207; 13 W. R. 108; 164 E. R. 1406.

3657. ——— ——— **Must be set out.**]—(1) A petition for divorce must specifically allege adultery.

(2) Adultery will not be inferred from bigamy alone being alleged in the petition.—BONAPARTE *v.* BONAPARTE (1891), 65 L. T. 795; 8 T. L. R. 66.

3658. ——— All material facts.]—BROOKE *v.* BROOKE, No. 5115, *post.*

3659. ——— Particular charges of cruelty—Communication of disease.]—WALKER *v.* WALKER, No. 3635, *ante.*

3660. Signature to—Leave to solicitor to sign—Petitioner employed abroad.]—Where it appeared that a proposed petitioner was engaged as an engine driver at the diamond fields at Kimberley, in South Africa, & that the acts of adultery to be alleged against his wife in the petition had been committed after he left England; & it further appeared that he could not come to England without risking the loss of his situation.

The ct. gave leave to the solr. to sign the petition & swear the affidavit verifying same on behalf of petitioner; & also gave leave to prove the marriage & cohabitation by affidavit.—*Ex p.* HOBSON (1894), 70 L. T. 816; 6 R. 661.

3661. Wife's petition—Party cited—Statement of name.]—OLIVER *v.* OLIVER (1918), 35 T. L. R. 24.

3662. ——— ——— ———.]—Where adultery by a husband is alleged, the woman's name ought always to be disclosed in the petition if it is known.—HIGHLEY *v.* HIGHLEY (1924), 40 T. L. R. 236.

3663. ——— ——— ———.]—In a wife's petition alleging adultery against the husband the name of the woman must, if known, be inserted, with the result that Matrimonial Causes Rules, 1924,

a divorce, is entitled to find in the petition itself the whole case made against her & a full statement of the facts relating to her husband's change of domicil.—BUSFIELD *v.* BUSFIELD, GUEST *v.* GUEST, [1916] N. Z. L. R. 524.—**N.Z.**

g. *Signature to—Leave to solicitor.*]—Petition for dissolution of marriage must be signed by petitioner, not by his solicitor, unless leave has been obtained permitting latter to sign.—PLOWMAN *v.* PLOWMAN (1909), 10 W. L. R. 20; 14 B. C. R. 164.—**CAN.**

h. *Where separation order in existence.*]—A woman petitioned for a divorce on the ground of desertion & there was in force a separation order under "The Married Persons Summary Separation Act, 1896." Resp. did not plead the plea in bar:—*Held:* the order should have been pleaded. MICHAEL *v.* MICHAEL (1906), N. Z. L. R. 165.—**N.Z.**

Sect. 8.—Institution and defence of proceedings: Sub-sect. 1, F. (a) & (b), & G.; sub-sects. 2 & 3, B., C. & D.]

r. 17, as to service on such woman will apply, & if the name, though not known when the petition was filed, be subsequently learnt, the petition should be amended, & the rule followed as to service of the amended petition.—TAYLOR *v.* TAYLOR, WHITE *v.* WHITE (1925), 133 L. T. 320; 41 T. L. R. 522.

(b) Claiming Damages against Co-Respondent.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3664. Must specify amount claimed.]—Where damages are claimed against co-resp. the petition should specify the amount claimed. *Qu.:* whether the counsel for co-resp. can, upon his own authority, consent to a petition being amended by the insertion of the amount of damages claimed. —SPEDDING *v.* SPEDDING & SMITH (1862), 31 L. J. P. M. & A. 96.

Annotations:—**Folld.** Pegler *v.* Pegler & Russell (1901), 18 T. L. R. 13. **Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

3665. ——.]—In a husband's petition for divorce, by reason of his wife's adultery with co-resp., when there is a claim for damages, the amount claimed must be specified in the petition.—PEGLER *v.* PEGLER & RUSSELL (1901), 85 L. T. 649; 18 T. L. R. 13.

Petition for damages only.]—*See* Sect. 5, sub-sect. 3, F. (*b*), *ante*.

G. Supplemental Petitions.

3666. New charges—Adultery—Since original petition—Consolidation.]—If it be expedient to bring before the ct. acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose; & on the preliminary proceedings being completed, the two petitions will be consolidated.—BORHAM *v.* BORHAM & BROWN (1870), L. R. 2 P. & D. 193; 40 L. J. P. & M. 6; 19 W. R. 215; *sub nom.* BOREHAM *v.* BOREHAM & BROWN, 23 L. T. 600.

3667. —— Desertion—Two years incomplete when original petition filed.]—In a wife's suit for a dissolution of marriage on the ground of adultery & desertion, resp.'s adultery was proved, but it appeared that his desertion of his wife had lasted for less than two years. The hearing was adjourned, & on a supplementary petition, filed more than a year afterwards the ct. heard further evidence as to desertion, & granted a decree.—WOOD *v.* WOOD (1887), 13 P. D. 22; 57 L. J. P. 48.

Annotation:—**Consd.** Kay *v.* Kay, [1904] P. 382.

3668. —— —— ——.]—LAPINGTON *v.* LAPINGTON, No. 2984, *ante*.

3669. Whether new citation necessary.]—On July 30, 1908, the husband filed a petition for divorce alleging adultery by his wife with men unknown. On being advised that he had not sufficient evidence to support the charges in the petition he made further inquiries, & on Nov. 7, 1908, he filed a supplemental petition alleging his wife's adultery with co-resp. on specific dates in Oct. 1908, all the charges in the original petition having been struck out:—*Held:* the charges contained in the supplemental petition were covered by the citation which had been served with the petition.—HOLMES *v.* HOLMES & BAWLS (1909), 25 T. L. R. 263.

3670. Lapse of time since filing of original petition—Original petition followed by reconciliation—Proceedings not withdrawn or stayed.]—SCHARRER *v.* SCHARRER (1909), *Times*, July 7, C. A.

SUB-SECT. 2.—AFFIDAVITS VERIFYING PETITIONS.

See Matrimonial Causes Rules, 1924, r. 3, A. & B.

3671. Contents of—Detailed history of parties unnecessary.]—The affidavit required to be filed in verification of a petition should not go into a detailed statement of the history of the parties. The ct. may have no power to order an affidavit to be removed from the file of the ct., but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party.—FORSTER *v.* FORSTER & EVANS (1858), 1 Sw. & Tr. 167; 31 L. T. O. S. 104; 164 E. R. 677.

3672. —— Truth of adultery charge—"Best of belief."]—A petition for dissolution of marriage on the ground of the wife's adultery charged various acts of adultery in 1856, 1857 & 1858. Resp., in her answer, pleaded, first, a denial of the adultery; secondly, desertion on Sept. 4, 1857; thirdly, condonation; fourthly, connivance. The affidavit of petitioner, filed in pursuance of rule 2, did not verify the statements in the petition as to the adultery. Resp.'s affidavit, filed in pursuance of rule 15, did not verify the third & fourth pleas, it being supposed that by doing so the adultery would be admitted. On motion to disallow the last three pleas & for leave for petitioner to file an affidavit verifying the adultery charged "to the best of his belief":—*Held:* (1) the second plea was bad, as, though it was pleaded to the adultery charged in the petition, it was only an answer as to part; (2) the third & fourth pleas should be verified by affidavit, as resp., by doing so, would not admit the adultery, each plea being to be construed by itself; (3) petitioner might in his affidavit state that the adultery was committed "to the best of his belief."

All matter in an answer beyond a simple denial must be verified by affidavit, which however need not be in absolute terms.—TOURLE *v.* TOURLE (1858), 1 Sw. & Tr. 165; 27 L. J. P. & M. 52; 31 L. T. O. S. 89; 6 W. R. 544; 164 E. R. 676.

3673. How intituled.]—The affidavit verifying the petition should be headed "In the matter of the petition of A. B."—GAPP *v.* GAPP & LEVERSON (1859), 4 Sw. & Tr. 273; 28 L. J. P. & M. 48; 164 E. R. 1521.

Annotation:—**Folld.** Steed *v.* Steed (1867), L. R. 1 P. & D.

3674. .]—The affidavit verifying a petition must not be headed in a cause, but "In the matter of the petition of ——."—STEED *v.* STEED (1867), L. R. 1 P. & D. 364; 36 L. J. P. & M. 50; 16 L. T. 125.

3675. Affidavit by person other than petitioner—Petitioner abroad—On military service.]—A petitioner in a divorce suit being on military service, & unable to make the usual affidavit verifying the

PART XIII. SECT. 8, SUB-SECT. 1.—G.

k. *New charges — Adultery — Since original petition.*]—Where resp. in a suit for dissolution of marriage, has, after service of the petition, committed adultery with a person other than the co-respondent, petitioner may obtain an order for leave to file a supplemental petition, setting out such acts of adultery, & adding such person as co-resp.—SMITH *v.* SMITH & CASHION (1877), 3 V. L. R. 122.—AUS.

petition, the ct. allowed the petition to be filed if verified by the affidavit of his solr., but ordered that petitioner's affidavit should also be filed as soon as possible.—*Ex p.* BRUCE (1881), 6 P. D. 16; 50 L. J. P. 64; *sub nom.* BRUCE *v.* BRUCE & LAING, 29 W. R. 474.

Anotation:—**Distd.** *Ex p.* Tartt (1886), 2 T. L. R. 352.

3676. —— —— Of own will.]—The ct. will not allow the affidavit verifying a petition for divorce to be sworn by another person when petitioner is absent from the country by his own will.—*Ex p.* TARTT (1886), 34 W. R. 368; 2 T. L. R. 352.

3677. —— —— British consul resident abroad.]—Where petitioner was resident abroad as British consul, & as such was himself the only authority in the place where he resided before whom the affidavit in support of his petition for dissolution could be sworn, & by rule 142 he was not competent to swear his own affidavit, the ct. allowed petitioner's solr. to verify the petition to the best of his knowledge & belief.—RUSSELL *v.* RUSSELL & MACLAREN (1889), 59 L. J. P. 13; *sub nom. Re* PETITION FOR DISSOLUTION OF MARRIAGE, *Ex p.* RUSSELL, 62 L. T. 186; 54 J. P. 167.

3678. Swearing of—Petitioner only commissioner available.]—RUSSELL *v.* RUSSELL & MACLAREN, No. 3677, *ante*.

3679. —— Where petitioner inmate of asylum—Order for access by solicitor & commissioner.]—A married woman, confined in an asylum, gave instructions to her solr. to institute proceedings against her husband for judicial separation, & the solr. attended with a comr. for oaths in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved & signed by her previously. The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary & addressed from the Office of the Comrs. in Lunacy, refused to allow the solr. & comr. for oaths to see the proposed petitioner, &, upon application being made by the solr. to the Comrs. in Lunacy, they upheld the refusal of the superintendent. The ct., upon motion, & upon affidavit, proving notice, made an order, the Comrs. in Lunacy having notice & not opposing, that the Comrs. should forthwith authorise the superintendent of the asylum to permit the solr. & comr. for oaths to have access to the proposed petitioner.—*Re* PETITION FOR JUDICIAL SEPARATION, *Ex p.* BEECHAM, [1901] P. 65; *sub nom. Re* BEECHAM & LUNACY COMRS., 70 L. J. P. 20; 84 L. T. 63.

SUB-SECT. 3.—AMENDMENT OF PLEADINGS.

A. In General.

See, now, Matrimonial Causes Rules, 1924, rr. 25, 26.

3680. Discretion of court.]—An application for an order that a pleading be reformed is an application to the discretion of the ct.; in exercising this discretion the ct. will not, as in case of demurrer, consider whether or not the pleading is good in law, but whether or not it may prejudice the opposite side in the conduct of his case.—GRIFFITH *v.* GRIFFITH (1864), 3 Sw. & Tr. 355; 33 L. J. P. M. & A. 81; 10 L. T. 308.

3681. Ordered if embarrassing to opponent.]—The ct. will not order a pleading to be amended unless it so framed as to embarrass the opposite side.—GREEN *v.* GREEN (1864), 33 L. J. P. M. & A. 83.

3682. Refusal to amend petition—Prayer for dissolution—Proof only of right to judicial separation—Petition dismissed.]—ROWLEY *v.* ROWLEY, No. 4582, *post*.

B. Leave to Amend.

See, now, Matrimonial Causes Rules, 1924, rr. 25, 26.

3683. Notice of application for leave—To respondent.]—Notice of application for leave to amend should be given to the other party, or the petition may be withdrawn & served *de novo*.—WRIGHT *v.* WRIGHT (1858), 1 Sw. & Tr. 80; 27 L. J. P. & M. 32; 30 L. T. O. S. 370; 6 W. R. 507.

3684. —— —— Application of rules.]—(1) An application was made to the ct. to amend an answer by adding to it a fresh charge of adultery. Notice of the intended application was served upon the opposite party the evening previously. The facts in issue were appointed to be tried by a common jury, at the sittings then in progress:—*Held:* the rules as to notice were not applicable.

(2) Although the opposite party had only four days allowed (Rule 36) to amend his answer to such amended petition or answer, the ct. will, if it be advisable, direct that the cause shall not be heard until the expiration of ten days from that on which the amended answer was filed.—HITCHCOCK *v.* HITCHCOCK (1867), 36 L. J. P. & M. 40.

3685. Granted after decree nisi—Two ceremonies of marriage—Omission to plead both.]—HAMPSON *v.* HAMPSON, No. 6068, *post*.

3686. —— —— ——.]—A wife having been married to her husband, first by a declaration before witnesses in Edinburgh, & afterwards at the sheriff's ct., Edinburgh, obtained a decree *nisi* for divorce. In the petition & the decree *nisi* only the second ceremony was referred to. The ct. allowed the petition & the decree *nisi* to be amended by alleging also the first ceremony, but without costs against resp.—MARSHALL *v.* MARSHALL (1909), 25 T. L. R. 716.

C. Where Charges Inferential.

3687. Amendment making charge distinct—Desertion.]—PYNE *v.* PYNE, No. 3650, *ante*.

3688. —— Adultery.]—AMBLER *v.* AMBLER & HOGHTON, No. 3651, *ante*.

3689. —— ——.]—FORMAN *v.* FORMAN DAVIS, No. 3746, *post*.

3690. —— ——.]—SPILSBURY *v.* SPILS No. 3652, *ante*.

D. Corrections of Dates, Names, Places, etc.

3691. Name—Mis-statement of Christian name.]—Where in the affidavit verifying the petition for marriage co-resp.'s [illegible] was stated to be John instead of

P. M.

3692. —— [illegible] Where a petition for dissolution of marriage has been served in which a

PART XIII. SECT. 8, SUB-SECT. 3.—A.

1. *Addition of plea of condonation by respondent—After petitioner's evidence denying condonation.*]—In a suit for dissolution of marriage upon the ground of adultery petitioner in his evidence denied condonation, & resp. then applied for leave to amend her answer by adding a plea of condonation:—*Held:* petitioner having denied condonation, the application to amend should be refused.—MARYCHURCH *v.* MARYCHURCH & BUCKLEY (1913), 32 N. Z. L. R. 712.—**N.Z.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 3, *D., E., F., G. & H.*]

mistake is made in the Christian name of the person with whom resp. is alleged to have committed adultery, the ct. will allow it to be amended, but it must be re-served.—LOVE *v.* LOVE (1863), 32 L. J. P. M. & A. 134.

3693. —— Mis-spelling in citation.]—Where co-resp.'s name had been mis-spelt in the citation served, the ct. made an order for a fresh citation to issue.—COTTON *v.* COTTON & KINNIS (1862), 4 Sw. & Tr. 275; 32 L. J. P. M. & A. 133.

3694. —— Misnomer of respondent—Respondent not appearing.]—The misnomer of resp. in a petition is cured by appearance; but if there is no appearance the petition must be amended & re-served.—KISCH *v.* KISCH (1864), 4 New Rep. 28; 33 L. J. P. M. & A. 115.

3695. —— Assumed name of co-respondent.]—NICOLAS *v.* NICOLAS, No. 3807, *post*.

3696. —— Wrong name—Of person with whom adultery alleged.]—A wife filed a petition for divorce, alleging adultery by her husband with a certain woman, who intervened & denied the allegation. Subsequently it was discovered that a mistake had been made, & that the adultery alleged should have been with another woman. Petitioner applied, without giving notice to resp. or the intervener, to amend the petition by striking out the name of the intervener & inserting that of the other woman. The ct. allowed the amendment, the petition to be re-served on resp., & the intervener to have her costs.—HARDING-COX *v.* HARDING-COX (1908), 24 T. L. R. 631; 52 Sol. Jo. 518.

3697. Date—Dates amended to those on which cruelty proved.]—A petition for dissolution of marriage on the ground of adultery & cruelty charged cruelty "in & during the months of Apr. & May, 1861." Resp. filed an answer denying the charges of the petition. Upon the trial of the cause, at which resp. did not appear, petitioner failed to prove cruelty at the time alleged, but established cruelty in June & July, 1861:—*Held:* the petition might be amended by substituting the date of the cruelty proved.—BUNYARD *v.* BUNYARD (1863), 32 L. J. P. M. & A. 176; 11 W. R. 990.

3698. Amendment instead of ordering further particulars—Times, places & persons uncertain.]—KING *v.* KING & DENT (1862), 32 L. J. P. M. & A. 64, n.

3699. —— ——.]—WODEHOUSE *v.* WODEHOUSE & FARROW (1863), 32 L. J. P. M. & A. 90, n.

E. Additional Charges.

3700. Satisfactory reason for previous omission—Necessity for.]—BRITTAIN *v.* BRITTAIN & CAMP, No. 4010, *post*.

3701. Knowledge of charge before petition filed—General rule.]—(1) Where petitioner after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition by adding a new charge, it is an objection to granting his application that the charge in question had come to his knowledge before the petition in its original form was drawn.

Semble: (2) where a cause has been part heard before the full ct., & adjourned for further evidence, the Judge Ordinary sitting alone has not power to dismiss the petition, or to allow an amendment to be made thereon; (3) the ct. will not dismiss the petition on the prayer of petitioner after evidence has been given in the cause entitling the resp. to a matrimonial remedy.

Qu.: will the ct. make a decree of judicial separation in favour of a resp., who has proved an answer entitling resp. to a judicial separation unaccompanied by a prayer for same.—BANNISTER *v.* BANNISTER & DAVIS (1860), Sea. & Sm. 143; 29 L. J. P. M. & A. 53.

3702. —— Additional charge of cruelty—Application not vexatious.]—A wife petitioned for a dissolution of her marriage on the ground of her husband's adultery, coupled with desertion. The husband filed no answer. She applied for leave to amend her petition, by adding a charge of cruelty, alleged to have been committed & to have been known to her before she filed her petition. The ct. required her to bring in an affidavit of the acts of cruelty upon which she relied, & of the motives which had induced her to suppress them in her petition:—*Held:* the wife might amend her petition by adding a new ground for the dissolution of her marriage, the ct. being satisfied that this new charge was not brought forward vexatiously.—ROWLEY *v.* ROWLEY (1859), 1 Sw. & Tr. 487; 29 L. J. P. & M. 15; 34 L. T. O. S. 61; 23 J. P. 744; 7 W. R. 653.

3703. —— —— Subsequent to latest act alleged.]—TOPPER *v.* TOPPER, No. 2673, *ante*.

3704. —— —— Absence of special circumstances.]—Cruelty being a fact which must be in the knowledge of a petitioner at the commencement of the suit, the ct. will generally refuse to allow fresh charges of cruelty to be added to a petition.—AUSTIN *v.* AUSTIN (1871), 41 L. J. P. & M. 8; 25 L. T. 856; 20 W. R. 128.

3705. Evidence obtained after petition filed—Additional charge of adultery.]—Adultery committed by either party, husband or wife, at any time before sentence, will bar a sentence of separation, at the suit of the other party; or will compel the ct. to dismiss both parties, adultery being mutually, or reciprocally charged in the cause; & cts. must permit either of such parties to plead adultery against the other in any stage of such a cause, whether before or after publication, & how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to proponent's knowledge.—BRISCO *v.* BRISCO (1824), 2 Add. 259.

Annotations:—**Consd.** Webb *v.* Webb (1828), 1 Hag. Ecc. 349. **Reld.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Everett *v.* Everett & McCullum, [1919] P. 298.

3706. —— ——.]—Facts of adultery newly come to the knowledge of the party may be pleaded after publication.—WEBB *v.* WEBB (1828), 1 Hag. Ecc. 349; 162 E. R. 609.

3707. —— ——.]—Under a citation for cruelty only in a suit for separation by the wife adultery by the husband occurring prior to the institution of the suit but sworn to have come recently to the wife's knowledge may be pleaded, even though publication of the evidence on the libel & on a responsive plea is about to pass.—SAMPSON *v.* SAMPSON (1832), 4 Hag. Ecc. 285.

3708. —— ——.]—WORTH *v.* WORTH (1859), Sea. & Sm. 109.

3709. —— ——.]—DICKENSON *v.* DICKENSON & CLEMENT (1862), 1 New Rep. 70.

3710. —— Addition of bigamy charge. After the hearing of a petition of a wife for dissolution of marriage on the ground of adultery & cruelty, no decree having been pronounced, the ct. allowed the petition to be amended by the addition of a charge of bigamy which came to the knowledge of petitioner in the interval between the cause being set down for hearing & the hearing.

—WALKER *v.* WALKER (1861), 30 L. J. P. M. & A. 214.

3711. Previous ignorance of nature of charge—Acts amounting to legal cruelty.]—The wife petitioned the ct. for a dissolution of marriage by reason of her husband's adultery, coupled with desertion. At the hearing, the ct. held that the desertion was not proved, & adjourned the final decision in order that petitioner might consider whether she would accept a judicial separation. Subsequently, the ct. allowed her to amend her petition by adding a charge of cruelty, being satisfied from the affidavits that until the hearing she was ignorant that the acts she could prove against her husband amounted to legal cruelty.—PARKINSON *v.* PARKINSON (1869), L. R. 2 P. & D. 27; 39 L. J. P. & M. 21; 21 L. T. 597.

3712. Cause of action arising after petition filed—Desertion.]—KETTLEWELL *v.* KETTLEWELL, No. 2982, *ante*.

3713. —— ——.]—LAPINGTON *v.* LAPINGTON, No. 2984, *ante*.

3714. Petition incomplete without additional charge.]—BONAPARTE *v.* BONAPARTE, No. 3057, *ante*.

F. New Co-Respondents.

Co-respondents as parties, *see* Sub-sect. 4, E., *post*.

3715. Petition alleging adultery with specified person—Amendment to "or with person unknown" refused.]—A petition, by a husband, for a dissolution of marriage, alleged that resp. at a specified time & place, committed adultery with A. Resp. did not appear. At the hearing, the ct. refused to allow the petition to be amended by adding to that charge the words "or with some person whose name is unknown to your petitioner," without re-service.—WALLACE *v.* WALLACE, GUITER & MACNAMARA (1862), 32 L. J. P. M. & A. 47; 9 Jur. N. S. 134; 11 W. R. 112.

3716. Petition alleging adultery with co-respondent & other persons—Addition of new co-respondent refused—Application not made bonâ fide.]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 3973, *post*.

G. Countercharges.

3717. Charging petitioner with adultery—Addition to answer generally traversing allegations.]—A co-resp. whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that petitioner had been guilty of adultery, or of such misconduct as would induce the ct. to exercise its discretion by withholding a decree; but upon a statement being made that co-resp. would probably be able to establish a case of such misconduct on the part of petitioner if he had the opportunity, the ct. allowed him to amend his answer by the insertion of various countercharges against petitioner, & reserved the question of the costs of the day until the merits of the case had been ascertained.—PLUMER *v.* PLUMER & BYGRAVE (1859), Sea. & Sm. 147; 4 Sw. & Tr. 257; 29 L. J. P. M. & A. 63; 164 E. R. 1514.

Annotation:—**Apld.** Seddon *v.* Seddon & Doyle (1860), 30 L. J. P. M. & A. 12.

3718. —— —— Non-payment of petitioner's taxed costs.]—A wife petitioned for judicial separation, on the ground of cruelty & adultery; resp. traversed the charges, & afterwards obtained leave to amend his answer by adding a countercharge of adultery. Before leave to amend was granted, & after an order for payment of the wife's taxed costs, resp. became bkpt. on his own petition. An application to rescind the order for the amendment of the answer, on the ground that resp. had become bkpt. solely for the purpose of avoiding payment of his wife's costs, & that the order was made by the ct. in ignorance of the bkpcy., was rejected.—GREATOREX *v.* GREATOREX (1864), 4 New Rep. 122; 34 L. J. P. M. & A. 9.

3719. —— Amendment of vague charges in answer—Insufficient information as to dates & places.]—WELLS *v.* WELLS & HUMMERSTON (1863), 32 L. J. P. M. & A. 65, n.

3720. Charging petitioner with cruelty—Addition to co-respondent's answer after issue joined—Refused.]—In a husband's suit for dissolution, after the pleadings had been completed & issue joined, the ct. refused to allow co-resp. to add to his answer a charge of cruelty against the husband.—JAYNE *v.* JAYNE & PROTHERO (1869), 21 L. T. 401; 18 W. R. 53.

H. Amendment of Prayer.

3721. From judicial separation to dissolution—On payment of costs by petitioner.]—The ct. granted an application by a wife that a petition for a judicial separation filed by her might be dismissed, & that she might substitute for it a petition for dissolution of marriage upon the terms of her paying the costs.—LEWIS *v.* LEWIS (1860), 29 L. J. P. M. & A. 123.

3722. —— ——.]—Where both parties are before the ct., a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on resp.

The costs of the motion must not be taxed against the husband (*per* CUR.).—CARTLEDGE *v.* CARTLEDGE (1862), 4 Sw. & Tr. 249; 31 L. J. P. M. & A. 135; 8 Jur. N. S. 493; 164 E. R. 1511.

3723. —— Non-payment of costs by respondent.]—The ct. will allow a wife to withdraw her petition for judicial separation & file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit.—ASHLEY *v.* ASHLEY (1861), 2 Sw. & Tr. 388; 30 L. J. P. M. & A. 175; 5 L. T. 139; 164 E. R. 1046.

3724. —— On same grounds as in first petition.]—Leave granted to withdraw a petition for judicial separation & file a petition for dissolution of marriage upon the same grounds as those alleged in the first petition.—MASSEY *v.* MASSEY (1863), 32 L. J. P. M. & A. 141.

3725. —— Cross-charges by wife.]—Where a husband brought a suit for dissolution on the ground of adultery with co-resp., & the wife answered charging petitioner with adultery & cruelty, & prayed for a judicial separation, & the jury found for resp. on all the issues. The ct. allowed the prayer of the answer to be amended, & pronounced a decree *nisi* for dissolution on the application of resp.—CORPATAUX *v.* CORPATAUX & STAUB (1875), 23 W. R. 456.

3726. From dissolution to judicial separation—Charges proved.]—DENT *v.* DENT, No. 3183, *ante*.

3727. —— Failure of proof.]—SMITH *v.* SMITH, No. 2883, *ante*.

PART XIII. SECT. 8, SUB-SECT. 3.—F.

m. *No co-respondent named—Power of court to add name suo motu—Necessity for amendment of petition.*]—In a suit for divorce petitioner did not make any person a co-respondent but simply averred that his wife was generally leading an immoral life:—*Held*: the ct. should not add a person as co-respondent *suo motu* without calling on petitioner to amend the petition by making the necessary allegations against him.—HOWE *v.* HOWE (1913), I. L. R. 38 Mad. 466,—**IND.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 3, *H., I. & J.; sub-sect* 4, *A., B. & C*

3728. ·]—DUPLANY *v.* DUPLANY, No. 3628, *ante*.

3729. —— Intervention by King's Proctor—Plea of collusion & adultery.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante*.

3730. —— Countercharges established—Giving court discretion to refuse relief.]—BOREHAM *v.* BOREHAM, No. 3439, *ante*.

Discretionary bars to relief, *see* Sect. 7, sub-sect. 4, *ante*.

3731. —— Attempt to expunge countercharges.]—LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante*.

3732. —— Whether respondent's consent necessary—All charges proved.]—A wife, having presented a petition praying for a dissolution of her marriage by reason of the cruelty & adultery of her husband, at the hearing proved both charges. The decree was suspended at her request, & on applying for a decree for judicial separation instead of a decree *nisi* for dissolution, resp. opposed the application. The ct. refused to allow her to alter the prayer of her petition until resp. had had an opportunity of bringing before the ct. the facts on which he grounded his opposition.—MYCOCK *v.* MYCOCK (1870), L. R. 2 P. & D. 98; 39 L. J. P. & M. 56; 23 L. T. 238; 18 W. R. 1144.

3733. —— —— All charges not established.]—In a suit for dissolution of marriage on the ground of cruelty & adultery, if one of the charges only be established, petitioner has a right to a decree of judicial separation without the consent of resp.—BROMFIELD *v.* BROMFIELD (1871), 41 L. J. P. & M. 17; 26 L. T. 264.

3734. —— After decree nisi—Solicitor's costs.]—COLYER *v.* COLYER (1904), *Times*, Nov. 8.

Annotation:—**Folld.** Parsons *v.* Parsons (1907), 23 T. L. R. 749.

3735. —— —— Upon respondent's motion to dismiss for want of prosecution.]—A petitioner is entitled to a reasonable time after the expiration of the time at which the decree could, at the earliest possible date, be made absolute, in order to determine whether to proceed further or to have the petition dismissed.

Upon an adjourned motion by a resp. to dismiss a suit for want of prosecution, the ct. allowed petitioner to take a decree of judicial separation in place of the decree *nisi* previously obtained for dissolution of the marriage.—PARSONS *v.* PARSONS, [1907] P. 331; 76 L. J. P. 159; 23 T. L. R. 749.

I. Petitions Claiming Damages.

3736. Addition of claim.]—Leave granted to amend a petition for dissolution of marriage by adding a claim for damages.—BARTLETT *v.* BARTLETT & BALMANNO (1864), 34 L. J. P. M. & A. 64.

3737. —— Application made bonâ fide.]—Petitioner in a suit for divorce, after the petition, but before an answer was filed, applied for leave to amend his petition by adding a claim for damages. The ct., being satisfied that it was made in good faith without any collateral purpose, granted the application.—SYMONDS *v.* SYMONDS & HARRISON (1870), 23 L. T. 568; 19 W. R. 166.

3738. —— Fresh evidence.]—At the date of filing his petition the only evidence which petitioner had was the confession of resp. He subsequently obtained independent evidence of her alleged adultery with co-resp., & he then applied to amend his petition by adding a claim for damages. The ct. allowed the amendment.—HENSLOW *v.* HENSLOW & BEARDSLEY (1871), 40 L. J. P. & M. 31; 24 L. T. 846; 19 W. R. 786.

3739. Insertion of amount—Authority of counsel for co-respondent to consent.]—SPEDDING *v.* SPEDDING & SMITH, No. 3664, *ante*.

3740. Amendment after verdict—Award of larger sum than claimed.]—Petitioner in a suit for dissolution of marriage claimed £500 damages from co-resp. The jury having awarded £1,000, the ct. allowed petitioner to amend his claim to that amount.—MODERA *v.* MODERA & BARCLAY (1893), 10 T. L. R. 69.

3741. —— —— Undefended suit.]—Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by petitioner, if he desire to amend his claim, asking for leave to amend & re-serve the petition. The summons should be served upon co-resp., who, although not represented at the trial, will be entitled to be heard in opposition to the application.—BECKETT *v.* BECKETT & JONES, [1901] P. 85; 70 L. J. P. 17; 84 L. T. 272; 17 T. L. R. 120.

3742. Withdrawal of claim—Whether notice to opposite parties essential—Undefended suit.]—When no appearance has been entered by either resp. or co-resp., against whom damages are claimed, by leave of ct. & without notice to resp. or co-resp. the claim for damages may be withdrawn & the case transferred from the common jury to the undefended list.—CHAMBERLAIN *v.* CHAMBERLAIN & HARTWELL (1907), 51 Sol. Jo. 357.

3743. Reinsertion after withdrawal—Withdrawal by mistake—Fresh evidence.]—SYKES *v.* SYKES & SMITH, No. 4442, *post*.

J. Re-Service of Amended Petitions.

See Matrimonial Causes Rules, 1924, r. 25.

3744. Necessity for—No notice of motion to respondent.]—WRIGHT *v.* WRIGHT, No. 3683, *ante*.

3745. —— Non-appearance by respondents—Amendment making charge more distinct.]—AMBLER *v.* AMBLER & HOGHTON, No. 3651, *ante*.

3746. —— —— ——.]—A petition, by a husband, for dissolution of marriage did not charge adultery, but alleged that resp. & co-resp. were "living & cohabiting together." Neither of resps. appeared. At the hearing the ct. refused to allow the petition to be amended, by inserting a charge of adultery, without re-service.—FORMAN *v.* FORMAN & DAVIS (1863), 32 L. J. P. M. & A. 80; 11 W. R. 401.

3747. —— —— ——.]—SPILSBURY *v.* SPILSBURY, No. 3652, *ante*.

3748. —— —— Additional adultery "with person unknown."]—WALLACE *v.* WALLACE, GUITER & MACNAMARA, No. 3715, *ante*.

3749. —— —— Correction of respondent's name.]—KISCH *v.* KISCH, No. 3694, *ante*.

3750. —— —— Amendment of date of adultery.]—The rule that when a petition has been amended by leave of the ct. it must be re-served will not be waived merely because resp. has not appeared. Therefore, where a charge of adultery was wrongly dated in a petition, the ct. allowed the petition

PART XIII. SECT. 8, SUB-SECT. 3.—J.

n. *Necessity for — Non-appearance by respondents.*]—Where an amendment is made in a petition to wl no appearance had been entered by resp., if it is clear that resp. cannot by the amendment, then mended petition need not be ; but if it is not clear, then there must be re-service.—PATRICK *v.* PATRICK, [1921] N. Z. L. R. 514.—**N.Z.**

o. —— ——.]—A material amendment in a petition will not be allowed without re-service even where

to be amended by correcting the date, but ordered that the petition be re-served on resp. although he had not appeared.—CHARTER *v.* CHARTER (1889), 58 L. J. P. 44 ; 60 L. T. 872.

3751. —— —— Amendment of amount of damages claimed—Verdict for larger sum than prayed.]—BECKETT *v.* BECKETT & JONES, No. 3741, *ante*.

3752. —— Respondent cited by advertisement—Advertisement of amended petition not essential.]—Where a resp. is cited by advertisement, & leave to amend the petition is afterwards granted, the amended petition need not be advertised.—SMITH *v.* SMITH (1863), 3 Sw. & Tr. 216 ; 32 L. J. P. M. & A. 145 ; 9 L. T. 118 ; 7 Jur. N. S. 539 ; 11 W. R. 989 ; 164 E. R. 1257.

3753. —— Amendment of name of person with whom adultery alleged—Christian name.]—LOVE *v.* LOVE, No. 3692, *ante*.

3754. —— —— Undefended suit.]—When a resp. in India, who had been served with the citation & petition, had not appeared, & the petition was amended by changing the name only of the woman with whom adultery was alleged, the ct. allowed personal re-service of the amended petition to be dispensed with.—ROBERTS *v.* ROBERTS (1909), 53 Sol. Jo. 301.

3755. —— Substitution of new party with whom adultery alleged.]—HARDING-COX *v.* HARDING-COX, No. 3696, *ante*.

3756. —— Amendment of prayer—From judicial separation to dissolution.]—CARTLEDGE *v.* CARTLEDGE, No. 3722, *ante*.

Service generally, *see* Sub-sect. 5, *post*.

SUB-SECT. 4.—PARTIES.

A. In General.

Co-respondents.]—*See* Sub-sect. 4, E., *post*.

Parties by intervention.]—*See* Sub-sect. 4, F., *post*.

3757. Suit for dissolution—Parties recognised by court.]—Y—— *v.* Y—— (1860), No. 3831, *post*.

3758. —— Alien enemy.]—An alien enemy, who has been registered as such & who is domiciled in England, has a right to bring a petition for the dissolution of his marriage.—KRAUSS (OTHERWISE DES SALLES D'EPINOIX) *v.* KRAUSS (OTHERWISE DES SALLES D'EPINOIX) & ORBACH (1919), 35 T. L. R. 637 ; 63 Sol. Jo. 760.

Right of alien enemies to sue or initiate proceedings on own behalf.]—*See* ALIENS, Vol. II., pp. 154–162, Nos. 250–329.

3759. Suit for nullity on ground of affinity—Interested parties.]—Any interest, however slight, provided it be specific & pecuniary, whether to be secured in a contingent right, or released from a possible legal obligation, is sufficient to entitle a party to sustain a suit in the Ecclesiastical Ct. for nullity of a marriage, on the ground of affinity. Where, therefore, a father brought such suit to dissolve a marriage contracted by his daughter, after she was of age, by reason of incest :—*Held :* his possible liability, under Poor Relief Act, 1601 (c. 2), to maintain the issue of such marriage, if legitimate, in case of the death or impotency of the parents, was an interest sufficient to entitle him to sustain such suit ; & a sentence of nullity of marriage was pronounced therein.—SHERWOOD *v.* RAY (1837), 1 Moo. P. C. C. 353 ; 12 E. R. 848, P. C. ; *affg.* S. C. *sub nom.* RAY *v.* SHERWOOD & RAY (1836), 1 Curt. 193.

Annotations :—**Consd.** R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525. **Refd.** Bevan *v.* M'Mahon & Bevan (1859), 2 Sw. & Tr. 58 ; Wells *v.* Cottam (1863), 3 Sw. & Tr. 364 ; Sheppard *v.* Phillimore & Bennett (1869), L. R. 2 P. C. 450 ; Elphinstone *v.* Purchas (1870), L. R. 3 P. C. 245 ; Fagg *v.* Lee (1873), L. R. 4 A. & E. 135 ; Lowe *v.* Lowe (1899), 80 L. T. 575. **Mentd.** Harrison *v.* Sparrow (1842), 3 Curt. 1 ; Sanders *v.* Head (1843), 2 Notes of Cases, 355 ; Brookes *v.* Cresswell (1846), 4 Notes of Cases, 429 ; Fenton (or Livingstone) *v.* Livingstone (1856), 27 L. T. O. S. 18 ; Ditcher *v.* Denison (1857), 11 Moo. P. C. C. 324 ; Brook *v.* Brook (1861), 9 H. L. Cas. 193 ; Martin *v.* Mackonochie, Flamank *v.* Simpson (1868), L. R. 2 A. & E. 116 ; Winchester (Bp.) *v.* Wix (1869), L. R. 3 A. & E. 19 ; The Helenslea, The Catalonia (1882), 7 P. D. 57.

3760. Suit for judicial separation—Persons acting under power of attorney.]—In a suit by S., resident in India, against his wife, resident in England, for a separation by reason of her adultery, the question of the sufficiency of the authority from the husband arose, upon the ct.'s inquiry, previous to signing the sentence. There was a power of attorney authorising certain persons to commence proceedings on the part of the husband, ratifying & confirming what the attorneys had done, & agreeing to ratify & confirm what they should do : —*Held :* a sufficient authority.—SEWELL *v.* SEWELL (1840), 1 Notes of Cases, 33.

Suit for jactitation—Only maintainable by one of parties to alleged marriage.]—*See* Sect. 4, *ante*.

B. Minors.

See Matrimonial Causes Rules, 1924, r. 74, &, *generally*, INFANTS.

3761. Guardian ad litem—Appointment of father—Without consent.]—Appointment of the father of a minor, as curator *ad litem*, on election of the minor ; but without the consent of the father, in order to substantiate proceedings against the son in a suit of cruelty & adultery, not sustained.—BEAURAINE *v.* BEAURAINE (1808), 1 Hag. Con. 498 ; 161 E. R. 630.

Annotations :—**Distd.** Morgan *v.* Morgan (1841), 2 Curt. 679. **Consd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109. **Mentd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

3762. —— —— Need of proxy—Nullity suit.]—DENNIS *v.* DENNIS (1815), cited in 2 Curt. at p. 687 ; 163 E. R. 552.

Annotation :—**Consd.** Morgan *v.* Morgan (1840), 2 Curt. 679.

3763. —— In same position as next friend—Liability for costs.]—RUTTER *v.* RUTTER, No. 5044, *post*.

3764. Nullity suit by father of minor—Necessity to state capacity in which father sues—Whether as guardian or in own right.]—In a suit for nullity instituted by the father of a minor, it must appear upon the face of the petition whether the father has instituted the suit in his own right or as guardian of the minor.—WELLS *v.* COTTAM (FALSELY CALLED WELLS) (1863), 3 Sw. & Tr. 364 ; 33 L. J. P. M. & A. 41 ; 10 L. T. 138 ; 10 Jur. N. S. 444 ; 12 W. R. 672 ; 164 E. R. 1316.

Annotation :—**Refd.** Gilroy *v.* Gilroy, [1914] P. 122.

3765. Objection to minority—Time.]—ZYCKLINSKI *v.* ZYCKLINSKI, No. 3952, *post*.

C. Persons of Unsound Mind.

See Matrimonial Causes Rules, 1924, r. 75, &, *generally* LUNATICS.

3766. Suit by committee—Nullity.]—FUST *v.*

---

no appearance has been entered. Leave was asked to amend the petition in order to insert an earlier date of the alleged desertion :—*Held :* such leave could only be granted upon terms that the petition as amended was served.—GOW *v.* GOW, [1921] N. Z. L. R. 695.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 4.—C.

p. *Where respondent insane — Assignment of guardian.*]—When the ground of a petition for dissolution of marriage is the unsoundness of resp.'s mind, the ct. on proof of service of the petition & citation on the master in lunacy in accordance with Divorce (Insanity) Act, 1919, s. 5, will dispense

Sect. 8.—Institution and defence of proceedings: Sub-sect. 4, C., D. & E. (a) & (b) i. & ii.]

BOWERMAN (1790), cited in 2 Hag. Con. at pp. 170, 171; 2 Add. at p. 402; 161 E. R. 705.

Annotations:—**Expld.** Parnell *v.* Parnell (1814), 2 Hag. Con. 169. **Refd.** Nokes *v.* Milward (1824), 2 Add. 386.

3767. —— Dissolution.]—The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery.—PARNELL *v.* PARNELL (1814), 2 Hag. Con. 169; 2 Phillim. 158; 161 E. R. 704.

Annotations:—**Consd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109. **Refd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

3768. —— ——.]—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the lunatic.—BAKER *v.* BAKER (1880), 5 P. D. 142; 49 L. J. P. 49; 42 L. T. 332; 28 W. R. 630; *affd.* 6 P. D. 12.

Annotations:—**Expld.** Stanhope *v.* Stanhope (1886), 11 P. D. 103. **Folld.** Burrell *v.* Burrell & Blake (1900), 17 T. L. R. 41.

3769. —— Judicial separation.]—The committee of a lunatic may maintain a suit for judicial separation on the ground of the adultery of the wife of the lunatic.—WOODGATE *v.* TAYLOR (1861), 2 Sw. & Tr. 512; 30 L. J. P. M. & A. 197; 5 L. T. 119; 164 E. R. 1095.

Annotation:—**Consd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

—— Suit to perpetuate testimony—Illegitimacy of children.]—*See* BASTARDY, Vol. III., p. 371, Nos. 126, 127.

3770. Guardian ad litem—Appointment of.]—(1) A petition for divorce against a wife was met by an allegation of her insanity & consequent inability to defend herself. The ct. below appointed a guardian *ad litem* on her behalf. Upon a verdict of her insanity, proceedings were suspended; but with liberty to the husband to apply again to the ct. in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar, or impede, the investigation of the charge of adultery brought against her. The House adopted this view; &, reversing the order appealed against, sent the case back with directions to proceed.

Divorce may be asked & decreed on behalf of, or against, a lunatic, the ct. appointing a guardian *ad litem* for protection (KELLY, C.B., DENMAN, J., & POLLOCK, B., as consulted judges).

(2) By the law of England, adultery, though a grievous sin, is not a crime, & the analogies & precedents of criminal law have no authority in the Divorce Ct., a civil tribunal.

In the proceedings against a criminal, every step is arrested by his or her becoming a lunatic; but the procedure in divorce is not a criminal proceeding (LORD HATHERLEY).—MORDAUNT *v.* MONCREIFFE (1874), L. R. 2 Sc. & Div. 374; 43 L. J. P. & M. 49; 30 L. T. 649; 39 J. P. 4; 23 W. R. 12, H. L.; *revsg.* S. C. *sub nom.* MORDAUNT *v.* MORDAUNT (1870), L. R. 2 P. & D. 109, 382.

Annotations:—*As to* (1) **Consd.** Baker *v.* Baker (1880), 5 P. D. 142. **Refd.** Giles *v.* Giles (1899), 69 L. J. P. 26. *As to* (2) **Consd.** Redfern *v.* Redfern, [1891] P. 139. **Refd.** Branford *v.* Branford (1878), 4 P. D. 72.

3771. —— —— Not where dispute as to insanity.]—An order ought not to be made under rule 196, assigning a guardian *ad litem* to a person alleged to be of unsound mind, where there is a substantial & *bonâ fide* dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian. *Qu.:* whether rule 196 applies where the person has not been found lunatic by inquisition.—FRY *v.* FRY (1890), 15 P. D. 50; 62 L. T. 501; *sub nom.* ROUTH (OTHERWISE FRY) *v.* FRY, 59 L. J. P. 43; 38 W. R. 615, C. A.

Annotation:—**Consd.** Howell *v.* Lewis (1891), 61 L. J. Ch. 89.

3772. —— —— Application by petitioner.]—GILES *v.* GILES, No. 2318, *ante*.

3773. —— Petitioner appearing by—Decree for dissolution granted.]—The ct. granted a decree *nisi* for a dissolution of marriage on the petition of a person detained in a lunatic asylum under a reception order made by a magistrate, petitioner appearing by his guardian *ad litem*.—BURRELL *v.* BURRELL & BLAKE (1900), 17 T. L. R. 41.

3774. Where respondent insane—Adjournment to appoint guardian.]—GILES *v.* GILES, No. 2318, *ante*.

3775. —— Answer filed by official solicitor.]—JOHNSON *v.* JOHNSON, [1901] P. 193; 70 L. J. P. 44; 84 L. T. 725.

Annotations:—**Mentd.** Coppinger *v.* Coppinger & Lutwyche (1918), 34 T. L. R. 328; Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511.

3776. —— Notice to official solicitor.]—In a suit for dissolution of marriage where resp. is a lunatic, notice must be given to the official solr. in case he should think fit to appear & take part in the proceedings.—BURNETT *v.* BURNETT & PURDY (1922), 39 T. L. R. 111; 67 Sol. Jo. 147.

3777. Insanity at time of trial—Sanity of co-respondent at time of service.]—As co-resp. seems to have been sane when he was served & to have had an opportunity of appearing, it does not lie on petitioner to take steps to have co-resp. represented, & if costs on a finding of adultery are not asked for against him, I think the case may proceed (MCCARDIE, J.).—WHITING *v.* WHITING & BOTWRIGHT (1920), 36 T. L. R. 215.

D. Pauper Suitors.

See R. S. C., 1925, Ord. 16, rr. 22–31 G; Ord. 36 A.

Costs.]—*See* Sect. 18, sub-sect. 6, *post*.

3778. Assignment of counsel by court—Effect of.]—A person suing in *formâ pauperis*, to whom counsel has been assigned by the ct., cannot appear by another counsel, until there has been a renunciation, or a new assignment of counsel, or he has been dispauperised.—HAMER *v.* BOREHAM (1858), 1 Sw. & Tr. 26; 27 L. J. P. & M. 107; 164 E. R. 613.

E. Co-Respondents.

(*a*) *Jurisdiction of Court over Co-Respondents.*

Whether dependent on domicil of co-respondent.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 425, 426, Nos. 907–915.

Where co-respondent a foreign ruling prince.]—*See* ACTION, Vol. I., p. 48, No. 388.

(*b*) *Necessity to make every Alleged Adulterer Co-Respondent.*

i. *In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177.

Matrimonial Causes Rules, 1924, rr. 4, 5.

3779. General rule.]—Unless petitioner can satisfy the ct. on affidavit that he cannot or ought not to make a co-resp., Matrimonial Causes Act, 1857 (c. 85), s. 28, is imperative that he should

with service on resp. & will assign the master, where he consents to act as such, as guardian to resp. for the purposes of the suit.—BLACKBELL *v.* BLACKBELL, [1920] V. L. R. 356.—**AUS.**

q. *Where petitioner insane—Action for judicial separation.*]—An action of separation at the instance of an insane wife is incompetent.—THOMSON *v.* THOMSON (1887), 14 R. (Ct. of Sess.) 634 24 Sc. L. R. 450.—**SCOT.**

do so.—QUICKE *v.* QUICKE (1861), 2 Sw. & Tr. 419; 31 L. J. P. M. & A. 28; 5 L. T. 690; 10 W. R. 448.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89.

3780. ——.]—Petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-resp., unless he is excused from so doing by the ct. on special grounds.

Qu.: whether the fact that petitioner can only obtain evidence admissible against resp., but inadmissible against the alleged adulterer, would be such special ground.—CARRYER *v.* CARRYER & WATSON (1865), 4 Sw. & Tr. 94; 34 L. J. P. M. & A. 47; 13 L. T. 250; 11 Jur. N. S. 352; 13 W. R. 507.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89. **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3781. ——.]—When a petition charges adultery with a person unknown, & names no adulterer, it is necessary to obtain the leave of the ct. to proceed without making a co-resp.—PITT *v.* PITT (1868), L. R. 1 P. & D. 464; 37 L. J. P. & M. 24; 17 L. T. 671.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89. **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316.

3782. ——.]—A husband who petitions for dissolution of his marriage on the ground of his wife's adultery must join the alleged adulterer as a co-resp., though he possesses no legal evidence against the alleged adulterer, & though his only knowledge as to the man's name be derived from confessions made by the wife or from other *ex p.* statements.—JONES *v.* JONES, [1896] P. 165; 65 L. J. P. 101; 75 L. T. 190; 12 T. L. R. 416.

Annotations:—**Consd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. **Dbtd.** Saunders *v.* Saunders, [1897] P. 89.

3783. "Alleged adulterer"—Person alleged by petitioner.]—SAUNDERS *v.* SAUNDERS, No. 3784, *post*.

ii. *"Special Grounds" Dispensing with Necessity.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3784. Discretion of court as to—Unfettered—How exercised.]—(1) The discretion given to the judge, by Matrimonial Causes Act, 1857 (c. 85), s. 28, to allow a petition for a divorce to proceed, on special grounds, without making any co-resp. is to be exercised with regard to the principles laid down in or to be gathered from the Act & the rules, & to the circumstances of each particular case, & cannot be fettered by any general rule of practice.

A husband, who had been absent from England for more than two years, ascertained, when he returned home, that his wife had recently given birth to a child, of which he was not the father. She registered the birth of the child, giving her own name as the mother but without giving the name of any father. She took out a bastardy summons against H., whom she alleged to be the father of the child, but, at the time appointed for its hearing, she did not appear, & the summons was struck out. The husband did not believe that H. was the father of the child, & his solr., after making careful inquiry, was unable to obtain any evidence against H. H. was prepared to swear that he had never had intercourse with the wife. The husband presented a divorce petition, in which he alleged that the wife had committed adultery with a man whose name was unknown to him:—*Held:* the husband should be allowed to proceed with the petition without naming any co-resp.

(2) The words "alleged adulterer" in Matrimonial Causes Act, 1857 (c. 85), s. 28, & rule 4 of the Rules of 1863, mean only the person alleged by petitioner in the petition to be the adulterer.—SAUNDERS *v.* SAUNDERS, [1897] P. 89; 66 L. J. P. 57; 76 L. T. 330; 45 W. R. 583; 13 T. L. R. 328; 41 Sol. Jo. 404, C. A.

Annotations:—*As to* (1) **Consd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. **Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271. *As to* (2) **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. *Generally*, **Refd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242; Franklin *v.* Franklin & Minshall, [1921] P. 407. **Mentd.** Field *v.* Ommanney (1920), 36 T. L. R. 695.

3785. —— —— **When interfered with on appeal.**]—Petitioner, a British subject domiciled in England, who charged his wife with adultery committed at Lisbon with two foreigners, applied by motion for leave to proceed without citing either of co-resps., on the grounds that they had both left Portugal; that neither he nor resp. knew their addresses; & that he had wholly failed to trace them. The petition contained no claim for damages or costs against either of co-resps. Resp. had not been served with notice of the motion, but at her own request had received copies of the affidavits to be used at the hearing of the motion. At the hearing, counsel for petitioner objected to resp. being heard. The President held that resp. was entitled to be heard, &, on the facts, that petitioner had not shown that co-resps. could not be reached by one or other of the methods by which service or substituted service could be effected; & accordingly refused the motion. On appeal:—*Held:* (1) Matrimonial Causes Act, 1857 (c. 85), ss. 27, 28, 33, showed that a foreign co-resp. domiciled abroad was not entitled as of right to claim to be dismissed from the suit, & in the absence of special grounds the petition ought to be served upon him; but the matter was one entirely within the discretion of the judge of the Probate & Divorce Div., & the Ct. of Appeal would not interfere with the exercise of that discretion unless it appeared that the judge had acted upon a wrong principle, or under some misapprehension, or without consideration: (2) although it was the usual practice for motions for leave to proceed without citing a co-resp. to be made *ex p.*, there was no rule of practice which prevented a resp. from being heard on such an application.—RUSH *v.* RUSH, BAILEY & PIMENTA, [1920] P. 242; 89 L. J. P. 129; 122 L. T. 792; 36 T. L. R. 302; 64 Sol. Jo. 323, C. A.

Annotation:—*As to* (1) **Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3786. Absence or insufficiency of evidence—Whether sufficient to dispense with necessity.]—CARRYER *v.* CARRYER & WATSON, No. 3780, *ante*.

3787. —— ——.]—JONES *v.* JONES, No. 3782, *ante*.

3788. —— ——.]—The mere belief of petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-resp.; if, however, the ct. is satisfied that no evidence can be obtained against

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 4, *E.* (*b*) *ii., iii. & iv*

the accused person, it may exercise its discretion under sect. 28 of Matrimonial Causes Act, 1857 (c. 85), & allow petitioner to proceed without joining him as co-resp.—EDWARDS *v.* EDWARDS & WILSON, [1897] P. 316; 67 L. J. P. 1; 77 L. T. 406; 13 T. L. R. 592.

3789. —— Wife's confession sole evidence of guilt.]—*Semble:* if a husband, who has been allowed to proceed without making a co-resp., afterwards & before the trial acquire evidence as to the person with whom his wife committed adultery, & who was previously unknown, he ought to bring the matter before the ct. He need not do so when the sole evidence is the wife's confession.—MUSPRATT *v.* MUSPRATT (1861), 31 L. J. P. M. & A. 28.

Annotations:— **Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3790. —— ——.]—The ct. will allow petitioner to proceed without making the alleged adulterer a co-resp., where no evidence can be obtained against him, the only evidence that he is the adulterer being the wife's confession.—JINKINGS *v.* JINKINGS (1867), L. R. 1 P. & D. 330; 36 L. J. P. & M. 48; 15 L. T. 512.

Annotations:—**Folld.** Gill *v.* Gill (1889), 37 W. R. 623. **Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3791. —— ——.]—A husband presented a petition to the ct. praying for a dissolution of his marriage on the grounds of his wife's adultery with two men, R. & E., both of whom were mentioned by name in the petition. The charge against E. was made on the strength of certain rumours which reached petitioner, & which were confirmed by a statement made to petitioner's solr. by resp., to the effect that E. was the father of her illegitimate child. The man E. positively denied the truth of resp.'s statement, &, upon petitioner & his solr. making inquiries into the matter, no satisfactory evidence was forthcoming to support resp.'s confession. Petitioner was thereupon advised to apply to the ct. for leave to proceed without citing any co-resp. in respect of the adultery which resulted in the birth of resp.'s illegitimate child:—*Held:* resp. having given the name of E. as the father of her child, & his name having been inserted in the petition, he must be made a co-resp. & be served with the usual citation.—PAYNE *v.* PAYNE, RODWAY & EDDELS (1888), 60 L. T. 238.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3792. —— ——.]—On a husband's petition for dissolution of the marriage on the ground of his wife's adultery, of which the only evidence was a confession by the wife, the ct., on motion, excused the husband from making the alleged adulterer a co-resp.—GILL *v.* GILL (1889), 60 L. T. 712; 37 W. R. 623.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89.

3793. —— ——.]—In a petition by a husband for divorce, it appeared that the address & occupation of the alleged adulterer were known to petitioner, but there was no evidence against him except resp.'s confession:—*Held:* petitioner could not be excused from making the adulterer a co-resp., & the citation must be personally served upon him as such co-resp.—CORNISH *v.* CORNISH (1890), 15 P. D. 131; 59 L. J. P. 84; 62 L. T. 667.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3794. —— ——.]—Where no evidence was obtainable against the man whom resp. had indicated as the father of one of her illegitimate children, & who was believed to be in America, the ct. gave petitioner leave to proceed without citing the alleged adulterer as co-resp.—BAGOT *v.* BAGOT (1890), 62 L. T. 612.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3795. —— ——.]—JONES *v.* JONES, No. 3782, *ante.*

3796. —— ——.]—MILES *v.* MILES (1896), *Times*, Mar. 20.

Annotation:—**Consd.** Jones *v.* Jones, [1896] P. 165.

3797. —— ——.]—A wife, in answer to inquiries by her husband touching the paternity of a child with which she was pregnant, & of which he could not be the father gave the name of a man, & made certain statements which she said were within petitioner's knowledge, but of which he declared he knew nothing; neither did he know of the existence of such a man. After petition filed, & upon motion by the husband (petitioner) for leave to proceed without citing any person as co-resp., the ct. directed petitioner's solr. to write to resp. with a view to having a personal interview with & obtaining an explanation from her, & refused to make an order in petitioner's favour until this had been done & the result made known to the ct.—GROSE *v.* GROSE (1897), 78 L. T. 89.

Annotation:—**Consd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3798. —— —— **Petitioner's belief in innocence of party accused.**]—SAUNDERS *v.* SAUNDERS, No. 3784, *ante.*

3799. —— —— ——.]—EDWARDS *v.* EDWARDS & WILSON, No. 3788, *ante.*

3800. Verdict against co-respondent in previous suit.]—A. having in an action of crim. con. recovered damages against B., applied for leave to present a petition for the dissolution of his marriage without making B. co-resp. to such petition:—*Held:* the circumstances of A. having recovered damages against B. did not constitute such special ground, within sect. 28 of Matrimonial Causes Act, 1857 (c. 85), as to justify the ct. to grant the application.—*Ex p.* ARMITAGE (1858), 1 Sw. & Tr. 71; *sub nom. Re* ARMITAGE'S DIVORCE, 4 Jur. N. S. 56; *sub nom. Ex p.* ——, 27 L. J. P. & M. 4; *sub nom.* ANON., 30 L. T. O. S. 278; 6 W. R. 222.

3801. ——.]—A. had obtained sentence of divorce *a mensâ et thoro* in the Ecclesiastical Ct. by reason of the wife's adultery, & had recovered damages in an undefended action for crim. con. from B., the alleged adulterer, who was now at the Cape of Good Hope. A. was allowed to proceed with his petition for dissolution, without making B. a co-resp.—TOMKIN *v.* TOMKIN (1858), 1 Sw. & Tr. 182; 27 L. J. P. & M. 54; 31 L. T. O. S. 186.

Annotation:—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

3802. Adulterer dead.]—In a suit for dissolution of marriage, by reason of the wife's adultery, where the alleged adulterer is dead or unknown, petitioner should apply at once to the ct. for an order to be excused from making a co-resp. *Qu.:* whether the ct. has power to make such an order after the citation has been served on resp.—TOLLEMACHE *v.* TOLLEMACHE (1858), 28 L. J. P. & M. 2.

Annotations:—**Distd.** Hunter *v.* Hunter & Vernon (1858), 28 L. J. P. & M. 3. **Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89; Slaytor *v.* Slaytor & Jackson, [1897] P. 85.

3803. —— **One of two alleged adulterers.**]—Where, in a petition for dissolution of marriage, adultery is charged with a person who died before the institution of divorce proceedings, petitioner must apply to the ct. for an order to be excused

from making him a co-resp., even though adultery be charged against a second person who has been made a co-resp. to the suit.—SLAYTOR *v.* SLAYTOR & JACKSON, [1897] P. 85 ; 66 L. J. P. 97 ; 77 L. T. 141 ; 13 T. L. R. 244.

3804. Wife leading life of prostitute.]—An application to proceed in a suit for dissolution, without making a co-resp. granted, on the ground that the wife was living in a brothel.

Qu.: whether the wife can object to such an application.—HOOK *v.* HOOK (1858), 1 Sw. & Tr. 183 ; 27 L. J. P. & M. 61 ; 31 L. T. O. S. 269 ; 6 W. R. 868.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89 ; Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3805. ——.]—Where the wife, resp., was alleged to be leading the life of a common prostitute & to have committed adultery with several persons, who were necessary witnesses to enable petitioner to establish the charges of adultery, petitioner was allowed to proceed without making a co-resp.—PETERS *v.* PETERS & WILLETT (1861), 3 Sw. & Tr. 264.

3806. Inability to trace co-respondent—Affidavit in support.]—Where a petition for dissolution of marriage alleged that "in the month of July, 1857, resp., at Birkenhead, committed adultery with a man whose name is to petitioner unknown," the judge ordinary refused to excuse petitioner from making a co-resp., on an affidavit simply stating that petitioner was unable to learn the name of the alleged adulterer, but subsequently granted the application on an affidavit which stated that petitioner had been informed by H. that resp. & a man had taken furnished apartments, & slept together in her house, & that she had not since seen the man, & did not know his name, though she had made efforts to discover it.—EVANS *v.* EVANS (1859), 28 L. J. P. & M. 20.

3807. —— **Adultery admitted by wife.**]—A husband petitioned for a dissolution of his marriage with his wife on the ground of her adultery with a man unknown. No evidence could be obtained as to the adulterer, except that the wife had stayed with a man in an hotel in London, where their names were entered in the books as "Mr. & Mrs. E. L. G." The wife, whilst admitting her adultery, would give no information as to the adulterer, beyond that "he would marry her when the divorce was pronounced." The ct. refused to dispense with making a co-resp., but ordered the petition to be amended by charging adultery with "E. L. G." in the ordinary way, co-resp. to be served by advertisement: &, petitioner being in Western Australia, any further affidavit in support of the petition to be dispensed with.—NICOLAS *v.* NICOLAS (1899), 68 L. J. P. 66 ; 80 L. T. 422.

3808. —— —— **Birth of illegitimate child.**]—JEFFREYS *v.* JEFFREYS (1912), 28 T. L. R. 504.

3809. Adulterer domiciled & resident abroad—Notice of proceedings.]—A person whose name has been introduced into a divorce petition as an alleged adulterer is entitled to have notice of the proceedings so as to afford him an opportunity of clearing himself from the charge, if he should desire to do so. The ct., in relieving a petitioner from the necessity of citing an alleged adulterer on the ground that he was a foreigner domiciled & resident out of the jurisdiction, required petitioner to give him notice of the pending proceedings.—BOGER *v.* BOGER, [1908] P. 300 ; 77 L. J. P. 151 ; 99 L. T. 881 ; 24 T. L. R. 744 ; 52 Sol. Jo. 552.

Annotation:—**Consd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Bulst, [1910] P. 271.

3810. ·]—RUSH *v.* RUSH, BAILEY & PIMENTA, No. 3785, *ante*.

iii. *Adultery alleged in Countercharges.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177 ; Matrimonial Causes Rules, 1924, rr. 4 & 5.

Parties by intervention, *see* Sub-sect. 4, F., *post*.

3811. Whether adulterer must be made co-respondent—Claim for cross-relief.]—In a wife's petition for divorce, her husband, in his answer, made a countercharge of adultery against his wife, & prayed for a divorce. On an application made on behalf of the husband, by direction of the registrar, to be allowed to proceed without making a co-resp., the ct. granted the application, but reserved the question whether it has power to make a man a co-resp. in such a suit.—CURLING *v.* CURLING (1888), 14 P. D. 13 ; 58 L. J. P. 20 ; 59 L. T. 899.

Annotation:—**Consd.** Kenworthy *v.* Kenworthy, [1919] P. 65.

3812. —— ——.]—WHEELER *v.* WHEELER & RHODES, No. 3838, *post*.

3813. —— ——.] *v.* HARROP, No. 3840, *post*.

3814. —— — —]—When a husband in his answer to his wife's petition makes a countercharge against her of adultery, & seeks a divorce in the prayer of his answer, pursuant to Matrimonial Causes Act, 1866 (c. 32), s. 2, he must, pursuant to Matrimonial Causes Act, 1857 (c. 85), s. 28, make any known man, with whom he charges his wife with committing adultery, a party to the proceedings by citation ; & as regards any unknown man, he must apply, in the manner obligatory upon a petitioning husband under the same sect., for leave to be excused from making such man a party. Until the husband has taken these steps the registrar's certificate under Divorce Rules, r. 206, that the pleadings & proceedings are correct & in order cannot be granted ; but a time should be limited within which the husband is to take such steps &, in default, the part of his answer asking for relief in respect of his countercharge should be struck out, so as to put the pleadings in order & enable the registrar to make his certificate.—KENWORTHY *v.* KENWORTHY, [1919] P. 65 ; 88 L. J. P. 38 ; 120 L. T. 263 ; 35 T. L. R. 67 ; 63 Sol. Jo. 99, C. A.

3815. Application for leave to proceed without naming co-respondent—Service of notice of motion on petitioner—Whether essential.]—Where a husband in his answer to his wife's petition for divorce alleges that petitioner had communicated to him a venereal disease in consequence of her adultery with some man or men unknown, & the husband moves to proceed without naming the alleged adulterers as parties cited, petitioner ought not to be served with notice of the motion.—MACKENZIE *v.* MACKENZIE (1916), 114 L. T. 564 ; 32 T. L. R. 318.

——.]—*See, generally,* Sub-sect. 4, E. (*c*), *post*.

iv. *Adultery alleged both with Specified and Unknown Persons.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177 ; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3816. General rule.]—If a husband's petition for a dissolution of marriage alleges adultery with A. & B., & also with divers persons unknown, leave must be obtained to dispense with making such unknown persons co-resps.—PENTY *v.* PENTY, JOHNSON & SABINGIE (1882), 7 P. D. 19 ; 47 L. T.

Sect. 8.—Institution and defence of proceedings: Sub-sect. 4, E. (b) iv., (c), & F. (a) & (b).]

131; *sub nom.* PENHY *v.* PENHY, JOHNSON & SABINGIE, 51 L. J. P. 24.

3817. Allegations of adultery with unknown persons struck out.]—A petition for dissolution of marriage alleged that the wife had committed adultery with A., who was made co-resp., & in the fifth paragraph charged her with having committed adultery with a person unknown. On motion that petitioner might be excused from making such unknown person a co-resp., or be allowed to strike the fifth paragraph out of the petition:—*Held:* either might be done. *Qu.:* whether, as there was one co-resp. there was any necessity for the application.—HUNTER *v.* HUNTER & VERNON (1858), 28 L. J. P. & M. 3.

Annotation:—**Consd.** Carryer *v.* Carryer & Watson (1865), 4 Sw. & Tr. 94.

3818. ——.]—Where a petition in an undefended suit contained allegations of adultery with two co-resps. & also with two unknown persons, the ct. ordered the paragraphs of the petition referring to the two unknown persons to be struck out.—PEACOCK *v.* PEACOCK (1894), 6 R. 656.

3819. Petitioner excused from making unknown person co-respondent.]—HUNTER *v.* HUNTER & VERNON, No. 3817, *ante*.

(c) *Leave to proceed without naming Co-Respondents.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3820. Application for leave—Time for.]—An application to dispense with making a co-resp. should be made at an early stage of the suit; but, except under special circumstances, it will be allowed even after resp. has filed her answer to the petition.—JEFFERS *v.* JEFFERS (1877), 2 P. D. 90; 46 L. J. P. 80; 25 W. R. 513.

Annotations:—**Refd.** Dobson *v.* Dobson & Paxton, [1916] P. 110; Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3821. —— Affidavit of petitioner in support—Necessity for.]—Upon a motion to dispense with citation of any person as a co-resp., an affidavit by petitioner is indispensable.—DRINKWATER *v.* DRINKWATER (1889), 60 L. T. 398.

3822. —— —— Must be corroborated.]—The ct. will not, upon the affidavit of petitioner only, allow him to proceed without making a co-resp.—LEADER *v.* LEADER (1863), 32 L. J. P. M. & A. 136.

3823. —— —— ——.]—Where, upon a motion for leave to proceed without making a co-resp., it appeared that the affidavit of petitioner was not corroborated, the ct. ordered an adjournment in order that an affidavit in corroboration might be filed, & stated that, in future, if the affidavit of petitioner were not corroborated, any such motion would probably be dismissed.—BARBER *v.* BARBER, [1896] P. 73; 65 L. J. P. 58.

3824. —— Whether respondent may be heard in opposition—Notice of motion served.]—On a motion to dispense with a co-resp.:—*Held:* resp. had no *locus standi*, &, notwithstanding the fact that notice of motion had been served on her solrs., she could not be heard in opposition to the application.—DOBSON *v.* DOBSON & PAXTON, [1916] P. 110; 85 L. J. P. 150; 114 L. T. 565; 60 Sol. Jo. 387.

Annotation:—**Consd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3825. —— —— Motions usually made ex parte.]—RUSH *v.* RUSH, BAILEY & PIMENTA, No. 3785, *ante*.

3826. Where leave granted—Application for discharge of order—Whether respondent competent to make.]—The ct. refused to treat a resp. as guilty of contempt for not having complied with an order respecting the custody of a child in the absence of an affidavit that the order had been personally served upon her.

Petitioner having obtained leave to proceed without service of the citation upon co-resp., the ct. held it was not competent to resp. to move to discharge that order, although she alleged that it had been obtained by fraud.—ALLEN *v.* ALLEN & D'ARCY (1859), 23 J. P. 360.

3827. —— Subsequent evidence as to adulterer—Must be disclosed to court.]—MUSPRATT *v.* MUSPRATT, No. 3789, *ante*.

3828. —— Notice of pending proceedings to alleged adulterer.]—BOGER *v.* BOGER, No. 3809, *ante*.

3829. Proper procedure where adulterer domiciled abroad.]—(1) Where, upon a husband's petition for divorce, the alleged adulterer is domiciled abroad, & so is not subject to the jurisdiction of the Divorce Ct. here, the proper practice is for petitioner to move for leave to proceed without citing him as co-resp.

(2) Where co-resp., domiciled in a foreign country, had been dismissed from a suit on his own motion, the ct. declined to give the husband his costs, although co-resp. had entered an unconditional appearance to the citation.—BAKER *v.* BAKER, BAKER *v.* BAKER & DWYER, [1908] P. 257; 77 L. J. P. 96; 99 L. T. 313; 24 T. L. R. 493; 52 Sol. Jo. 413.

Annotation:—*As to* (2) **Consd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

Jurisdiction over adulterers domiciled abroad.]—*See* CONFLICT OF LAWS, Vol. XI., p. 425, Nos. 907–915.

F. Parties by Intervention.

(a) *In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17 & 19.

Legitimacy declarations, *see* BASTARDY, Vol. III., p. 370, Nos. 110 *et seq.*

3830. Whether court will admit—Parties with estates expectant upon issue of marriage—When validity of marriage questioned.]—In a cause of divorce, where the alleged marriage is denied to be valid, the ct. may probably permit third parties, who have estates expectant (*inter alia*) upon the issue of such alleged marriage being illegitimate; & who consequently are interested in the question of its validity, to be cited to "see proceedings" in the cause, so far as relates to the marriage.—MONTAGUE *v.* MONTAGUE (1824), 2 Add. 372; 162 E. R. 331.

3831. —— Where no personal interest.]—In a suit for dissolution of a marriage, the only parties who are recognised by the rules of the ct. are petitioner, resp., & co-resp. The ct. has no authority to allow an individual, who has no personal interest, to suggest a charge against one of the parties which has not been imputed by the other, &, for that purpose, to intervene in the suit.—Y—— *v.* Y—— (1860), 1 Sw. & Tr. 598; 1 L. T. 414; 8 W. R. 273; 164 E. R. 877; *sub nom. Re* CHADDOCK *v.* CHADDOCK, *Ex p.* VERAX, 29 L. J. P. M. & A. 55; 6 Jur. N. S. 348.

Annotation:—**Distd.** Jessop *v.* Jessop (1861), 7 Jur. N. S. 609.

s. *Inability to discover co-respondent.*]—BUSH *v.* BUSH (1893), 12 N. L. R. 269.—**N.Z.**

3832. —— Alleged adulteress to be made a respondent—Petition by wife.]—In a suit by a wife for dissolution of marriage, the ct., upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a resp.—BELL *v.* BELL (1883), 8 P. D. 217.

3833. —— Assignee of damages.]—HUNT *v.* HUNT & COOPER, No. 5854, *post*.

3834. Time for intervention—After issue joined.]—An intervener may plead after issue joined by leave of the ct.—JONES *v.* WILLIAMS (1865), 4 Sw. & Tr. 19; 34 L. J. P. M. & A. 102; 29 J. P. 200; 11 Jur. N. S. 288.

3835. After decree nisi.]—In a divorce suit, between the decree *nisi* & the application to make it absolute, the ct. on terms, allowed the intervention of a lady who was not a party to the suit, but with whom resp. was alleged by the petition to have committed adultery.—FRENCH *v.* FRENCH (1914), 30 T. L. R. 584.

3836. Position of intervener—Opposite party—Within Married Women's Property Act, 1893, s. 2.]—A wife, having presented a petition for dissolution of marriage on the ground of cruelty & adultery, in her particulars alleged that the adultery had been committed with M. R. An order was made on Oct. 10, 1911, giving M. R. leave to intervene & directing her to file an answer within fourteen days. The intervener filed an answer, & at the trial the jury found that there had been no misconduct between her & resp., & petitioner was ordered to pay her costs. Under her marriage settlement petitioner was entitled to the income of realty for her life without power of anticipation. The intervener issued a summons for the appointment of a receiver of the life estate. Immediately after the conclusion of the first proceedings petitioner presented a second petition for dissolution of marriage. This was undefended, & a decree *nisi* was pronounced on July 9, 1912. On July 22 an order was made by the President that the trustees of petitioner's settlement should, notwithstanding the restraint on anticipation, pay half her income to the intervener from the date of the summons up to decree absolute, towards satisfaction of her costs. On Mar. 18, 1913, the summons was ordered to stand over until the decree *nisi* had been made absolute. Petitioner appealed & the intervener gave cross-notice of appeal:—*Held:* (1) the intervener was an "opposite party" within the above sect.; (2) the discretionary power of the ct. was not exhausted by the order of July 22, 1912; (3) the property which the ct. could deal with under sect. 2 was the whole property which was subject to the restraint on anticipation, & not merely the portion of the property which for the time being was effectually restrained from anticipation, that was to say, during coverture; & the matter must be remitted to the President to be dealt with according to his discretion.—STUDLEY *v.* STUDLEY, [1913] P. 119; 82 L. J. P. 65; 108 L. T. 657; 57 Sol. Jo. 425, C. A.

Annotation:—*As to* (3) **Refd.** Wood *v.* Lewis, [1914] 3 K. B. 73.

3837. No evidence offered against intervener at hearing—Dismissal from proceedings.]—In a petition by the wife for dissolution of the marriage on the ground of adultery & cruelty, one of the persons wth whom the husband was alleged to have committed adultery obtained leave to intervene, & her name was added to the title of the suit. Subsequently she obtained an order for a commission to examine witnesses abroad, & for the postponement of the trial of the issues affecting her until the return of the commission. Petitioner obtained a decree absolute, on evidence which satisfied the ct. that resp. had committed adultery with women other than intervener; & the issue affecting her was never tried:—*Held:* the name of intervener must be struck out of all pending & future proceedings.—CONNEMARA *v.* CONNEMARA, [1892] P. 102; 61 L. J. P. 96; 66 L. T. 592.

Costs.]—*See* Sect. 18, sub-sect. 5, *post*.

(b) Adultery alleged in Countercharges.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17–19.

Whether adulterer must be made co-respondent, *see* Sub-sect. 4, E. (*b*) iii., *ante*.

3838. Whether alleged adulterer allowed to intervene—No claim for cross-relief.]—Where in a wife's suit for dissolution of marriage the husband in his answer charged his wife with having committed adultery with a specified person, but did not pray for a dissolution of the marriage, the ct. allowed the alleged adulterer to intervene & file an answer.

Under that sect. [29 & 30 Vict. c. 32, s. 2], where resp., the husband, has in answer to his wife's petition for a dissolution of marriage, made a countercharge of adultery against her, & prays for a dissolution of his marriage on the ground of the adultery, it is the clearly established practice of the ct. to require him to state who the person is who is charged with committing adultery with his wife, & to make him a party to the suit ((BUTT, J.).—WHEELER *v.* WHEELER & RHODES (1889), 14 P. D. 154; 58 L. J. P. 65; 61 L. T. 306.

Annotations:—**Distd.** Harrop *v.* Harrop, [1899] P. 61. **Apprvd.** Lowe *v.* Lowe, [1899] P. 204; Kenworthy *v.* Kenworthy, [1919] P. 65.

3839. —— ——.]—A petition by a husband claiming a divorce from his wife & damages against co-resp. was dismissed, by consent, before trial. Thereupon the wife filed a petition claiming a judicial separation, & the husband, in his answer, countercharged the adultery which he had alleged in the former suit, but he asked for no relief. The alleged adulterer applied for leave to intervene & defend: *Held:* the practice of the Ecclesiastical Cts. governed the case, &, as that practice afforded no precedent for allowing an intervention in such circumstances, the application must be refused.—FARRELL *v.* FARRELL (1896), 76 L. T. 167.

3840. —— ——.]—A husband, in his answer to a petition by his wife for dissolution of marriage, made a countercharge against her of adultery with a specified person, without claiming cross-relief, or "such further or other remedy as the nature of the case may require": *Held:* the ct. had no power to allow the alleged adulterer to intervene.

Where the answer of resp. is, as in this case, merely an answer the ct. cannot make a decree for dissolution. This can only be done where the

---

PART XIII. SECT. 8, SUB-SECT. 4.—F. (a).

3832 i. *Whether court will admit—Alleged adulteress to be made a respondent—Petition by wife.*]—In a wife's petition for dissolution of marriage by reason of the husband's adultery, the alleged adulteress obtained a rule calling upon petitioner to show cause why she should not be allowed to intervene.—BAILEY *v.* BAILEY (1897), I. L. R. 30 Calc. 490, n.—**IND.**

t. —— —— —— *Incestuous adultery.*] a wife's suit for divorce against the husband on the ground of incestuous adultery, the ct. has no power under Indian Divorce Act (IV. of 1869) to allow the alleged adulteress to intervene.—RAMSAY *v.* BOYLE (1903), I. L. R. 30 Calc. 489; 7 C. W. N. 501.—**IND.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 4, *F.* (*b*) & (*c*); *sub-sect.* 5, *A.*, *B.*, *C.* & *D.* (*a*)

answer contains a claim for cross-relief, & in that case resp., if a husband, is bound to make the alleged adulterer a co-resp., as he would have had to do if he had presented a cross-petition (GORELL BARNES, J.).—HARROP *v.* HARROP, [1899] P. 61; 68 L. J. P. 58; 80 L. T. 171; 15 T. L. R. 144.

Annotations:—**Follid.** Lowe *v.* Lowe, [1899] P. 204. **Apprvd.** Kenworthy *v.* Kenworthy, [1919] P. 65.

3841. Answer not treated as cross-petition.]—Where a husband in his answer to his wife's petition made a countercharge against her of adultery with a person named, but did not ask for any relief whatever beyond the simple dismissal of the petition:—*Held:* under the circumstances the answer could not be treated as a cross-petition under sect. 2 of Matrimonial Causes Act, 1866 (c. 32), but merely as an ordinary defence, & therefore the ct. had no jurisdiction, on the opposition of the husband, to allow the alleged adulterer to intervene.—LOWE *v.* LOWE, [1899] P. 204; 68 L. J. P. 60; 80 L. T. 575; 47 W. R. 553; 15 T. L. R. 360; 43 Sol. Jo. 495, C. A.

Annotation:—**Apld.** Kenworthy *v.* Kenworthy, [1919] P. 65.

(*c*) *Where King's Proctor has intervened.*

See, now, Supreme Court of Judicature Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17–19.

Intervention by King's Proctor, generally, *see* Sect. 19, *post.*

3842. When petitioner charged with adultery—Whether intervention of alleged adulterer permitted.]—A wife obtained a decree *nisi*, but the Queen's Proctor subsequently intervened, & alleged that petitioner was living in adultery with one J.:—*Held:* J. was not a party to the suit, & could not be admitted to intervene.—GRIEVE *v.* GRIEVE, [1893] P. 288; 63 L. J. P. 29; 69 L. T. 462; 1 R.

Annotations:—**Follid.** Carew *v.* Carew, [1894] P. 31. **Consd.** Harrop *v.* Harrop, [1899] P. 61; Lowe *v.* Lowe (1899), 80 L. T. 575.

3843. ——— ———.]—Where a wife had obtained a decree *nisi*, dissolving her marriage on the ground of adultery & cruelty, & the Queen's Proctor intervened, alleging, in his plea, collusion, condonation, & suppression of material facts, leave was given to the Queen's Proctor, in the course of the trial, to add a charge of adultery, which he alleged had been committed by petitioner with one E. who thereupon moved for leave to intervene & defend himself from the charge:—*Held:* there was no jurisdiction to permit such an intervention.—CAREW *v.* CAREW, [1894] P. 31; 63 L. J. P. 74; 6 R. 662.

Annotations:—**Consd.** Harrop *v.* Harrop, [1899] P. 61; Lowe *v.* Lowe (1899), 80 L. T. 575.

See, now, Matrimonial Causes Act, 1907 (c. 12), s. 3.

3844. ——— ———.]—DAVISON *v.* DAVISON, No. 5169, *post.*

3845. Co-respondent dismissed from original suit—Whether intervention by co-respondent or respondent permitted—No charge of collusion.]—In a suit by a husband for dissolution of his marriage on the ground of his wife's alleged adultery with co-resp., the principal evidence consisted of the husband's statement on oath of a confession by his wife that she had committed adultery with co-resp. Co-resp. on the advice of his counsel did not tender himself as a witness. A decree *nisi* for dissolution of the marriage was pronounced, but the suit was dismissed as against the co-resp. with costs, the ct. holding that there was no evidence against him. The Queen's Proctor afterwards entered an appearance in the suit, & filed a plea wherein he alleged that it would be contrary to justice for the decree *nisi* to be made absolute, as certain material facts had not been brought to the attention of the ct.; that there was no corroboration of the confession; that certain witnesses who had been referred to in such confession, & whose evidence was material had not been called; & that, apart from the confession, there was no evidence of adultery. The pleas were held sufficient, though redundant.

An application was made by resp. for leave to enter an appearance in, & appear on the hearing of the proceedings by the Queen's Proctor. She also intimated that she intended to give evidence in support of the admission of adultery. A similar application was made on behalf of co-resp. who alleged that he would now have to meet the additional evidence of resp.:—*Held:* both applications must be refused.

The only issue in such a case is between resp. & petitioner; co-resp. on his dismissal from the suit, is no longer a party & neither he nor resp. (the ground of intervention not being collusion) has any *locus standi.*—CRAWFORD *v.* CRAWFORD & DILKE (1886), 55 L. T. 305; 34 W. R. 677; 2 T. L. R. 768, C. A.

Annotations:—**Consd.** Lowe *v.* Lowe (1899), 80 L. T. 575. **Refd.** Blackhall *v.* Blackhall (1888), 13 P. D. 94; Taplen *v.* Taplen (1891), 64 L. T. 870; Grieve *v.* Grieve, [1893] P. 288.

SUB-SECT. 5.—SERVICE.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 6–14, 28, 29.

3846. Commencement of proceedings.]—RAY *v.* SHERWOOD & RAY, No. 3647, *ante.*

3847. Petition for damages—Service on wife—Necessity for.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *ante.*

3848. Petition charging husband with adultery—Service on person with whom adultery alleged—Matrimonial Causes Rules, 1924, r. 17.]—TAYLOR *v.* TAYLOR, WHITE *v.* WHITE, No. 3663, *ante.*

3849. Questions put to respondent at time of service—Propriety.]—PURGOLD *v.* PURGOLD & LAMBART (1903), *Times*, Oct. 29.

Annotation:—**Refd.** Hallam *v.* Hallam (1903), 20 T. L. R. 34.

3850. ——— ———.]—HALLAM *v.* HALLAM (1903), 20 T. L. R. 34.

Annotation:—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3851. Identification of persons served.]—SMITH *v.* SMITH & ARMSTRONG, No. 3919, *post.*

3852. Royal palaces exempt from service.]—NYERFORD *v.* WARREN (EARL) (1293), 3 Co. Inst. 141.

Annotations:—**Refd.** A.-G. *v.* Dakin (1867), L. R. 2 Exch. 290; Combe *v.* De la Bere (1882), 22 Ch. D. 316.

———.]—*See, further*, CONSTITUTIONAL LAW, Vol. XI., pp. 519 *et seq.*, Nos. 242 *et seq.*

PART XIII. SECT. 8, SUB-SECT. 5.—A.

a. *Where service impossible — Dismissal of co-respondent from suit.*]—On a petition for dissolution of marriage the proper course, when personal service or substituted service which may be trusted to reach the co-resp. is impossible, is to move to dismiss him from the suit.—SCOTT *v.* SCOTT (1913), 32 N. Z. L. R. 979.—N.Z.

B. Necessity for Personal Service.

See Matrimonial Causes Rules, 1924, rr. 7, 8.
Substituted service, *see* Sub-sect. 5, E., *post*.

3853. General rule.]—Sect. 42 of Matrimonial Causes Act, 1857 (c. 85), & the Rules founded thereon require personal service of the citation & copy of petition, unless the ct. authorises a substituted service, or gives petitioner leave to proceed without service. Acceptance of service by an attorney on behalf of resp. is not sufficient.—MILNE *v.* MILNE (1865), 4 Sw. & Tr. 183; 34 L. J. P. M. & A. 143; 164 E. R. 1487.

3854. Respondents abroad.]—In a suit for dissolution of marriage on the ground of the wife's adultery, the affidavits, in support of a motion to dispense with personal service of citations & copies of the petition, stated that the wife had deserted her husband at Liverpool in Aug. 1857; that there was reason to believe that she afterwards lived in this country with Q., co-resp., as his wife; that in Oct. 1857, two persons passing under the name of Mr. & Mrs. Q. sailed from London for Australia, & afterwards landed in Melbourne; that there was reason to believe that the said Mrs. & Mr. Q. were resp. & co-resp.; that inquiries had been made in Melbourne of the agent of the ship in which those persons went to Australia, & of other shipping agents there, also of the inspector of police at Sydney, but that no trace of them or of their movements could be discovered. Upon the above affidavits, service on the resp. & co-resp. was altogether dispensed with.

Semble: if there had been any certain information as to their movements in Australia, further inquiries would probably have led to their discovery, & would have, therefore, been necessary.—COOK *v.* COOK & QUAILE (1858), 28 L. J. P. & M. 5; *subsequent proceedings*, COOKE *v.* COOKE & QUAILE (1859), 2 Sw. & Tr. 50.

3855. Acceptance of service by respondent's solicitor.]—MILNE *v.* MILNE, No. 3853, *ante*.

3856. ——.]—An undertaking by resp.'s solr. to appear is not sufficient: the citation must be served upon resp.—DE NICEVILLE *v.* DE NICEVILLE (1868), 37 L. J. P. & M. 43.

C. Service on Persons under Disability.

3857. Convict—Prison official—Communication of contents.]—If resp. be in prison the ct. will not be satisfied with substituted service of the petition & citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to resp.—BLAND *v.* BLAND (1875), L. R. 3 P. & D. 233; 44 L. J. P. & M. 14; 32 L. T. 404; 23 W. R. 419.

3858. Lunatic—Not so found—Service on respondent—Presence of asylum officials.]—GILES *v.* GILES, No. 2318, *ante*.

3859. Minor—Service on respondent—Presence of guardians.]—Where resp. is a minor it is not necessary for petitioner to see that a guardian *ad litem* has been appointed. Service on a resp. who has no such guardian is good if effected in the presence of his natural guardians.

Semble: it would be good without their presence.—QUINN *v.* QUINN, [1920] P. 65; 89 L. J. P. 38; 122 L. T. 464; 36 T. L. R. 170; 64 Sol. Jo. 226.

D. Service out of the Jurisdiction.

(a) In General.

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Jurisdiction of court over foreign respondents & co-respondents.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 421 *et seq.*, Nos. 874 *et seq.*

3860. Effect of Matrimonial Causes Act, 1857 (c. 85), s. 42—Jurisdiction not extended.]—GRAHAM *v.* GRAHAM, No. 3867, *post*.

(b) In Suits for Dissolution of Marriage.

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Jurisdiction of court over foreigners—As regards petitioner & respondent.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 421 *et seq.*, Nos. 874 *et seq.*

—— **As regards co-respondent.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 425 *et seq.*, Nos. 907 *et seq.*

3861. On respondent—Service of citation.]—An attempt was made, at the suit of a wife for a divorce, to serve the husband with a citation taken out in Oct. 1848, at his last-known place of residence, which was within the jurisdiction of the ct. It subsequently appeared he left that residence in Mar. 1847. A decree by ways & means was, on the return of the citation, executed at that house, & at the parish church. On Feb. 5, 1849, he was personally served in the West Indies. The ct. on motion pronounced the husband in contempt, "for the purpose of carrying on the proceedings, & placing the evidence on record." It was stated there was no jurisdiction in the West Indies to enable the wife to institute a suit. Eventually a sentence of divorce was pronounced. The proceedings throughout were *in pœnam*.—DASENT *v.* DASENT (1850), 1 Rob. Eccl. 800; 7 Notes of Cases, 126; 14 L. T. O. S. 48; 13 Jur. 832; 163 E. R. 1218.

Annotations:—**Consd.** Yelverton *v.* Yelverton (1859), 1 Sw. & Tr. 574. **Refd.** Burton *v.* Burton (1873), 21 W. R. 618; Graham *v.* Graham, [1923] P. 31. **Mentd.** L. C. C. *v.* Dundas, [1904] P. 1.

3862. —— **Whether essential—Dissolution suit after dismissal of previous suit for nullity—Respondent resident abroad.**]—CATTERALL *v.* CATTERALL (1847), 1 Rob. Eccl. 580; 5 Notes of Cases, 466; 11 Jur. 914; 163 E. R. 1142.

Annotations:—**Refd.** Anon. (1857), Dea. & Sw. 295. **Mentd.** Beamish *v.* Beamish (1861), 9 H. L. Cas. 274; Sichell *v.* Lambert (1864), 3 New Rep. 385.

3863. —— **On active service abroad—Service by registered letter—Practice in restitution suits not applicable.**]—The practice laid down in regard to service of decrees for restitution of conjugal rights upon resps. engaged on active service abroad does not apply to the service of citations & petitions in suits for dissolution of marriage; although it is recognised that where, after service of the citation, it appears that a resp. desires to contest the suit, the further proceedings may have to abide his return to this country, on leave or otherwise.

Where personal service of a citation & petition for divorce could not be effected upon a resp., who was serving as a seaman on board one of His Majesty's ships in the Far East in time of war, the ct. directed that service might be effected by sending the documents in a prepaid registered letter addressed to resp., & fixed the time for

PART XIII. SECT. 8, SUB-SECT. 5.—B.

3853 1. *General rule.*]—In a divorce action the trial judge may take into consideration the propriety of an order made dispensing with personal service of the writ of summons, & if in his opinion such order was made on insufficient material he may on that ground refuse a decree.—S. *v.* S., [1921] 2 W. W. R. 939.—**CAN.**

b. *Respondent abroad · In prison.*]—C. filed a petition for dissolution of marriage. Resp. was proved to be undergoing a sentence in a prison in N. S. W.:—*Held:* in the circumstances resp. should be personally served with the summons & petition.—L. (OTHERWISE C.) *v.* C. (1912), 31 N. Z. L. R. 1064.—**N.Z.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 5, *D.* (*b*), (*c*), (*d*) & (*e*), & *E.* (*a*) *i.*]

appearance at one hundred days.—TURNER *v.* TURNER, [1910] P. 324; 86 L. J. P. 13; 115 L. T. 790; 33 T. L. R. 33; 61 Sol. Jo. 58.

3864. Position of co-respondent.]—(1) Whatever it is that determines the jurisdiction of this ct. with regard to co-resps., that jurisdiction does not depend upon the domicil of co-resp., nor is it to be determined by the question whether co-resp. is or is not a British subject.

(2) So far as a co-resp. is concerned, the citation corresponds with what would have been, before Matrimonial Causes Act, 1857 (c. 85), came into operation, the writ in an action for *crim. con.*

(3) Service of the citation & sealed copy of the petition upon a co-resp., if out of England, places him on the same footing with regard to jurisdiction as a deft. properly served with a writ out of the jurisdiction under R. S. C., Ord. 11, in the K. B. or Ch. Div.

(4) The claim against a co-resp. in a divorce suit is merely a personal claim for money, & is not complicated with questions of international law arising out of status, as in the case of a petitioner & resp.

(5) Although a judgment, following on a verdict for damages in a divorce suit in this ct., could not be enforced against a foreigner in a foreign country, it might possibly be enforced against a Scotsman or an Irishman, in Scotland or Ireland, by means of Judgments Extension Act, 1868 (c. 54).

(6) The enactment in Matrimonial Causes Act, 1857 (c. 85), s. 42, providing for service of any person at any place is only a municipal law in favour of those who sue in this ct.; & the Legislature thereby does not concern itself with the question whether an order against a co-resp. for payment of damages or costs in a proceeding began by citation served abroad would or would not be enforceable as a foreign judgment in another country. The object of the provision is that this ct. may make the order & may enforce it against any property which the person against whom the order is made may have within its own jurisdiction or within its own reach.

(7) As the Act gives power to serve anybody as co-resp. anywhere, it gives jurisdiction to make any order against co-resp., & to issue process of execution to enforce the order in this country; & this can be done without in any way affecting any international comity or offending any international susceptibilities.—RAYMENT *v.* RAYMENT & STUART, CHAPMAN *v.* CHAPMAN & BUIST, [1910] P. 271; 79 L. J. P. 115; 103 L. T. 430; 26 T. L. R. 634; 54 Sol. Jo. 721.

Annotations:—*As to* (1) **Apprvd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242. **Refd.** Phillips *v.* Batho, [1913] 3 K. B. 25. *As to* (7) **Apprvd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3865. Service in France—Requirements of Anglo-French Convention, 1922.]—Where there has been service in France of a divorce petition in accordance with the requirements of the Anglo-French Convention, 1922, that may be taken to be a sufficient compliance with Divorce Rules, rr. 11, 14.—REECE *v.* REECE (1924), 132 L. T. 349; 41 T. L. R. 24.

(*c*) *In Suits for Judicial Separation.*

See Matrimonial Causes Rules, 1921, r. 10; &, *generally*, PRACTICE.

3866. Service on respondent.]—A citation issued from this ct., addressed to a party then residing & being within the diocese. The party quitted England before service was affected. The citation was personally served on him in parts abroad. Protest to appearing overruled.—COLLETT *v.* COLLETT (1843), 3 Curt. 726; 2 Notes of Cases, 504; 7 Jur. 1164; 163 E. R. 881.

Annotations:—**Refd.** Yelverton *v.* Yelverton (1859), 1 Sw. & Tr. 574; Graham *v.* Graham, [1923] P. 31.

3867. ——.]—Statute of Citations, 1531 (c. 9), s. 2, which forbade the Ecclesiastical Cts. to cite any person out of the diocese where he was inhabiting or dwelling, must be taken to have limited the jurisdiction & not only the power of service of the Ecclesiastical Cts., & Matrimonial Causes Act, 1857 (c. 85), s. 42, which permits service within or without His Majesty's Dominions, cannot extend the jurisdiction.—GRAHAM *v.* GRAHAM, [1923] P. 31; 92 L. J. P. 26; 128 L. T. 639; 39 T. L. R. 139; 67 Sol. Jo. 316.

Annotations:—**Consd.** Eustace *v.* Eustace, [1924] P. 45. **Mentd.** Smith *v.* Smith, [1923] P. 128.

See, also, CONFLICT OF LAWS, Vol. XI., pp. 426, 427, Nos. 916–920.

(*d*) *In Suits for Restitution of Conjugal Rights.*

See Matrimonial Causes Rules, 1924, r. 10 &, *generally*, PRACTICE.

Whether residence within jurisdiction essential.]—*See* CONFLICT OF LAWS, Vol. XI., p. 427, Nos. 921–923.

3868. Service of petition & citation—Whether court has power to order.]—A wife's remedy for matrimonial wrongs must be usually sought in the place of her husband's domicil. The English Divorce Ct. has not jurisdiction against a foreigner, after he has quitted this country, for not rendering conjugal rights to his wife while he was here. The provisions of Matrimonial Causes Act, 1857 (c. 85), s. 42 (for service out of Her Majesty's dominions), do not apply to suits for restitution of conjugal rights.—FIREBRACE *v.* FIREBRACE (1878), 4 P. D. 63; 47 L. J. P. 41; 39 L. T. 94; 26 W. R. 617.

Annotations:—**Folld.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Consd.** Graham *v.* Graham, [1923] P. 31; Eustace *v.* Eustace, [1924] P. 45. **Refd.** Niboyet *v.* Niboyet (1878), 4 P. D. 1; Armytage *v.* Armytage, [1898] P. 178; Dicks *v.* Dicks, [1899] P. 275; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Perrin *v.* Perrin, Powell *v.* Powell (1914), 83 L. J. P. 69.

3869. —— ——.]—The ct. has no power to allow service abroad of a petition for restitution of conjugal rights.—CHICHESTER *v.* CHICHESTER (1885), 10 P. D. 186; 34 W. R. 65.

Annotations:—**Consd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Refd.** Dicks *v.* Dicks, [1899] P. 275.

3870. —— — —.]—(1) A citation & petition in a suit for restitution of conjugal rights, as well as the previous letter of demand required by the rules, may now be served out of the jurisdiction; & where a decree is granted the decree may likewise be served out of the jurisdiction.

(2) In any further proceedings arising out of a non-compliance with the decree, petitioner must satisfy the ct. that resp. has been served therewith at a place from which he could reasonably have returned to his wife within the period named in the decree.

(3) If an agreement for separation has previously been entered into between the parties to a suit for restitution of conjugal rights, but such agreement has not been pleaded by resp. in bar to the petition, it is not the duty of the ct. to raise the point how far petitioner's rights to a decree for restitution are affected by such agreement. Nevertheless, if such decree is made the basis of

subsequent proceedings, it is open to the ct. to go into the whole matter.—BATEMAN *v.* BATEMAN, [1901] P. 136; 84 L. T. 64, 331; 17 T. L. R. 190; 45 Sol. Jo. 295; *sub nom.* HARDIE *v.* HARDIE, BATEMAN *v.* BATEMAN, 70 L. J. P. 29.

Annotations:—As to (1) **Consd. & Distd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Folld.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135. **Refd.** Eustace *v.* Eustace, [1924] P. 45. *Generally*, **Mentd.** Kennedy *v.* Kennedy, [1907] P. 49.

3871. —— ——.]—(1) The amendment of the law effected by Matrimonial Causes Act, 1884 (c. 68), relates to matters subsequent to the decree; the essence of the suit & of the decree for restitution of conjugal rights remains the same, but its consequences & effects are different.

(2) No power is given, either by Matrimonial Causes Act, 1857 (c. 85), s. 42, or by any other sect. or Act, to serve a citation & petition for restitution of conjugal rights beyond the jurisdiction of the ct.

Where service of the citation & of a sealed copy of a petition for restitution of conjugal rights had been effected abroad, an order setting aside the service was made.

(3) *Qu.:* whether, in a case where service is duly & properly effected, & where no question arises as to the jurisdiction of the ct. in pronouncing a decree for restitution of conjugal rights, such decree can be served out of the jurisdiction.

(4) Where neither party to a marriage was domiciled or resident within the jurisdiction, & their only connection with this country at the date of their marriage was that they came over here for one day for the purpose of being married, & their only matrimonial residences were abroad, the ct. cannot decree restitution of conjugal rights.—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), [1914] P. 53; 83 L. J. P. 40; 110 L. T. 121; 30 T. L. R. 329; 58 Sol. Jo. 341.

Annotation:—As to (4) **Distd.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135.

3872. —— —— Both parties domiciled in England—Residence in England when suit instituted.]—In a suit for restitution of conjugal rights, where it appears from the petition that the parties to the suit are domiciled in England at the date thereof, or that they had a matrimonial home in England at the time when cohabitation ceased, or that they were both resident in England at the time of the institution of the suit, the citation & sealed copy of the petition may be served either within or without His Majesty's dominions; & when a suit for restitution of conjugal rights has been duly instituted, & a decree has been made therein, such decree may be served on resp. either within or without His Majesty's dominions.—PERRIN *v.* PERRIN, POWELL *v.* POWELL, [1914] P. 135; 83 L. J. P. 69; 111 L. T. 335; 30 T. L. R. 497; 58 Sol. Jo. 513.

Annotation:—**Refd.** Eustace *v.* Eustace, [1924] P. 45.

3873. Service of decree—Respondent domiciled in England.]—A decree for restitution of conjugal rights made against a resp. who is domiciled in England may be served on him out of the jurisdiction.—DICKS *v.* DICKS, [1899] P. 275; 68 L. J. P. 118; 81 L. T. 462; 48 W. R. 302; 15 T. L. R. 482.

Annotations:—**Consd.** Bateman *v.* Bateman, [1901] P. 136; De James *v.* Mecklenburg-Schwerin, [1914] P. 53. Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135. **Refd.** Eustace *v.* Eustace, [1924] P. 45.

3874. Where service of petition & citation effected.]—BATEMAN *v.* BATEMAN, No. 3870, *ante*.

3875. —— ——.]—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), No. 3871, *ante*.

3876. —— ——.]—PERRIN *v.* PERRIN, POWELL *v.* POWELL, No. 3872, *ante*.

3877. —— Suspension of service—Till respondent's return to England.]—PEARSON *v.* PEARSON, No. 2432, *ante*.

3878. —— —— Until further order—Respondent on active service.]—Where, in a suit for restitution of conjugal rights, resp. was on active service abroad, the ct. in pronouncing a decree, directed that the decree should not be served until further order.—MASON *v.* MASON (1915), 59 Sol. Jo. 530.

Annotations:—**Distd.** Turner *v.* Turner, [1916] P. 324. **Refd.** Lang *v.* Lang (1915), 113 L. T. 928.

3879. —— —— —— ——.]—In cases where a decree for the restitution of conjugal rights is made against a resp. who is on active service with His Majesty's forces the decree will be drawn up, but ordered to lie in the office until the ct. gives further directions as to its service.—LANG *v.* LANG (1915), 113 L. T. 928; 31 T. L. R. 467; 59 Sol. Jo. 561.

Annotation:—**Distd.** Turner *v.* Turner, [1916] P. 306.

Service of written demand for return to cohabitation.]—*See* Sect. 5, sub-sect. 1, D., *ante*.

3880. Whether leave of court essential.] Where a sealed copy of a petition for the restitution of conjugal rights & a copy of the citation had been duly served upon resp., then resident in Ireland, the ct. granted a decree, although no leave had been previously obtained for service out of the jurisdiction.—BUCKLEY *v.* BUCKLEY (1912), 107 L. T. 590; 57 Sol. Jo. 9.

3881. Where service effected abroad—Order made setting aside service.]—CHICHESTER *v.* CHICHESTER (1885), 10 P. D. 186; 31 W. R. 65.

Annotations:—**Refd.** Dicks *v.* Dicks, [1899] P. 275; De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53.

3882. —— ——.]—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), No. 3871, *ante*.

(c) *In Suits for Nullity of Marriage.*

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Jurisdiction of court as to nullity proceedings, *see* CONFLICT OF LAWS, Vol. XI., p. 428, Nos. 924–926.

3883. Personal service abroad.]—TENDUCCI'S CASE (1775), cited in 3 Phillim. at p. 595; 161 E. R. 1425.

Annotations:—**Consd.** Yelverton *v.* Yelverton (1859), Sea. & Sm. 49. **Refd.** Collett *v.* Collett (1843), 3 Curt. 726; Dasent *v.* Dasent (1849), 7 Notes of Cases, 126; H. (falsely called C ——) *v.* C—— (1860), 29 L. J. P. M. & A. 81.

E. Substituted Service.

(a) *When Granted.*

i. *In Suits for Dissolution of Marriage.*

See Matrimonial Causes Rules, 1924, r. 9.

3884. Respondent's address withheld.]—A wife filed a petition for dissolution of marriage, but was unable to effect personal service of the citation, etc., in consequence of resp. having gone abroad, but whither she knew not. A. knowing where resp. was, though refusing to give his address, forwarded to him, by post, an office copy & a plain copy of the petition, & two copies of the

PART XIII. SECT. 8, SUB-SECT. 5.—E. (a) i.

c. *General rule.*]—An order for substituted service in divorce proceed should not be made unless there is reasonable ground for supposing that the mode of service ordered will bring the proceedings to the knowledge of the party to be served.—LODGE *v.* LODGE (1906), 26 N. Z. L. R. 385.—**N.Z.**

d. *Power of local master to order.*]

Sect. 8.—Institution and defence of proceedings: Sub-sect. 5, E. (a) i., ii. & iii., (b) & (c) i., ii. &

citation. Resp. returned, by post, to A. the plain copy of the petition & one of the copies of the citation, on which were indorsed memoranda signed by him, acknowledging the receipt of the office copy of the petition, & also a copy of the citation. Resp. not having entered an appearance, petitioner was allowed to proceed without further service.—CHANDLER *v.* CHANDLER (1858), 28 L. J. P. & M. 6.

3885. Failure to trace whereabouts after reasonable efforts.]—COOK *v.* COOK & QUAILE, No. 3854, *ante*.

3886. ——.]—The service of the citation upon co-resp. will be dispensed with if, after a sufficient search, he cannot be found.—PARKER *v.* PARKER & MACLEOD (1859), 5 Jur. N. S. 103.

3887. ——.]—Where every reasonable effort has been made to trace resp. for the purpose of effecting a personal service of the citation & petition in a matrimonial suit, but without success, the ct. will dispense with such personal service. —APPLEYARD *v.* APPLEYARD & SMITH (1875), L. R. 3 P. & D. 257.

3888. ——.]—Though the fact that resp.'s whereabouts cannot be discovered may be due to petitioner's delay in bringing his petition, substituted service of the petition & citation may be allowed.—JENSON *v.* JENSON (1898), 78 L. T. 764.

3889. Respondent abroad—Address unknown—Necessity to show that attempts at discovery made.] —To entitle petitioner, in a suit for dissolution of marriage, to proceed without personal service of a citation, it is not sufficient to show that resp. is abroad, & that petitioner does not know where he is; some attempt should be made to discover & serve him.—SUDLOW *v.* SUDLOW (1858), 28 L. J. P. & M. 4.

3890. —— —— ——.] — COOK *v.* COOK & QUAILE, No. 3854, *ante*.

3891. —— **Probability of being in definite place —Personal service not impossible.**]—An application on behalf of a wife, who had presented a petition for dissolution of marriage, that a substitutional service of the citation on the father of her husband should be allowed, on the ground that she did not know her husband's address, but that his father was in communication with him, was rejected by the Judge Ordinary, as it appeared probable that the husband was in New York, & the impossibility of serving him personally was not made out.

Qu.: whether the Judge Ordinary has power to dispense with personal service of the citation in a proceeding for dissolution of marriage.—ROWBOTHAM *v.* ROWBOTHAM (1858), 1 Sw. & Tr. 73; 30 L. T. O. S. 326; 6 W. R. 328; 164 E. R. 635; *sub nom.* ROBOTHAM *v.* ROBOTHAM, 27 L. J. P. & M. 33; 4 Jur. N. S. 148.

3892. —— **Right of action against process server by lex loci.**]—In a petition for divorce it appeared that resp. & co-resp. were residing together abroad, & that by the law of the place where they resided co-resp., a foreigner, had a right of action against any person serving him with English process:—*Held:* the citation might be served on co-resp. by inclosing it in a registered letter addressed to him, another copy being sent to resp. so as to make it more probable that it would come to his knowledge.—TRUBNER *v.* TRUBNER & CRISTIANI (1889), 15 P. D. 24; 59 L. J. P. 56; 62 L. T. 186; 54 J. P. 167; 38 W. R. 464.

3893. Refusal of foreign authorities to serve or allow service.]—Co-resp. in a suit for dissolution of marriage was resident in a sanatorium in the Canton of Neufchatel in Switzerland. The principal of such sanatorium refused to serve him with the citation & petition, or to allow him to be served with them. The Procureur-General of Neufchatel stated that service must be effected through a diplomatic source, but the Foreign Office refused to act in the matter except under an order of the ct. It was shown on affidavit that the mother & uncle of co-resp. resided in Switzerland, & that petitioner was acquainted with their addresses. The ct., after observing that the usual practice was to serve through the foreign tribunal, made an order for the service of the citation & petition on co-resp. by registered letters addressed to his mother & uncle.—STUMPEL *v.* STUMPEL & ZEPFEL (1900), 70 L. J. P. 6; 17 T. L. R. 17.

3894. —— **Letters of request refused.**]—Where, upon a citation & petition for dissolution of marriage, it appeared that resp. & co-resp. were known to be residing at certain addresses in Portugal, the ct., after letters of request had been applied for & refused, dispensed with personal service & ordered substituted service to be effected by registered letters.—WRAY *v.* WRAY & D'ALMEIDA, [1901] P. 132; 70 L. J. P. 32; 84 L. T. 64; 17 T. L. R. 242.

Annotation:—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

3895. —— **Active service.**]—TURNER *v.* TURNER, No. 3863, *ante*.

3896. Co-respondent's name unknown—Citation in name known to respondent.]—NICOLAS *v.* NICOLAS, No. 3807, *ante*.

ii. *In Suits for Judicial Separation.*

See Matrimonial Causes Rules, 1924, r. 9.

3897. Respondent's address unknown—After due inquiries made—Affidavits in support.]—In a suit by the wife for judicial separation, application having been made for an order that service of the citation & copy of the petition upon the father of the husband should be deemed good service, upon affidavits which stated that the wife did not know where the husband was, & that his father, though it was believed he knew his address, would not disclose it, & that the wife had last heard from her husband in 1854, when he wrote to her; the Judge Ordinary refused to make the order without an affidavit that inquiries had been made for the husband at the place from which the letter was addressed, but subsequently granted it on an affidavit that such inquiries had been made there, & that he had left & gone to another place which he had also left, & that the person in whose employ he had been at the latter place did not know whither he had gone.—LACEY *v.* LACEY (1858), 28 L. J. P. & M. 24.

iii. *In Suits for Restitution of Conjugal Rights.*

See Matrimonial Causes Rules, 1924, r. 9.

Service of written demand for return to cohabitation.]—*See* Sect. 5, sub-sect. 1, D., *ante*.

3898. Power to order substituted service—Of demand, petition & decree.]—PALMER *v.* PALMER, *Re* THOMASSON'S PETITION, No. 4767, *post*.

3899. When court will order—Respondent's address unknown—Service on solicitor.]—WATERS *v.* WATERS, No. 2445, *ante*.

3900. —— **Respondent's address withheld.**]—If the ct. is satisfied that the residence of an in-

—The making of an order for substitutional service of the writ of summons in a divorce action is within the jurisdiction of a local master.—S. *v.* S. & H. (1922), 63 D. L. R. 279; 15 Sask. L. R. 132; [1922] 1 W. W. R. 221.—CAN.

tended resp. is wilfully kept from the knowledge of petitioner, it will order substituted service of the demand for cohabitation required by Additional Rules & Regulations, Jan. 30, 1869, r. 175, as well as of the petition & citation.—*Re* SHEEHY (1876), 1 P. D. 423; *sub nom.* O'SHEEHY *v.* O'SHEEHY, 34 L. T. 367.

Annotation:—**Apld.** Palmer *v.* Palmer (1921), 125 L. T. 864.

3901. —— —— Service on solicitor.]—In a suit by the husband for restitution of conjugal rights, a decree was made that the wife should return to cohabitation. The wife was abroad; her address was kept secret by her friends, & personal service of the decree could not be effected. Substituted service on her attorney was in consequence allowed, & the decree remaining unobeyed, the ct., without requiring a previous writ of attachment to issue, granted a writ of sequestration against the wife's separate estate, for the purpose of enforcing obedience to its order.—MILLER *v.* MILLER (1870), L. R. 2 P. & D. 54; 39 L. J. P. & M. 38; 22 L. T. 418; 18 W. R. 585.

Annotations:—**Mentd.** Allen *v.* Allen (1885), 10 P. D. 187; Hyde *v.* Hyde (1888), 13 P. D. 166; R. *v.* Wigand, *Re* Wigand (1913), 82 L. J. K. B. 735.

(*b*) *Application for Leave to Effect.*

See Matrimonial Causes Rules, 1924, rr. 12, 13.

3902. Affidavit in support—Necessity for—By petitioner.]—On an application to allow substituted service of a petition on a co-resp., there should be an affidavit by petitioner.—WILLIAMS *v.* WILLIAMS & POCOCK, [1896] P. 153; 65 L. J. P. 98.

3903. —— Respondent's address unknown.]—LACEY *v.* LACEY, No. 3897, *ante*.

3904. —— ——.]—An affidavit by petitioner of his ignorance of the address of the parties to be served should be filed with applications for substituted service.—MARTIN *v.* MARTIN & VELLEMAN (1898), 78 L. T. 170.

3905. Divorce bill—Time for making application.]—In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on resp. on the ground that his address was unknown to petitioner, that a solr. who had previously acted for the resp. had admitted that he knew of his address but had refused to divulge it & that resp. had been last heard of in Feb. 1886, being then at Montreal, in Canada:—*Held:* the application was premature, & must be refused.—GIFFORD'S DIVORCE BILL (1886), 12 App. Cas. 361, H. L.

(*c*) *Methods of Substituted Service.*

i. *In General.*

See Matrimonial Causes Rules, 1924, rr. 11, 12.

3906. Service at address in appearance book.]—NUTTALL *v.* NUTTALL, No. 4191, *post*.

3907. Last known address.]—NUTTALL *v.* NUTTALL, No. 4191, *post*.

3908. Service on relations.]—STUMPEL *v.* STUMPEL & ZEPFEL, No. 3893, *ante*.

ii. *By Registered Post.*

3909. Service complete on proof of receipt by respondent.]—The ct. made an order for substituted service of a divorce petition & citation upon a husband by registered letter; but directed that such service should not be treated as complete service until the ct. should be satisfied that the letter was actually received by the proposed resp.—COX *v.* COX (1889), 61 L. T. 698.

3910. Respondent abroad—Protected by foreign law from service.]—TRÜBNER *v.* TRÜBNER & CRISTIANI, No. 3892, *ante*.

3911. —— Refusal of authorities to serve or allow service—Service on relations.]—STUMPEL *v.* STUMPEL & ZEPFEL, No. 3893, *ante*.

3912. —— Letters of request refused.]—WRAY *v.* WRAY & D'ALMEIDA, No. 3894, *ante*.

3913. —— Active service.]—TURNER *v.* TURNER, No. 3863, *ante*.

iii. *By Advertisement in the Press.*

See Matrimonial Causes Rules, 1924, r. 12.

3914. Respondent's address unknown—Fruitless inquiries made.]—Where the husband had had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, & could gain no information of her by inquiring of her relations or at the places she was last supposed to have been at, the ct. directed the citation to be left in the registry, & advertisements of that fact to be inserted in newspapers.—PECKOVER *v.* PECKOVER & JOLLY (1858), 1 Sw. & Tr. 219; 31 L. T. O. S. 269; 164 E. R. 700.

Annotation:—**Folld.** Appleyard *v.* Appleyard (1875), L. R. 3 P. & D. 257.

3915. Co-respondent's name unknown—Service by advertisement in name given.]—NICOLAS *v.* NICOLAS, No. 3807, *ante*.

3916. Sufficiency of insertions—Twice with the interval of a week.]—(1) When an order has been made, dispensing with personal service upon a resp., a copy of it should be brought in with the other papers, when the ct. is moved to direct the mode of trial.

(2) The insertion in a newspaper of advertisements on the 7th & 14th of a month, is a sufficient compliance with an order to advertise twice with the interval of a week.—ELSLEY *v.* ELSLEY, BEACHAM & BAGSHAW (1863), 32 L. J. P. M. & A. 145.

Re-service of amended petitions.]—*See* Sub-sect. 3, J., *ante*.

F. Proof of Service—Affidavits.

See Matrimonial Causes Rules, 1924, rr. 11, 13, 14.

3917. Affidavit of service—Contents—Delivery of certified copy of petition.]—The original citation, together with a copy, as also a certified copy of the petition, were forwarded to Australia, with full directions, for service on resp. On the return of the citation it was found that the affidavit of service made no mention of the certified copy of the petition having been left with resp.:—*Held:* nevertheless pltf. might proceed to prove her petition.—MOON *v.* MOON (1859), 5 Jur. N. S. 1365.

3918. —— —— Allegation that party served is party to suit.]—An affidavit of service of the citation, etc., should allege that the party served is a resp. in the suit.—TEMPLE *v.* TEMPLE & LAING (1861), 31 L. J. P. M. & A. 34.

PART XIII. SECT. 8, SUB-SECT. 5.—E. (c) iii.

e. *Form of advertisement—Where to be circulated.*]—If an application for leave to advertise a petition for dissolution of marriage in lieu of service is granted, the advertisement should be circulated in the district where resp. has most acquaintances, & should contain a footnote requesting friends to bring it to resp.'s notice.—HURLEY *v.* HURLEY (1909), 28 N. Z. L. R. 725.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 5.—F.

3917 i. *Affidavit of service—Contents—Delivery of certified copy of petition.*]—Where the affidavit of service on resp. states that the deponent served "a certified copy of the petition under the seal of the ct." & that "a true copy of which petition . . . is hereunto annexed," these statements are not inconsistent.—UPTON *v.* UPTON, [1924] 2 W. W. R. 1092; 34 Man. L. R. 333; 3 D. L. R. 975.—**CAN.**

Sect. 7.—Bars to relief: Sub-sect. 4, D. (d) E. (a)

(d) In Suits for Nullity of Marriage.

Marriage voidable for impotence.]—*See* Part XIII., Sect. 3, sub-sect. 2, *ante*.

3565. Whether adultery a bar.]—(1) The husband brought a suit of nullity of marriage, by reason of impotency, against the wife, who pleaded in answer matters in contradiction to the husband's case & also the adultery of the husband :—*Held :* it was not competent to the wife to plead the husband's adultery at that stage of the cause.

(2) [Counsel] pressed the ct. not to order an inspection. I am very sensible how painful this must be to any lady, & certainly would make no such order save *ex debito justitiae*. If the allegation had pleaded merely matters in bar, not putting in issue the malformation, I might have deliberated whether I would not have delayed ordering the inspection until publication had passed as to the plea in bar, for if that plea were good & proved there would have been an end of the suit ; but this allegation puts in issue the malformation & all the facts to prove the contrary : how is it possible I could receive evidence on one side, & not legal evidence on the other ? . . . There is still an additional reason. Deft. has brought with reference to this very question of malformation a most serious charge against pltf. She has charged him with having caused an appearance of malformation, by giving her the venereal disease. Surely it would be against all justice to allow that article to go to proof & not permit pltf. by the only possible process to rebut that charge & prove his original case (DR. LUSHINGTON).—ANON. (1857), Dea. & Sw. 295 ; 5 W. R. 750 ; 164 E. R. 581.

Annotation :—Generally, **Refd.** M. (otherwise D.) *v.* D. (1885), 10 P. D. 75.

3566. ——.]—A plea to a petition for a decree of nullity of marriage on the ground of the impotence of resp., that petitioner had committed adultery is irrelevant & will be struck out.—TAVERNER (FALSELY CALLED DITCHFIELD) *v.* DITCHFIELD (1864), 4 New Rep. 28 ; 33 L. J. P. M. & A. 105.

Annotation :—**Refd.** G. *v.* M. (1885), 10 App. Cas. 174, n.

3567. ——.]—G. *v.* M. (1885), No. 3339, *ante*.

3568. —— **Sincerity.**]—At the end of seven years' cohabitation a marriage had not been consummated, through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, & upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him & he a suit for dissolution of marriage against her :—*Held :* the proof of impotence being clear her conduct did not show such a want of sincerity as to deprive her of her right to have the marriage annulled.

(2) When the impotence is undoubted, mere delay is not sufficient to disentitle the injured party to relief.—M. (OTHERWISE D.) *v.* D. (1885), 10 P. D. 75 ; 54 L. J. P. 68 ; 33 W. R. 657.

3569. —— ——.]—(1) In order to raise the question of insincerity in a suit for nullity, it is necessary that the answer should specifically allege it.

(2) Adultery may be alleged, &, if established, is material matter for consideration on the question of petitioner's insincerity.

(3) Petitioner is, however, not bound to answer questions tending to establish adultery.—S. (OTHERWISE G.) *v.* S., [1907] P. 224 ; 76 L. J. P. 118 : 23 T. L. R. 460 ; 51 Sol. Jo. 430.

Annotation :—As to (3) **N.F.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

(e) In Suits claiming Damages only.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 48), s. 189.

3570. Petitioner barred—Unless discretion exercised in his favour.]—COX *v.* COX & WARDE, No. 2815, *ante*.

E. Petitioner's Cruelty.

(a) In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*b*).

Cruelty of respondent—As matrimonial offence.]—*See* Part XIII., Sect. 5, sub-sect. 2, *ante*.

3571. Whether pleadable in bar to charge of adultery.]—FORSTER *v.* FORSTER, No. 3403, *ante*.

3572. ——.]—MOORSOM *v.* MOORSOM, No. 3082, *ante*.

3573. ——.]—Cruelty is not a bar to a charge of adultery, but may be pleaded as introductory to the history of an adulterous intercourse.—ARKLEY *v.* ARKLEY (1821), 3 Phillim. 500 ; 161 E. R. 1397.

Annotations :—**Refd.** Eldred *v.* Eldred (1840), 2 Curt. 376 ; Cocksedge *v.* Cocksedge (1844), 3 Notes of Cases, 218.

3574. ——.]—(1) Cruelty cannot be pleaded by the wife in bar of a charge of adultery.

The wife having failed in a charge of adultery & a recriminating plea having been proved by the husband cruelty & the introduction of the wife to a female of loose character (the wife's guilt not being connected with such introduction) form no bar to his prayer for divorce.

(2) Where the wife is charged with adultery her conduct & declarations on a confession of guilt by the alleged *particeps criminis* being communicated to her are admissible evidence on behalf of the husband.—HARRIS *v.* HARRIS (1829), 2 Hag. Ecc. 376 ; 162 E. R. 894 ; *affd.*, 2 Hag. Eccl. 511.

Annotations :—As to (1) **Folld.** Dillon *v.* Dillon (1842), 3 Curt. 86, 96. **Consd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Otway *v.* Otway (1888), 57 L. J. P. 81. *As to* (2) **Refd.** Graves *v.* Graves (1842), 3 Curt. 235. *Generally,* **Refd.** Russell *v.* Russell (1897), 66 L. J. P. 122.

3575. —— **Coupled with plea of adultery.**]—In a suit for divorce by reason of the wife's adultery, an allegation on her behalf, pleading cruelty by the husband, coupled with a charge of adultery, as a foundation for a prayer of separation against the husband, admitted.

There can be no doubt that cruelty is not pleadable as a bar to adultery ; but it is not clear that cruelty, coupled with other circumstances, may not be pleaded as a foundation for a sentence of separation (SIR H. JENNER).—ELDRED *v.* ELDRED (1840), 2 Curt. 376 ; 163 E. R. 445.

Annotation :—**Folld.** Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90.

3576. ——.]—DILLON *v.* DILLON, No. 4008, *post*.

3577. ——.]—COCKSEDGE *v.* COCKSEDGE, No. 3598, *post*.

Cruelty as bar to relief—In petitions for dissolution of marriage.]—*See, now,* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 ; Part XIII., Sect. 7, sub-sect. 4, E. (*b*), *post*.

(b) In Suits for Dissolution of Marriage.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178.

3578. Discretionary bar.]—A remaining charge is that of cruelty. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty. I am inclined to think, that she would not. It is certain, that the wife has a right to say, " You shall not have a sentence against me

for adultery, if you are guilty of the same offence yourself." The received doctrine of compensation would have that effect, because both parties are *in eodem delicto ;* but this is not so in recrimination of cruelty ; the *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know, that she would be barred by a recrimination of that species ; for the consideration would be very different ; the ct. might not oblige her to cohabitation, which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, & I take the general doctrine to be, " that a wife cannot plead cruelty as a bar to divorce, for her violation of the marriage-bed " (SIR WILLIAM SCOTT).—CHAMBERS *v.* CHAMBERS (1810), 1 Hag. Con. 439 ; 161 E. R. 610.

Annotations :—**Consd.** Eldred *v.* Eldred (1840), 2 Curt. 376. **Folld.** Dillon *v.* Dillon (1842), 3 Curt. 86, 96. **Consd.** Cocksedge *v.* Cocksedge (1844), 1 Rob. Eccl. 90. **Refd.** Otway *v.* Otway (1888), 13 P. D. 141 ; Hodgson *v.* Hodgson & Turner (1905), 53 W. R. 623 ; Everett *v.* Everett & McCullum, [1919] P. 298.

3579. By what cruelty petitioner barred—Cruelty conducing to respondent's misconduct.]—The jury having found on the issues submitted to them in a suit for dissolution of marriage by the husband against the wife that resp. was guilty of adultery, & petitioner guilty of cruelty to resp. brought on by her drunkenness, the ct. made a decree dissolving the marriage.

Semble : the cruelty contemplated by Matrimonial Causes Act, 1857 (c. 85), s. 31, will in most cases be taken to mean such cruelty as has led to the adultery alleged in the petition.—PEARMAN *v.* PEARMAN & BURGESS (1860), 1 Sw. & Tr. 601 ; 29 L. J. P. M. & A. 54 ; 1 L. T. 415 ; 8 W. R. 274.

Annotations :—**Consd.** Edwards *v.* Edwards, [1894] P. 33 ; Symons *v.* Symons, [1897] P. 167 ; Pryor *v.* Pryor, [1900] P. 157 ; Wickins *v.* Wickins, [1918] P. 265. **Refd.** Parry *v.* Parry, [1896] P. 37.

3580. —— ——.]—Decree dissolving the marriage pronounced in favour of a husband who had been convicted by justices of an aggravated assault upon his wife, & against whom a separation has been thereupon made.

The rule with reference to cruelty has been, that if it should appear that the conduct of the husband has been such as to conduce to the wife's fault, then that has been sternly visited upon him. In other cases where that has not been so plain, a decree has been made with some provision for the guilty wife. . . . I think on the whole that I can pronounce this decree. It is quite true that the magistrate seems to have convicted this man of what appears to be an aggravated assault. It is also true that the magistrate was obliged to so convict him, in order to grant a separation to the wife. The petitioner seems to have paid the allowance regularly, until he found out his wife's adultery (JEUNE, J.).—SERGENT *v.* SERGENT & WEAVER (1891), 64 L. T. 236.

3581. —— ——.]—The discretion conferred upon judges of the Divorce Court by Matrimonial Causes Act, 1857 (c. 85), s. 31, is not an absolute or arbitrary, but a judicial discretion, & is intended to be exercised in conformity with the former practice of the House of Lords. Cruelty on the part of petitioner, in order to bar a claim for a divorce, must either have led to the adultery of the resp., or be entirely wanton & unprovoked in its character.

In considering what terms should be imposed upon petitioner who has been found guilty of cruelty towards resp. the ct. takes into consideration all the facts of the particular case before it, & considers the interests not merely of the parties, but of the child or children, if any, of the marriage.

Where the means of petitioner, the husband, were very small & uncertain, & resp.'s parents, whose character & goodwill were unquestioned, had offered to look after the only child of the marriage, the ct. in granting a decree, assented to an arrangement which had been arrived at between the parties subsequently to the verdict, whereby the formal custody of the child was given to resp. & no allowance was ordered against petitioner.—PRYOR *v.* PRYOR, COWIE & MACDONALD, [1900] P. 157 ; 69 L. J. P. 99.

Annotation :—**Consd.** Squire *v.* Squire, [1905] P. 4.

3582. —— ——.]—(1) In order that the ct. should exercise its discretionary power under Matrimonial Causes Act, 1857 (c. 85), s. 31, to deprive a husband, petitioning for a divorce on the ground of his wife's adultery, of his decree, on the ground that he has himself been guilty of cruelty, it is not of itself a material circumstance that the conduct of petitioner caused the separation of the parties antecedent to the adultery of the wife. The cruelty of the husband must conduce to, if it does not cause, the adultery of the wife ; & if that adultery is, in the opinion of the ct., brought about by other causes than the cruelty of the husband, for example, the habits & inclination of the wife, the husband who has been guilty of cruelty is nevertheless entitled to his decree.

(2) The object of the ct. in ordering a provision for a guilty wife is that she should be protected from temptation & lead a respectable life ; at the same time, a husband should not be called upon to support a wife who is leading an immoral life, & on this ground, as well as for the protection of the wife, the provision for her should be limited *dum casta.*

In the view I take of this class of case, it is material that the *dum casta* clause should be inserted. The wife should know & should be made to feel that her livelihood depends upon her leading a chaste life in the future. In cases where the wife has not been proved to have committed adultery I should be slow to insert the *dum casta* clause.

Although I do not lay so much stress upon the *dum sola* clause, I think that, too, ought to be inserted, & that the husband ought not to be called upon to contribute to the support of his divorced wife if she should become the wife of another man (JEUNE, P.).—SQUIRE *v.* SQUIRE & O'CALLAGHAN, [1905] P. 4 ; 74 L. J. P. 1 ; 92 L. T. 472 ; 21 T. L. R. 41.

Annotations :—*As to* (2) **Apld.** Woodcock *v.* Woodcock & Codesido (1914), 111 L. T. 924. **Refd.** Ollier *v.* Ollier, [1914] P. 240.

3583. —— **Cruelty not serious.**]—Decree *nisi* granted to a husband, although the jury found that he had been guilty of cruelty.—TANNAM *v.* TANNAM, BEESON & BALLARD (1897), 13 T. L. R. 453.

3584. —— **Wanton & unprovoked cruelty.**]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *ante.*

3585. —— **Not cruelty causing separation—Anterior to adultery.**]—SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante.*

3586. Respondent's conduct conducing to petitioner's cruelty—Drunken habits.]—PEARMAN *v.* PEARMAN & BURGESS, No. 3579, *ante.*

3587. —— ——.]—FORRESTER *v.* FORRESTER (1884), *Times*, May 19.

Annotation :—**Refd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

3588. —— ——.]—Upon a husband's petition for divorce on the ground of his wife's adultery, where the adultery is fully established against her, but where she cross-petitions cruelty as having

Sect. 7.—Bars to relief: Sub-sect. 4, E. (b), (c) & (d), & F. (a).]

been committed by her husband towards her, & where it appears that the wife is a woman of drunken habits, & that what she alleges as violence has been used upon her in consequence of her drunkenness, the ct. requires a very strong case to be made out against the husband in order to bar his right to relief from the marriage tie. Unless it is proved that he has been guilty of such gross violence towards her as the ct. cannot allow to be excused on the ground that he was provoked to it by her intemperance, the decree in his favour should not be withheld.—FORSYTH *v.* FORSYTH, ECCLES & FOSTER (1890), 63 L. T. 263.

3589. —— —— Respondent found in flagrante delicto.]—SMITH *v.* SMITH (1901), 45 Sol. Jo. 467.

3590. Where cruelty condoned by respondent—Whether discretion exercised in petitioner's favour—Communication of venereal disease.]—WILDEY *v.* WILDEY & RYDER, No. 3478, *ante*.

3591. —— —— Honest & straightforward account by petitioner.]—WOLTERECK *v.* WOLTERECK & WALTERS, No. 3485, *ante*.

3592. Sufficiency of proof of petitioner's cruelty—Former decree for judicial separation.]—The wife obtained in Mar. 1887, a decree for a judicial separation on the ground of cruelty, & was given the custody of her only child. On May 4, 1888, the husband was ordered to pay permanent alimony at the rate of £80 a year from the date of the decree. This he did not pay, although he had the means. On Sept. 17, 1888, a deed was executed by the husband & wife, by which the latter relinquished the custody of the child & all her right to alimony, in consideration of a lump sum of £75 then paid to her by her husband. Some little time after that deed was signed the husband became aware that his wife was committing adultery with the co-resp., with whom she went to live. The husband then filed his petition, asking for the dissolution of his marriage:—*Held:* as the cruelty on the part of the husband was not of such a nature as would induce the ct. to withhold a decree, & as the deed of release was executed by the wife with her eyes open, the husband should not be refused the relief prayed, & a decree *nisi* should accordingly be pronounced in his favour.—BADHAM *v.* BADHAM & GORST (1890), 62 L. T. 663.

Annotations:—**Consd.** Edwards *v.* Edwards, [1894] P. 33. **Refd.** Parry *v.* Parry, [1896] P. 37.

3593. —— Conviction for aggravated assault—Conviction necessary to grant separation.]—SERGENT *v.* SERGENT & WEAVER, No. 3580, *ante*.

3594. Exercise of discretion on terms—Allowance to wife.]—SERGENT *v.* SERGENT & WEAVER, No. 3580, *ante*.

3595. —— ——.]—EDWARDS *v.* EDWARDS & FRANCIS, No. 3412, *ante*.

3596. —— —— Custody of child to respondent.]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *ante*.

3597. —— —— Dum sola et dum casta clause.]—SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante*.

(c) *In Suits for Judicial Separation.*

3598. On ground of adultery—Whether cruelty a bar.]—Cruelty is not pleadable by a wife in bar to a separation prayed by the husband by reason of her adultery; but cruelty is pleadable by her in conjunction with a cross-petition of adultery against the husband.

Qu.: whether if the proof of adultery fails on both sides, the wife will be entitled to a sentence of separation in the same suit, provided she prove cruelty.—COCKSEDGE *v.* COCKSEDGE (1844), 1 Rob. Eccl. 90; 3 Notes of Cases, 218; 163 E. R. 975; *sub nom.* COXSEDGE *v.* COXSEDGE, 8 Jur. 935.

3599. —— ——.]—LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante*.

(d) *In Suits for Restitution of Conjugal Rights.*

Defences for suit for restitution, *see* Part XIII., Sect. 5, sub-sect. 1, F., *ante*.

3600. By what cruelty petitioner barred—Sufficient to found petition for judicial separation.]—In a suit for restitution of conjugal rights, no facts are sufficient to bar the proceeding, except such as would be sufficient to have entitled the party to a divorce on an original suit.

"I was of opinion nothing could be offered in bar to her living with her husband, but such facts as would entitle her to a divorce, in case she had brought a suit against him to be separated for cruelty" (SIR GEORGE LEE).—HOLMES *v.* HOLMES (1757), 2 Lee, 116; 161 E. R. 283.

Annotation:—**Consd.** Russell *v.* Russell, [1897] A. C. 395.

3601. —— Not accidental injuries in course of wrongful resistance—On minor acts.]—OLIVER *v.* OLIVER, No. 2574, *ante*.

3602. —— Personal violence or manifest danger—Not mere unkindness or unfounded fears.]—BARLEE *v.* BARLEE, No. 2463, *ante*.

3603. —— Conduct rendering cohabitation unsafe.]—To the wife's petition for restitution of conjugal rights, the husband answered alleging violence of language & conduct on her part, & that he could not, without danger to his health, renew the cohabitation, but setting out no facts amounting to *primâ facie* cruelty.

The ct., it being the husband's answer & the suit at his expense, declined to determine, until it had heard the evidence, whether the conduct attributed to petitioner amounted to legal cruelty, & held the answer sufficient.—STACE *v.* STACE (1868), 37 L. J. P. & M. 51; 18 L. T. 740; 16 W. R. 1176.

Annotation:—**Consd.** Russell *v.* Russell, [1895] P. 315.

3604. —— ——.]—In a suit by a wife for restitution of conjugal rights the husband alleged that petitioner drank to excess, &, further, that she had been guilty of cruelty towards him. The jury found that petitioner had been guilty of physical violence to resp., but not of cruelty; that petitioner drank to excess; that it was not unsafe at the time resp. left petitioner for the parties to live together:—*Held:* a decree of restitution of conjugal rights should be refused.—BUTLAND *v.* BUTLAND (1913), 29 T. L. R. 729.

Annotation:—**Refd.** Fisk *v.* Fisk (1920), 122 L. T. 803.

3605. —— Charging respondent with unnatural offence.]—RUSSELL *v.* RUSSELL, No. 2661, *ante*.

3606. Cruelty condoned—Not subsequently revived.]—GEILS *v.* GEILS, No. 2464, *ante*.

F. Petitioner's Desertion or Wilful Separation without Reasonable Excuse.

(a) *In Suits for Dissolution of Marriage.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3) (*c*).

Respondent's desertion—As matrimonial offence.]—*See* Part XIII., Sect. 5, sub-sect. 3, *ante*.

3607. "Without reasonable excuse"—General rule.]—The ct. will not dissolve a marriage on the ground of the wife's adultery when satisfied that before the date of the adultery complained of, the husband deserted her without reasonable excuse.—

YEATMAN *v.* YEATMAN (1870), L. R. 2 P. & D. 187; 39 L. J. P. & M. 77; 23 L. T. 283; 18 W. R. 1088.

3608. —— Equivalent to "without reasonable cause"—Separation without justification.]—WICKINS *v.* WICKINS, No. 3292, *ante*.

3609. —— Respondent submitting to indecent liberties with men.]—(1) Where the case of petitioner, in a suit for dissolution of marriage on the ground of adultery, has been proved, & the ct. do not find that he has been accessory to or conniving at the adultery, or that there had been condonation or connivance, they are bound to pronounce a decree dissolving the marriage, unless it is established affirmatively that petitioner has been guilty of one of the acts which, under the proviso to Matrimonial Causes Act, 1857 (c. 85), s. 31, give the ct. a discretionary power to refuse to dissolve the marriage.

(2) Where it appears doubtful on the evidence in the suit whether or not the conduct of petitioner has been such as to give the ct. such discretionary power, the ct. will, for the purpose of satisfying their minds, examine petitioner adversely under sect. 43, but will not in a suit instituted on the ground of adultery examine him or permit him to be examined for the purpose of proving his own case. After the ct. has examined petitioner adversely, his counsel will be permitted to suggest questions to petitioner for the purpose of clearing up what the ct. may have elicited adversely to the case.

(3) *Semble:* "deserted," in the proviso to sect. 31 is equivalent to "left destitute."

(4) In a suit for a dissolution of marriage, on the ground of the wife's adultery, it appeared from the evidence in support of the petition, that the husband had "wilfully separated himself from his wife" shortly after the marriage; but it was doubtful whether or not he did so "without reasonable excuse," the only evidence as to the cause of the separation being a statement made by the wife, that "her husband had left her because he had caught her with a young man." The ct., thinking that petitioner might not have had reasonable excuse for leaving her, examined him, when it appeared that he had found her submitting to indecent liberties, & had immediately broken off all intercourse with her:—*Held:* as, under these circumstances, it did not appear affirmatively that there was not reasonable excuse for the separation, the ct. had no discretionary power, but were bound to dissolve the marriage.—HASWELL *v.* HASWELL & SANDERSON (1859), 1 Sw. & Tr. 502; Sca. & Sm. 32; 29 L. J. P. & M. 21; 1 L. T. 69; 23 J. P. 825; 8 W. R. 76; 164 E. R. 832.

Annotations:—As to (4) **Consd.** Yeatman *v.* Yeatman (1868), L. R. 1 P. & D. 489; Wickins *v.* Wickins, [1918] P. 265. **Refd.** Oldroyd *v.* Oldroyd, [1896] P. 175; Harriman *v.* Harriman, [1909] P. 123; Fisk *v.* Fisk (1920), 122 L. T. 803.

3610. —— Clandestine marriage of young girl—Petitioner sent abroad on discovery of respondent's unsuitability.]—A., being only sixteen years of age, was privately married to B., aged thirty-six, without the consent of her family. On its being discovered that B. was an unsuitable husband for her, A. was removed to the Continent, & never saw him again. He made no attempts to procure cohabitation with her; & subsequently contracted a bigamous marriage:—*Held:* there had been a reasonable excuse for the separation, & dissolved the marriage, on the ground of B.'s bigamy & adultery.—DU TERREAUX *v.* DU TERREAUX (1859), 1 Sw. & Tr. 555; 28 L. J. P. & M. 95; 23 J. P. 647; 164 E. R. 857.

3611. Marriage to prostitute—Separation at father's instigation—Allowance to respondent.]—Petitioner, the son of a clergyman, & having taken his degree at Cambridge, married a woman who had been living as a prostitute in Cambridge, on June 13, 1863. Nothing in the nature of continuous cohabitation took place. In Oct. 1863, petitioner's father became aware of the fact, & in Dec. 1863, a deed of separation, under which resp. was to receive £1 a week, was executed. The adultery took place in the early part of 1864. Petitioner was dependent on his father:—*Held:* the separation, if wilful, was not without reasonable excuse, & made a decree *nisi*.—PROCTOR *v.* PROCTOR & SMITH & PITMAN (1865), 4 Sw. & Tr. 140; 34 L. J. P. M. & A. 99; 12 L. T. 505; 11 Jur. N. S. 531; 13 W. R. 963; 164 E. R. 1469.

3612. —— Respondent's inability to consummate marriage—Bonâ fide belief.]—OUSEY *v.* OUSEY & ATKINSON, No. 3004, *ante*.

3613. "Wilfully separated"—Marriage to prostitute—Petitioner going abroad to avoid unhappiness—Failure to maintain.]—In a suit for dissolution of marriage, on the ground of the wife's adultery, it appeared that petitioner, a draper's assistant, then twenty-one years of age, married in 1853 a woman whom he well knew to be a prostitute. A month after the marriage they removed from the lodgings to the house of petitioner's father, from which, after a stay of a few weeks, they were compelled to remove in consequence of the wife exhibiting bad temper & making herself disagreeable to the family. Ten days afterwards, the husband went to America, not on business, but because he lived unhappily with his wife, leaving her without any means of subsistence & supplying her with none during an absence of four years. After he left, his family had given the wife a small pittance on one occasion, & had promised to give her further assistance, but in consequence of her annoying them, all intercourse with her was broken off. The wife, after her husband left, returned to her former way of life. The ct., under these circumstances, held that there was a wilful separation of the husband from the wife before the adultery complained of, & that it was without reasonable excuse; & in exercise of the discretion given them by Matrimonial Causes Act, 1857 (c. 85), s. 31, refused to decree the dissolution of the marriage.—COULTHART *v.* COULTHART & GOUTHWAITE (1859), 28 L. J. P. & M. 21; 32 L. T. O. S. 394.

Annotation:—**Refd.** Beavan *v.* Beavan (1862), 11 W. R. 155.

3614. —— Separation ordered by court—Clandestine marriage of ward of court.]—BEAVAN *v.* BEAVAN, No. 3424, *ante*.

3615. —— Separation necessitated by petitioner's employment.]—Where a husband & wife were living together in service, & the husband left the wife & accepted another situation, & the wife subsequently committed adultery, such a separation by the husband from the wife will not be deemed a "wilful separation" such as under Matrimonial Causes Act, 1857 (c. 85), s. 31, would justify the ct. in refusing to dissolve the marriage on proof of the wife's adultery.—DAVIES *v.* DAVIES & HUGHES (1863), 3 Sw. & Tr. 221; 1 New Rep. 406; 32 L. J. P. M. & A. 111; 8 L. T. 703; 9 Jur. N. S. 828; 11 W. R. 402; 164 E. R. 1258.

3616. —— Voluntary separation by wife.]—CUFLEY *v.* CUFLEY & LOVECK, No. 2884, *ante*.

3617. —— Ante-nuptial agreement to live apart—Discontinuance of allowance on discovery of adultery.]—A husband, without reasonable excuse, obtained from his wife an agreement that they

Sect. 7.—*Bars to relief: Sub-sect.* 4, *F.* (*a*), (*b*) & (*c*). *Sect.* 8: *Sub-sect.* 1, *A., B. & C.* (*a*) & (*b*).]

should live apart from each other, which they accordingly did, & she subsequently committed adultery:—*Held:* under the circumstances he had deserted her, & a petition by him for dissolution of the marriage must be dismissed.—DAGG *v.* DAGG (1882), 7 P. D. 17; 51 L. J. P. 19; 47 L. T. 132; 30 W. R. 431.

Annotation:—**Refd.** Piper *v.* Piper, [1902] P. 198.

3618. "Deserted"—Respondent left destitute.]—HASWELL *v.* HASWELL & SANDERSON, No. 3609, *ante.*

3619. Statutory desertion—Discretionary bar.]—The ct. will exercise its discretion in favour of petitioner in a divorce suit, even though guilty of statutory desertion.—MULLEY *v.* MULLEY & SHAW (1909), 53 Sol. Jo. 469.

Annotation:—**Apld.** Stone *v.* Stone & Osborne, [1917] P. 125.

3620. —— —— Desertion not conducing to respondent's adultery—No active steps taken to enforce restitution decree.]—The statutory desertion arising under the Matrimonial Causes Act, 1884 (c. 68), by reason of the failure of a spouse to comply with a decree for restitution of conjugal rights, is only a discretionary bar to his or her claim for relief on the ground of subsequent adultery of the other spouse.

Where the ct. is satisfied that the statutory desertion has not conduced to the adultery & that the deserted spouse took no active steps to enforce the decree for restitution, the ct. may exercise its discretion by granting relief in respect of the subsequent adultery, in spite of the statutory desertion of which the complaining spouse has been guilty.—STONE *v.* STONE & OSBORNE, [1917] P. 125; 86 L. J. P. 101; 117 L. T. 156; 33 T. L. R. 319; 61 Sol. Jo. 461.

3621. Conviction for desertion—Under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—Where a husband, who presents a petition for a dissolution of his marriage, has been previously convicted of desertion under above Act, the ct. will exercise its discretion as to granting a decree dissolving his marriage. The mere fact of conviction will not be sufficient to establish a bar. The whole circumstances of the case will be considered, & if the ct. is of opinion that petitioner acted upon reasonable grounds, he will not be deprived of the relief prayed for.—LLOYD *v.* LLOYD (1901), 84 L. T. 728; 45 Sol. Jo. 556.

3622. Exercise of discretion—Where petitioner's default established by affirmative evidence.]—HASWELL *v.* HASWELL & SANDERSON, No. 3609, *ante.*

3623. —— On terms—Allowance to wife.]—The ct. while allowing an intervention by the King's Proctor, exercised its discretion in favour of petitioner, who had been guilty of desertion, but ordered him to pay a weekly sum to resp., with liberty to apply to rescind or vary that order.—FREEMAN *v.* FREEMAN & FREEMAN (1911), 105 L. T. 383; 27 T. L. R. 523.

3624. —— Not interfered with on appeal.]—WICKINS *v.* WICKINS, No. 3292, *ante.*

Discretion of court generally.]—*See* Part XIII., Sect. 7, sub-sect. 4, A., *ante.*

(*b*) *In Suits for Judicial Separation.*

Respondent's desertion.]—*See* Part XIII., Sect. 5, sub-sect. 8, *ante.*

3625. On ground of adultery—Whether petitioner barred.]—The mere desertion of a wife by the husband though a malicious desertion will not bar a sentence of divorce [*a mensâ et thoro*] at the suit of the husband on proof of adultery committed by the wife.—SULLIVAN *v.* SULLIVAN (1824), 2 Add. 299; 162 E. R. 303.

Annotations:—**Apld.** Morgan *v.* Morgan (1841), 2 Curt. 679. **Consd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Clowes *v.* Jones (falsely calling herself Clowes) (1845), 4 Notes of Cases, 1; Gandy *v.* Gandy (1882), 51 L. J. P. 41; Fearon *v.* Aylesbury (1884), 14 Q. B. D. 792; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203. **Mentd.** Steward *v.* Bateman (1842), 3 Curt. 201.

3626. —— ——.]—Divorce [*a mensâ et thoro*] by reason of adultery committed by the wife, is not barred by a previous wilful desertion of the wife by the husband.

During the absence of the husband, by the law of England, the wife has no direct remedy, she may pledge his credit for necessaries, but she cannot resort to a ct. for a direct remedy; but although left destitute of aid, it does not follow that she has a licence to commit adultery.

I find, from my own notes, that on the admission of the allegation in *Reeves* v. *Reeves* (1813), 2 Phill. 125, SIR JOHN NICHOLL expressly declared that a wilful desertion of a wife was no bar to a suit against her for adultery; & in *Sullivan* v. *Sullivan*, No. 3625, *ante*, the doctrine is repeated; he says, "I am still to learn that even a malicious desertion of the wife by the husband is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife" (DR. LUSHINGTON).—MORGAN *v.* MORGAN (1841), 2 Curt. 679; 1 Notes of Cases, 23; 163 E. R. 548.

Annotations:—**Consd.** Duplany *v.* Duplany (1891), 66 L. T. 267; Hodgson *v.* Hodgson & Turner, [1905] P. 233. **Refd.** Dillon *v.* Dillon (1842), 3 Curt. 86; Clowes *v.* Jones (falsely calling herself Clowes) (1845), 4 Notes of Cases, 1.

3627. —— ——.]—LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante.*

3628. —— —— Practice of Ecclesiastical Courts followed.]—The wife petitioned for a divorce upon the grounds of cruelty & adultery. The husband pleaded (*inter alia*) that she wilfully separated herself from him without reasonable excuse. At the trial it was admitted that the husband had committed adultery at a date some months after the final separation, & after all the subsequent negotiations for a deed of separation had gone off. The case was most strenuously fought upon the question of cruelty, &, in the result the jury found that the husband was not guilty of that offence. This was taken to imply a finding that the wife had wilfully separated herself from her husband, without just cause, at a date anterior to his admitted adultery. Thereupon, counsel for the wife applied for a decree of judicial separation with costs, & the custody of the child. The husband opposed the application:—*Held:* (1) inasmuch as desertion was first constituted a matrimonial offence by the Divorce Act, 1857 (c. 85), & would not prior to that Act have been a bar, discretionary or otherwise, to any suit in the Ecclesiastical Ct., in which relief was claimed upon the ground of adultery; & inasmuch as desertion was made by the Act a discretionary bar in suits for divorce, & further, that where the Act was silent, the old ecclesiastical practice was to still prevail, the ct. could not now take upon itself to supply any suggested omission in the Act, & as a matter of law, the wife's claim was not barred.

(2) If the desertion were a bar it could at most be a discretional bar: & in the exercise of his discretion the judge would grant the wife the decree she now asked; but, as each party had been partially successful, & as each had separate property, each would pay their own costs.—

DUPLANY *v.* DUPLANY, [1892] P. 53 ; 61 L. J. P. 49 ; 66 L. T. 267 ; 8 T. L. R. 169.

Annotations :—As to (1) **Apld.** Synge *v.* Synge, [1900] P. 180. **Distd.** Hodgson *v.* Hodgson & Turner, [1905] P. 233. *As to* (2) **Refd.** Cox *v.* Cox (1893), 70 L. T. 200.

3629. —— —— —— Desertion conducing to adultery of respondent.]—In considering to what extent desertion, not a matrimonial offence in the Ecclesiastical Cts. is to be held now to be a bar to relief, the ct. will especially have regard to the question whether it has conduced to the misconduct of the other spouse, the principles on which the Ecclesiastical Cts. acted having been apparently to refuse relief to petitioner found guilty of conduct conducing to the misconduct of resp.

Where the ct. found that desertion by petitioner had conduced to the adultery of resp. :—*Held :* petitioner was not entitled to a decree of judicial separation.—HODGSON *v.* HODGSON & TURNER, [1905] P. 233 ; 74 L. J. P. 140 ; 93 L. T. 446 ; 53 W. R. 623 ; 21 T. L. R. 601.

Annotations :—**Consd.** Tulk *v.* Tulk (1906), 23 T. L. R. 120. **Refd.** Everett *v.* Everett & McCullum, [1919] P. 298.

3630. —— —— Refusal by wife of marital relations.]—To the wife's petition for judicial separation, on the ground of the husband's cruelty & adultery, an allegation on his part that the wife had wilfully withdrawn herself from his bed, & refused him conjugal rights, is no answer.—ROWE *v.* ROWE (1865), 4 Sw. & Tr. 162 ; 34 L. J. P. M. & A. 111 ; 12 L. T. 639 ; 11 Jur. N. S. 568 ; 13 W. R. 1048 ; 164 E. R. 1478.

Annotations :—**Refd.** Duplany *v.* Duplany (1891), 66 L. T. 267 ; Synge *v.* Synge, [1900] P. 180.

3631. —— —— Desertion without reasonable excuse for two years—Adultery committed subsequently.]—(1) A wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, & is herself in such circumstances guilty of desertion without reasonable cause.

(2) Desertion without reasonable excuse for two years & upwards is no bar to a petition for judicial separation on the ground of subsequent adultery.—SYNGE *v.* SYNGE, [1901] P. 317 ; 70 L. J. P. 97 ; 85 L. T. 83 ; 17 T. L. R. 718, C. A.

Annotations :—As to (1) **Apld.** Davis *v.* Davis, [1918] P. 85. **Refd.** Frowd *v.* Frowd, [1904] P. 177 ; Jackson *v.* Jackson, [1924] P. 19 ; Russell *v.* Russell, [1924] A. C. 687. *As to* (2) **Consd.** Constantinidi *v.* Constantinidi, [1903] P. 246 ; Hodgson *v.* Hodgson, [1905] P. 233. **Refd.** Evans *v.* Evans & Elford, [1906] P. 125 ; Todd *v.* Todd & Cunniam (1906), 23 T. L. R. 9 ; Hines *v.* Hines & Burdett, [1918] P. 364.

(c) *In Suits for Restitution of Conjugal Rights.*

Defences to suit for restitution, *see* Part XIII., Sect. 5, sub-sect. 1, F., *ante*.

3632. Whether petitioner barred—Facts short of matrimonial offence.]—HOLMES *v.* HOLMES, No. 3600, *ante*.

3633. —— Desertion for less than two years—Injury to respondent's health.]—It is not a sufficient answer by a husband to a suit for restitution of conjugal rights that his wife had left the home for a less period than two years, had neglected her children, & that resp.'s health had suffered in consequence of her conduct.—WEST *v.* WEST (1910), 55 Sol. Jo. 48.

SECT. 8.—INSTITUTION AND DEFENCE OF PROCEEDINGS.

SUB-SECT. 1.—PETITIONS AND CONTENTS THEREOF.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 1, 2 ; Appendix 1.

3634. Domicil of wife—Whether necessary to plead.]—It is sufficient, under Divorce Rule 220 of 1905, to insert in a petition the domicil of the husband without stating that of the wife, unless petitioner is asserting a domicil for the wife different from that of the husband.—*Re* CLARK (1905), 75 L. J. P. 7 ; 22 T. L. R. 158.

3635. Communication of venereal disease—Must be specially pleaded.]—Where a petitioner relies upon a charge of wilfully communicating a venereal disease, it should be specifically pleaded in the petition.—WALKER *v.* WALKER (1912), 107 L. T. 655 ; 57 Sol. Jo. 175.

Whether petition must contain prayer for custody.]—*See* No. 4779, *post*.

B. Indorsement of Notice to Appear.

See Matrimonial Causes Rules, 1924, r. 2.

C. Petitions for Restitution of Conjugal Rights.

(a) *In General.*

See Matrimonial Causes Rules, 1924, rr. 1, 2 ; Appendix 1.

3636. Contents of—Age of parties need not be pleaded—When lawful solemnisation of marriage alleged.]—In a libel in a cause for the restitution of conjugal rights, it is not necessary to plead specifically, that the parties were of twenty-one years of age ; provided it is pleaded that the marriage was lawfully solemnised in consequence of a licence duly obtained.—POOL *v.* POOL (1813), 2 Phillim. 119 ; 161 E. R. 1095.

3637. Motives of petitioner—Immaterial to court.]—SIMMONS *v.* SIMMONS, No. 2797, *ante*.

3638. Preliminary steps—Previous separation order by justices—Must be discharged.]—A wife who has been deserted by her husband & has obtained from the magistrates an order against him for maintenance under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), in which order a clause has been inserted, without her knowledge or approval, that he "be no longer bound to cohabit with her," must, before filing her petition for restitution of conjugal rights, apply to the magistrates under sect. 7 of same Act for the discharge of such order.—NILAND *v.* NILAND (1913), 108 L. T. 50 ; 57 Sol. Jo. 248.

(b) *Preliminary Demand for Cohabitation.*

See Matrimonial Causes Rules, 1924, r. 3 (A) ; Sect. 5, sub-sect. 1, D., *ante*.

PART XIII. SECT 7, SUB-SECT. 4.—F. (c).

a. *Petitioner imposing unreasonable conditions.*]—Deft. left the home because of the wayward conduct & disobedience of the daughter, but was willing, & offered to make a home for his wife elsewhere. Pltf., however, distinctly declined to live with her husband without the daughter :—*Held :* pltf. was imposing a condition which she had no right to impose, & her action was dismissed.—BIRD *v.* BIRD, [1923] 1 D. L. R. 528 ; O. L. R. 1.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 1.—A.

b. *Bill for alimony — Refusal of husband to receive wife—Must be pleaded.*]—A bill for alimony should allege that the husband has refused to receive his wife. It is not sufficient to allege merely that they are living apart. —WALSH *v.* WALSH (1864), 1 Ch. Ch. 234.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 1.—C. (a).

c. *Contents of—Inclusion of alternative claim for alimony.*]—A wife may make an alternative claim for alimony ; such claim may be allowed by amendment.—O'LEARY *v.* O'LEARY, [1923] 1 D. L. R. 949 ; 19 Alta. L. R. 224 ; [1923] 1 W. W. R. 501.—**CAN.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 1, *D., E. & F.*

D. Petitions for Judicial Separation.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3639. What should be pleaded—Not non-residence in parish where banns published.]—BROWN *v.* BROWN, No. 2698, *ante.*

Publication of banns.]—*See* Part II., Sect. 7, sub-sect. 1, *ante.*

3640. —— Want of age.]—BROWN *v.* BROWN, No. 2698, *ante.*

3641. —— Not non-consummation—Suit based on adultery.]—BROWN *v.* BROWN, No. 2698, *ante.*

3642. Suit based on cruelty—Acts constituting legal cruelty should be alleged—As briefly as possible.]—SUGGATE *v.* SUGGATE, No. 2641, *ante.*

3643. Two petitions filed—First not served—Appearance entered to second—Priority of second petition.]—A petition was filed & a citation issued on the part of a wife for a judicial separation on the ground of cruelty; neither this petition nor citation was served. The wife's solr., in consequence of fresh instructions, afterwards filed a second petition for judicial separation, on the ground of adultery coupled with cruelty, & a citation issued thereon. The husband was served & entered an appearance in the second suit. The ct. directed the second suit to proceed.—TURNER *v.* TURNER (1862), 2 Sw. & Tr. 426; 31 L. J. P. M. & A. 134; 5 L. T. 849; 10 W. R. 292.

E. Petitions for Nullity of Marriage.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3644. Fact of marriage—Whether petition must establish—Where parties to marriage are parties to suit.]—In a cause of nullity of marriage, the alleged fact of marriage, of the legal nullity of which, a declaratory sentence is prayed, must be duly proved, in which part of his case if pltf. fails, it is the duty of the ct. to withhold its declaratory sentence of nullity; how clearly soever all the several facts may be established in evidence, upon which, had the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded. This, at least, is the rule where pltf. & deft. respectively are the alleged contracting parties.—NOKES *v.* MILWARD (FALSELY CALLING HERSELF NOKES) (1824), 2 Add. 386; 162 E. R. 336.

3645. —— —— ——.]—G. *v.* G. (FALSELY CALLED K.) (1908), No. 2360, *ante.*

3646. —— Bigamous ceremony—Petitioner must plead & admit.]—(1) Allegation on behalf of a woman, responsive to a libel of nullity of marriage by reason of bigamy, pleading deception, fraud & cognisance by the man of the existence of the husband of the first marriage at the date of the second fact of marriage, rejected.

(2) Misconduct, however gross, of a party proceeding, by reason of bigamy, is no bar to a sentence of nullity.

(3) A wife *de facto*, as a fact of marriage, is necessarily pleaded to such a suit, is entitled *pendente lite* to alimony.

(4) The party proceeding, who is asking the ct. to pronounce the second marriage null is of necessity bound to admit & plead the fact of that second marriage (DR. LUSHINGTON).

(5) There is a very strong distinction in the different suits of nullity, nullity by reason of impotency, nullity by reason of statutable enactment, & nullity at common law, where there has been a husband or wife living at the date of the second marriage (DR. LUSHINGTON).—MILES *v.* CHILTON (FALSELY CALLING HERSELF MILES) (1849), 1 Rob. Eccl. 684; 6 Notes of Cases, 636; 163 E. R. 1178.

Annotations:—As to (1) **Refd.** Bonaparte *v.* Bonaparte, [1892] P. 402. *As to* (3) **Refd.** Foden *v.* Foden, [1894] P. 307; Bateman *v.* Bateman (otherwise Harrison) (1898), 78 L. T. 472. *Generally*, **Refd.** Halpin (otherwise Boddington) *v.* Boddington (1881), 29 W. R. 444; Andrews *v.* Ross (1888), 14 P. D. 15; Moss *v.* Moss, [1897] P. 263.

3647. Who may present—Father of wife.]—(1) The service of a citation sufficient to constitute pendency of suit.

The *contestatio litis* is not necessary to constitute a *lis pendens*; there may be a "suit depending in the Ecclesiastical Ct." before the *contestatio litis* & the *lis pendens* commences with the extracting & service of the citation; & if not, by analogy with other cts., on the return of the citation, whenever it may be (SIR HERBERT JENNER).

(2) The father, *qua* father, has sufficient interest to enable him to a suit in the civil form, for the purpose of annulling the marriage of his daughter, when of age.

(3) The interest of Mr. R. [the father] in the legitimacy or illegitimacy of the issue of his daughter is sufficient to entitle him in these cts. to maintain a suit for annulling her marriage (SIR HERBERT JENNER).—RAY *v.* SHERWOOD & RAY (1836), 1 Curt. 193; 163 E. R. 65; *affd. sub nom.* SHERWOOD *v.* RAY (1837), 1 Moo. P. C. C. 353, P. C.

Annotations:—As to (1) **Refd.** Sanders *v.* Head (1842), 3 Curt. 32; Ditcher *v.* Denison (1857), 11 Moo. P. C. C. 324; The Helenslea, The Catalonia (1881), 7 P. D. 57. *As to* (2) **Consd.** Bevan *v.* M'Mahon (1859), 2 Sw. & Tr. 58. **Refd.** Wells *v.* Cottam (1863), 3 Sw. & Tr. 364. *Generally*, **Refd.** Brook *v.* Brook (1861), 9 H. L. Cas. 193; Lowe *v.* Lowe (1899), 80 L. T. 575. **Mentd.** Harrison *v.* Sparrow (1842), 3 Curt. 1; Brookes *v.* Cresswell (1846), 4 Notes of Cases, 429; Fenton (or Livingstone) *v.* Livingstone (1856), 27 L. T. O. S. 18; Martin *v.* Mackonochie, Flamank *v.* Simpson (1868), L. R. 2 A. & E. 116; Sheppard *v.* Bennett (1869), L. R. 2 A. & E. 335; Winchester (Bp.) *v.* Wix (1869), L. R. 3 A. & E. 19; Elphinstone *v.* Purchas (1870), L. R. 3 P. C. 245; Fagg *v.* Lee (1873), L. R. 4 A. & E. 135; R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525.

F. Petitions for Dissolution of Marriage.

(a) In General.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3648. Addressed to what court—"Court for Divorce & Matrimonial Causes."]—A petition for dissolution of marriage should be addressed "To the Ct. for Divorce & Matrimonial Causes."—EVANS *v.* EVANS (1858), 1 Sw. & Tr. 78; 27

PART XIII. SECT. 8, SUB-SECT. 1.—E.

d. *Malformation of respondent—Plea that intercourse impossible.*]—In order to support a decree of nullity of marriage on the ground of the malformation of resp. the petition must allege that the malformation is such that intercourse between the parties of an ordinary & complete character is not attainable & that such intercourse as has taken place has been substantially imperfect.—A. *v.* A. (1915), 34 N. Z. L. R. 1039.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 1.—F. (a).

e. *Contents of—Particulars as to issue of marriage—Domicil.*]—Where there are issue of the marriage their names & the dates of their births should be set out. This requirement is not complied with by stating their ages in general terms. The petition should also contain a statement as to domicil, especially where the wife is resp. & is resident abroad.—PARSONS *v.* PARSONS (1913), 32 N. Z. L. R. 723.—**N.Z.**

f. —— *Petitioner's change of domicil.*]—When a man marries abroad & subsequently changes his domicil to New Zealand, leaving his wife still resident in the place of his former domicil, resp., when the husband seeks

L. J. P. & M. 31; 30 L. T. O. S. 369; 6 W. R. 356; 164 E. R. 637.

3649. Second petition filed—After first dismissed on appeal—Refusal of court to proceed.]—A suit, for cruelty & adultery, brought by the wife was appealed from the Consistory Ct. of London to the Arches, & in 1828 was there alleged to be agreed, & the husband dismissed; but the inhibition to the Consistory was not relaxed. In 1831 a suit, for cruelty & adultery, was again brought by the wife in the Consistory; the husband appeared under protest; the judge, having directed the wife's libel, which referred to & prayed leave to invoke the proceedings in the former suit, & also pleaded new facts, to be brought in, overruled the protest; but, on the ground that the inhibition was still in force, did not assign the husband to appear absolutely, nor did it dismiss him, nor admit or reject the libel. The wife appealed: that appeal was dismissed for irregularity, & the cause remitted: the judge below, as still inhibited, refused to proceed: the wife again appealed:—*Held:* the agreement & consequent dismissal of the husband put an end to the former suit, & consequently to the inhibition, & the judge of the Consistory Ct. was bound to proceed in the cause. SMYTH *v.* SMYTH (1831), 4 Hag. Ecc. 509; 162 E. R. 1534.

3650. Contents of—Grounds for relief—Must be distinctly set out.]—A petition for dissolution of marriage by reason of the husband's adultery & desertion, directed to be amended by a distinct averment of the fact of desertion; some statement of circumstances in such a petition may be necessary, but evidence should not be pleaded.—PYNE *v.* PYNE (1858), 1 Sw. & Tr. 80; 30 L. T. O. S. 370; 22 J. P. 180; 6 W. R. 507; 164 E. R. 637.

3651. —— —— ——.]—(1) A petition for a divorce on the ground of adultery must allege adultery in distinct terms. A petition by a husband for dissolution of marriage contained an inferential, but not a distinct, charge of adultery at a specified time & place. Personal service on resp. had been dispensed with. Neither resp. nor co-resp. appeared. At the hearing, adultery at the said time & place having been proved, the ct. allowed the petition to be amended by adding a distinct charge of adultery without requiring the petition to be re-served.

(2) If at the hearing the ct. gives leave to amend the petition to meet the case proved, petitioner being in ct., it may be then amended & a decree *nisi* may be pronounced; but if leave to amend is only granted at a subsequent date after taking time to consider, & petitioner fails to move for a decree until some considerable time after the amendment has been made, the decree must bear date on the day when pronounced, & cannot be ante-dated.—AMBLER *v* AMBLER & HOGHTON (1862), 32 L. J. P. M. & A. 6; 7 L. T. 339; 11 W. R. 111.

Annotations:—As to (1) **Refd.** Wallace *v.* Wallace, Guiter & Macnamara (1862), 32 L. J. P. M. & A. 17; Forman *v.* Forman & Davis (1863), 11 W. R. 401.

3652. —— —— —— ——.]—(1) Adultery as the ground of a petition should be distinctly alleged. It is not sufficient that the petition alleges information & belief of petitioner that resp. has committed adultery.

(2) When leave to amend such a petition is granted, where there has been no appearance, it must be re-served.—SPILSBURY *v.* SPILSBURY (1863), 3 Sw. & Tr. 210; 32 L. J. P. M. & A. 126; 9 L. T. 23; 164 E. R. 1254.

3653. —— **Particulars of charge of adultery—Sufficiency.**]—FOSTER *v.* FOSTER & THOMAS (1862), 32 L. J. P. M. & A. 64, n.

Annotation:—**Refd.** Higgs *v.* Higgs & Hopkins (1862), 32 L. J. P. M. & A. 64.

3654. —— —— ——.]—KING *v.* KING & DENT (1862), 32 L. J. P. M. & A. 64, n.

3655. —— —— ——.]—FORMAN *v.* FORMAN & DAVIS, No. 3746, *post.*

3656. —— —— —— ——.]—A petition for divorce by a husband in para. 3 alleged that resp., since Oct. 8, 1846, had on divers occasions committed adultery; & in para 4 that resp. had, since Apr. 1864, up to the date of the petition, been habitually visited at her residence at, etc., by A., & had on divers of such occasions, & particularly on the night of Aug. 31, 1864, committed adultery with A.:—*Held:* (1) it was not sufficient to give particulars of the dates when, places where, & persons with whom, the adultery alleged in para. 3 was committed; but the petition must be amended by setting out such particulars; (2) resp. was not entitled to particulars of the adultery charged in para. 4.—PORTER *v.* PORTER & JAGGARD (1864), 3 Sw. & Tr. 596; 33 L. J. P. M. & A. 207; 13 W. R. 108; 164 E. R. 1406.

3657. —— —— —— **Must be set out.**]—(1) A petition for divorce must specifically allege adultery.

(2) Adultery will not be inferred from bigamy alone being alleged in the petition.—BONAPARTE *v.* BONAPARTE (1891), 65 L. T. 795; 8 T. L. R. 66.

3658. —— **All material facts.**]—BROOKE *v.* BROOKE, No. 5115, *post.*

3659. —— **Particular charges of cruelty—Communication of disease.**]—WALKER *v.* WALKER, No. 3635, *ante.*

3660. Signature to—Leave to solicitor to sign—Petitioner employed abroad.]—Where it appeared that a proposed petitioner was engaged as an engine driver at the diamond fields at Kimberley, in South Africa, & that the acts of adultery to be alleged against his wife in the petition had been committed after he left England; & it further appeared that he could not come to England without risking the loss of his situation.

The ct. gave leave to the solr. to sign the petition & swear the affidavit verifying same on behalf of petitioner; & also gave leave to prove the marriage & cohabitation by affidavit.—*Ex p.* HOBSON (1894), 70 L. T. 816; 6 R. 661.

3661. Wife's petition—Party cited—Statement of name.]—OLIVER *v.* OLIVER (1918), 35 T. L. R. 24.

3662. —— —— —— ——.]—Where adultery by a husband is alleged, the woman's name ought always to be disclosed in the petition if it is known.—HIGHLEY *v.* HIGHLEY (1924), 40 T. L. R. 236.

3663. —— —— ——.]—In a wife's petition alleging adultery against the husband the name of the woman must, if known, be inserted, with the result that Matrimonial Causes Rules, 1924,

a divorce, is entitled to find in the petition itself the whole case made against her & a full statement of the facts relating to her husband's change of domicil.—BUSFIELD *v.* BUSFIELD, GUEST *v.* GUEST, [1916] N. Z. L. R. 524.—**N.Z.**

g. *Signature to—Leave to solicitor.*]—Petition for dissolution of marriage must be signed by petitioner, not by his solicitor, unless leave has been obtained permitting latter to sign.—PLOWMAN *v.* PLOWMAN (1909), 10 W. L. R. 20; 14 B. C. R. 164.—**CAN.**

h. *Where separation order in existence.*]—A woman petitioned for a divorce on the ground of desertion & there was in force a separation order under "The Married Persons Summary Separation Act, 1896." Resp. did not plead the plea in bar:—*Held:* the order should have been pleaded.—MICHAEL *v.* MICHAEL (1906), 26 N. Z. L. R. 165.—**N.Z.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 1, *F.* (*a*) & (*b*), & *G.*; *sub-sects.* 2 & 3, *A., B., C. & D.*]

r. 17, as to service on such woman will apply, & if the name, though not known when the petition was filed, be subsequently learnt, the petition should be amended, & the rule followed as to service of the amended petition.—TAYLOR *v.* TAYLOR, WHITE *v.* WHITE (1925), 133 L. T. 320; 41 T. L. R. 522.

(b) Claiming Damages against Co-Respondent.

See Matrimonial Causes Rules, 1924, rr. 1, 2; Appendix 1.

3664. Must specify amount claimed.]—Where damages are claimed against co-resp. the petition should specify the amount claimed. *Qu.:* whether the counsel for co-resp. can, upon his own authority, consent to a petition being amended by the insertion of the amount of damages claimed.—SPEDDING *v.* SPEDDING & SMITH (1862), 31 L. J. P. M. & A. 96.

Annotations:—**Folld.** Pegler *v.* Pegler & Russell (1901), 18 T. L. R. 13. **Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

3665. ——.]—In a husband's petition for divorce, by reason of his wife's adultery with co-resp., when there is a claim for damages, the amount claimed must be specified in the petition.—PEGLER *v.* PEGLER & RUSSELL (1901), 85 L. T. 649; 18 T. L. R. 13.

Petition for damages only.]—*See* Sect. 5, sub-sect. 3, F. (*b*), *ante.*

G. Supplemental Petitions.

3666. New charges—Adultery—Since original petition—Consolidation.]—If it be expedient to bring before the ct. acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose; & on the preliminary proceedings being completed, the two petitions will be consolidated.—BORHAM *v.* BORHAM & BROWN (1870), L. R. 2 P. & D. 193; 40 L. J. P. & M. 6; 19 W. R. 215; *sub nom.* BOREHAM *v.* BOREHAM & BROWN, 23 L. T. 600.

3667. —— **Desertion—Two years incomplete when original petition filed.**]—In a wife's suit for a dissolution of marriage on the ground of adultery & desertion, resp.'s adultery was proved, but it appeared that his desertion of his wife had lasted for less than two years. The hearing was adjourned, & on a supplementary petition, filed more than a year afterwards the ct. heard further evidence as to desertion, & granted a decree.—WOOD *v.* WOOD (1887), 13 P. D. 22; 57 L. J. P. 48.

Annotation:—**Consd.** Kay *v.* Kay, [1904] P. 382.

3668. —— —— ——.]—LAPINGTON *v.* LAPINGTON, No. 2984, *ante.*

3669. Whether new citation necessary.]—On July 30, 1908, the husband filed a petition for divorce alleging adultery by his wife with men unknown. On being advised that he had not sufficient evidence to support the charges in the petition he made further inquiries, & on Nov. 7, 1908, he filed a supplemental petition alleging his wife's adultery with co-resp. on specific dates in Oct. 1908, all the charges in the original petition having been struck out:—*Held:* the charges contained in the supplemental petition were covered by the citation which had been served with the petition.—HOLMES *v.* HOLMES & BAWLS (1909), 25 T. L. R. 263.

3670. Lapse of time since filing of original petition—Original petition followed by reconciliation—Proceedings not withdrawn or stayed.]—SCHARRER *v.* SCHARRER (1909), *Times*, July 7, C. A.

SUB-SECT. 2.—AFFIDAVITS VERIFYING PETITIONS.

See Matrimonial Causes Rules, 1924, r. 3, A. & B.

3671. Contents of—Detailed history of parties unnecessary.]—The affidavit required to be filed in verification of a petition should not go into a detailed statement of the history of the parties. The ct. may have no power to order an affidavit to be removed from the file of the ct., but on a question of taxation of costs, the costs of such an affidavit would not be allowed against the other party.—FORSTER *v.* FORSTER & EVANS (1858), 1 Sw. & Tr. 167; 31 L. T. O. S. 104; 164 E. R. 677.

3672. —— **Truth of adultery charge—"Best of belief."**]—A petition for dissolution of marriage on the ground of the wife's adultery charged various acts of adultery in 1856, 1857 & 1858. Resp., in her answer, pleaded, first, a denial of the adultery; secondly, desertion on Sept. 4, 1857; thirdly, condonation; fourthly, connivance. The affidavit of petitioner, filed in pursuance of rule 2, did not verify the statements in the petition as to the adultery. Resp.'s affidavit, filed in pursuance of rule 15, did not verify the third & fourth pleas, it being supposed that by doing so the adultery would be admitted. On motion to disallow the last three pleas & for leave for petitioner to file an affidavit verifying the adultery charged "to the best of his belief":—*Held:* (1) the second plea was bad, as, though it was pleaded to the adultery charged in the petition, it was only an answer as to part; (2) the third & fourth pleas should be verified by affidavit, as resp., by doing so, would not admit the adultery, each plea being to be construed by itself; (3) petitioner might in his affidavit state that the adultery was committed "to the best of his belief."

All matter in an answer beyond a simple denial must be verified by affidavit, which however need not be in absolute terms.—TOURLE *v.* TOURLE (1858), 1 Sw. & Tr. 165; 27 L. J. P. & M. 52; 31 L. T. O. S. 89; 6 W. R. 544; 164 E. R. 676.

3673. How intituled.]—The affidavit verifying the petition should be headed "In the matter of the petition of A. B."—GAPP *v.* GAPP & LEVERSON (1859), 4 Sw. & Tr. 273; 28 L. J. P. & M. 48; 164 E. R. 1521.

Annotation:—**Folld.** Steed *v.* Steed (1867), L. R. 1 P. & D. 364.

3674. .]—affidavit verifying a petition must not be headed in a cause, but "In the matter of the petition of ——."—STEED *v.* STEED (1867), L. R. 1 P. & D. 364; 36 L. J. P. & M. 50; 16 L. T. 125.

3675. Affidavit by person other than petitioner—Petitioner abroad—On military service.]—A petitioner in a divorce suit being on military service, & unable to make the usual affidavit verifying the

PART XIII. SECT. 8, SUB-SECT. 1.—G.

k. *New charges — Adultery — Since original petition.*]—Where resp. in a suit for dissolution of marriage, has, after service of the petition, committed adultery with a person other than the co-respondent, petitioner may obtain an order for leave to file a supplemental petition, setting out such acts of adultery, & adding such person as co-resp.—SMITH *v.* SMITH & CASHION (1877), 3 V. L. R. 122.—AUS.

petition, the ct. allowed the petition to be filed if verified by the affidavit of his solr., but ordered that petitioner's affidavit should also be filed as soon as possible.—*Ex p.* BRUCE (1881), 6 P. D. 16; 50 L. J. P. 64; *sub nom.* BRUCE *v.* BRUCE & LAING, 29 W. R. 474.

Anotation:—**Distd.** *Ex p.* Tartt (1886), 2 T. L. R. 352.

3676. —— —— Of own will.]—The ct. will not allow the affidavit verifying a petition for divorce to be sworn by another person when petitioner is absent from the country by his own will.—*Ex p.* TARTT (1886), 34 W. R. 368; 2 T. L. R. 352.

3677. —— —— British consul resident abroad.]—Where petitioner was resident abroad as British consul, & as such was himself the only authority in the place where he resided before whom the affidavit in support of his petition for dissolution could be sworn, & by rule 142 he was not competent to swear his own affidavit, the ct. allowed petitioner's solr. to verify the petition to the best of his knowledge & belief.—RUSSELL *v.* RUSSELL & MACLAREN (1889), 59 L. J. P. 13; *sub nom. Re* PETITION FOR DISSOLUTION OF MARRIAGE, *Ex p.* RUSSELL, 62 L. T. 186; 54 J. P. 167.

3678. Swearing of—Petitioner only commissioner available.]—RUSSELL *v.* RUSSELL & MACLAREN, No. 3677, *ante.*

3679. —— Where petitioner inmate of asylum—Order for access by solicitor & commissioner.]—A married woman, confined in an asylum, gave instructions to her solr. to institute proceedings against her husband for judicial separation, & the solr. attended with a comr. for oaths in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved & signed by her previously. The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary & addressed from the Office of the Comrs. in Lunacy, refused to allow the solr. & comr. for oaths to see the proposed petitioner, &, upon application being made by the solr. to the Comrs. in Lunacy, they upheld the refusal of the superintendent. The ct., upon motion, & upon affidavit, proving notice, made an order, the Comrs. in Lunacy having notice & not opposing, that the Comrs. should forthwith authorise the superintendent of the asylum to permit the solr. & comr. for oaths to have access to the proposed petitioner.—*Re* PETITION FOR JUDICIAL SEPARATION, *Ex p.* BEECHAM, [1901] P. 65; *sub nom. Re* BEECHAM & LUNACY COMRS., 70 L. J. P. 20; 84 L. T. 63.

SUB-SECT. 3.—AMENDMENT OF PLEADINGS.

A. In General.

See, now, Matrimonial Causes Rules, 1924, rr. 25, 26.

3680. Discretion of court.]—An application for an order that a pleading be reformed is an application to the discretion of the ct.; in exercising this discretion the ct. will not, as in case of demurrer, consider whether or not the pleading is good in law, but whether or not it may prejudice the opposite side in the conduct of his case.—GRIFFITH *v.* GRIFFITH (1864), 3 Sw. & Tr. 355; 33 L. J. P. M. & A. 81; 10 L. T. 308.

3681. Ordered if embarrassing to opponent.]—The ct. will not order a pleading to be amended unless it so framed as to embarrass the opposite side.—GREEN *v.* GREEN (1864), 33 L. J. P. M. & A. 83.

3682. Refusal to amend petition—Prayer for dissolution—Proof only of right to judicial separation—Petition dismissed.]—ROWLEY *v.* ROWLEY, No. 4582, *post.*

B. Leave to Amend.

See, now, Matrimonial Causes Rules, 1924, rr. 25, 26.

3683. Notice of application for leave—To respondent.]—Notice of application for leave to amend should be given to the other party, or the petition may be withdrawn & served *de novo.*—WRIGHT *v.* WRIGHT (1858), 1 Sw. & Tr. 80; 27 L. J. P. & M. 32; 30 L. T. O. S. 370; 6 W. R. 507.

3684. —— —— Application of rules.]—(1) An application was made to the ct. to amend an answer by adding to it a fresh charge of adultery. Notice of the intended application was served upon the opposite party the evening previously. The facts in issue were appointed to be tried by a common jury, at the sittings then in progress:—*Held:* the rules as to notice were not applicable.

(2) Although the opposite party had only four days allowed (Rule 36) to amend his answer to such amended petition or answer, the ct. will, if it be advisable, direct that the cause shall not be heard until the expiration of ten days from that on which the amended answer was filed.—HITCHCOCK *v.* HITCHCOCK (1867), 36 L. J. P. & M. 40.

3685. Granted after decree nisi—Two ceremonies of marriage—Omission to plead both.]—HAMPSON *v.* HAMPSON, No. 6068, *post.*

3686. —— —— ——.]—A wife having been married to her husband, first by a declaration before witnesses in Edinburgh, & afterwards at the sheriff's ct., Edinburgh, obtained a decree *nisi* for divorce. In the petition & the decree *nisi* only the second ceremony was referred to. The ct. allowed the petition & the decree *nisi* to be amended by alleging also the first ceremony, but without costs against resp.—MARSHALL *v.* MARSHALL (1909), 25 T. L. R. 716.

C. Where Charges Inferential.

3687. Amendment making charge distinct Desertion.]—PYNE *v.* PYNE, No. 3650, *ante.*

3688. —— Adultery.]—AMBLER *v.* AMBLER & HOGHTON, No. 3651, *ante.*

3689. —— ——.]—FORMAN *v.* FORMAN & DAVIS, No. 3746, *post.*

3690. —— ——.]—SPILSBURY *v.* SPILSBURY, No. 3652, *ante.*

D. Corrections of Dates, Names, Places, etc.

3691. Name—Mis-statement of Christian name.]—Where in the affidavit verifying the petition for dissolution of marriage co-resp.'s Christian name was stated to be John instead of William, & a similar mistake was made in the citation & petition, the ct. allowed the citation & petition to be amended, & did not require the affidavit to be resworn.—REUSS *v.* REUSS & APPLEGARTH (1862), 32 L. J. P. M. & A. 168.

3692. —— ——.]—Where a petition for dissolution of marriage has been served in which a

---

PART XIII. SECT. 8, SUB-SECT. 3.—A.

1. *Addition of plea of condonation by respondent—After petitioner's evidence denying condonation.*]—In a suit for dissolution of marriage upon the ground of adultery petitioner in his evidence denied condonation, & resp. then applied for leave to amend her answer by adding a plea of condonation:—*Held:* petitioner having denied condonation, the application to amend should be refused.—MARYCHURCH *v.* MARYCHURCH & BUCKLEY (1913), N. Z. L. R. 712.—**N.Z.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 3, *D., E., F., G. & H.*]

mistake is made in the Christian name of the person with whom resp. is alleged to have committed adultery, the ct. will allow it to be amended, but it must be re-served.—LOVE *v.* LOVE (1863), 32 L. J. P. M. & A. 134.

3693. —— Mis-spelling in citation.]—Where co-resp.'s name had been mis-spelt in the citation served, the ct. made an order for a fresh citation to issue.—COTTON *v.* COTTON & KINNIS (1862), 4 Sw. & Tr. 275; 32 L. J. P. M. & A. 133.

3694. —— Misnomer of respondent—Respondent not appearing.]—The misnomer of resp. in a petition is cured by appearance; but if there is no appearance the petition must be amended & re-served.—KISCH *v.* KISCH (1864), 4 New Rep. 28; 33 L. J. P. M. & A. 115.

3695. —— Assumed name of co-respondent.]—NICOLAS *v.* NICOLAS, No. 3807, *post*.

3696. —— Wrong name—Of person with whom adultery alleged.]—A wife filed a petition for divorce, alleging adultery by her husband with a certain woman, who intervened & denied the allegation. Subsequently it was discovered that a mistake had been made, & that the adultery alleged should have been with another woman. Petitioner applied, without giving notice to resp. or the intervener, to amend the petition by striking out the name of the intervener & inserting that of the other woman. The ct. allowed the amendment, the petition to be re-served on resp., & the intervener to have her costs.—HARDING-COX *v.* HARDING-COX (1908), 24 T. L. R. 631; 52 Sol. Jo. 518.

3697. Date—Dates amended to those on which cruelty proved.]—A petition for dissolution of marriage on the ground of adultery & cruelty charged cruelty "in & during the months of Apr. & May, 1861." Resp. filed an answer denying the charges of the petition. Upon the trial of the cause, at which resp. did not appear, petitioner failed to prove cruelty at the time alleged, but established cruelty in June & July, 1861:—*Held:* the petition might be amended by substituting the date of the cruelty proved.—BUNYARD *v.* BUNYARD (1863), 32 L. J. P. M. & A. 176; 11 W. R. 990.

3698. Amendment instead of ordering further particulars—Times, places & persons uncertain.]—KING *v.* KING & DENT (1862), 32 L. J. P. M. & A. 64, n.

3699. —— ——.]—WODEHOUSE *v.* WODEHOUSE & FARROW (1863), 32 L. J. P. M. & A. 90, n.

E. Additional Charges.

3700. Satisfactory reason for previous omission—Necessity for.]—BRITTAIN *v.* BRITTAIN & CAMP, No. 4010, *post*.

3701. Knowledge of charge before petition filed—General rule.]—(1) Where petitioner after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition by adding a new charge, it is an objection to granting his application that the charge in question had come to his knowledge before the petition in its original form was drawn.

Semble: (2) where a cause has been part heard before the full ct., & adjourned for further evidence, the Judge Ordinary sitting alone has not power to dismiss the petition, or to allow an amendment to be made thereon; (3) the ct. will not dismiss the petition on the prayer of petitioner after evidence has been given in the cause entitling the resp. to a matrimonial remedy.

Qu.: will the ct. make a decree of judicial separation in favour of a resp., who has proved an answer entitling resp. to a judicial separation unaccompanied by a prayer for same.—BANNISTER *v.* BANNISTER & DAVIS (1860), Sea. & Sm. 143; 29 L. J. P. M. & A. 53.

3702. —— Additional charge of cruelty—Application not vexatious.]—A wife petitioned for a dissolution of her marriage on the ground of her husband's adultery, coupled with desertion. The husband filed no answer. She applied for leave to amend her petition, by adding a charge of cruelty, alleged to have been committed & to have been known to her before she filed her petition. The ct. required her to bring in an affidavit of the acts of cruelty upon which she relied, & of the motives which had induced her to suppress them in her petition:—*Held:* the wife might amend her petition by adding a new ground for the dissolution of her marriage, the ct. being satisfied that this new charge was not brought forward vexatiously.—ROWLEY *v.* ROWLEY (1859), 1 Sw. & Tr. 487; 29 L. J. P. & M. 15; 34 L. T. O. S. 61; 23 J. P. 744; 7 W. R. 653.

3703. —— —— Subsequent to latest act alleged.]—TOPPER *v.* TOPPER, No. 2673, *ante*.

3704. —— —— Absence of special circumstances.]—Cruelty being a fact which must be in the knowledge of a petitioner at the commencement of the suit, the ct. will generally refuse to allow fresh charges of cruelty to be added to a petition.—AUSTIN *v.* AUSTIN (1871), 41 L. J. P. & M. 8; 25 L. T. 856; 20 W. R. 128.

3705. Evidence obtained after petition filed—Additional charge of adultery.]—Adultery committed by either party, husband or wife, at any time before sentence, will bar a sentence of separation, at the suit of the other party; or will compel the ct. to dismiss both parties, adultery being mutually, or reciprocally charged in the cause; & cts. must permit either of such parties to plead adultery against the other in any stage of such a cause, whether before or after publication, & how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to proponent's knowledge.—BRISCO *v.* BRISCO (1824), 2 Add. 259.

Annotations:—**Consd.** Webb *v.* Webb (1828), 1 Hag. Ecc. 349. **Refd.** Seaver *v.* Seaver (1846), 2 Sw. & Tr. 665; Everett *v.* Everett & McCullum, [1919] P. 298.

3706. —— ——.]—Facts of adultery newly come to the knowledge of the party may be pleaded after publication.—WEBB *v.* WEBB (1828), 1 Hag. Ecc. 349; 162 E. R. 609.

3707. —— ——.]—Under a citation for cruelty only in a suit for separation by the wife adultery by the husband occurring prior to the institution of the suit but sworn to have come recently to the wife's knowledge may be pleaded, even though publication of the evidence on the libel & on a responsive plea is about to pass.—SAMPSON *v.* SAMPSON (1832), 4 Hag. Ecc. 285.

3708. —— ——.]—WORTH *v.* WORTH (1859), Sea. & Sm. 109.

3709. —— ——.]—DICKENSON *v.* DICKENSON & CLEMENT (1862), 1 New Rep. 70.

3710. —— Addition of bigamy charge.]—After the hearing of a petition of a wife for dissolution of marriage on the ground of adultery & cruelty, no decree having been pronounced, the ct. allowed the petition to be amended by the addition of a charge of bigamy which came to the knowledge of petitioner in the interval between the cause being set down for hearing & the hearing.

—WALKER *v.* WALKER (1861), 30 L. J. P. M. & A. 214.

3711. Previous ignorance of nature of charge—Acts amounting to legal cruelty.]—The wife petitioned the ct. for a dissolution of marriage by reason of her husband's adultery, coupled with desertion. At the hearing, the ct. held that the desertion was not proved, & adjourned the final decision in order that petitioner might consider whether she would accept a judicial separation. Subsequently, the ct. allowed her to amend her petition by adding a charge of cruelty, being satisfied from the affidavits that until the hearing she was ignorant that the acts she could prove against her husband amounted to legal cruelty.—PARKINSON *v.* PARKINSON (1869), L. R. 2 P. & D. 27 ; 39 L. J. P. & M. 21 ; 21 L. T. 597.

3712. Cause of action arising after petition filed—Desertion.]—KETTLEWELL *v.* KETTLEWELL, No. 2982, *ante*.

3713. —— ——.]—LAPINGTON *v.* LAPINGTON, No. 2984, *ante*.

3714. Petition incomplete without additional charge.]—BONAPARTE *v.* BONAPARTE, No. 3657, *ante*.

F. New Co-Respondents.

Co-respondents as parties, *see* Sub-sect. 4, E., *post*.

3715. Petition alleging adultery with specified person—Amendment to "or with person unknown" refused.]—A petition, by a husband, for a dissolution of marriage, alleged that resp. at a specified time & place, committed adultery with A. Resp. did not appear. At the hearing, the ct. refused to allow the petition to be amended by adding to that charge the words "or with some person whose name is unknown to your petitioner," without re-service.—WALLACE *v.* WALLACE, GUITER & MACNAMARA (1862), 32 L. J. P. M. & A. 47 ; 9 Jur. N. S. 134 ; 11 W. R. 112.

3716. Petition alleging adultery with co-respondent & other persons—Addition of new co-respondent refused—Application not made bonâ fide.]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 3973, *post*.

G. Countercharges.

3717. Charging petitioner with adultery—Addition to answer generally traversing allegations.]—A co-resp. whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that petitioner had been guilty of adultery, or of such misconduct as would induce the ct. to exercise its discretion by withholding a decree ; but upon a statement being made that co-resp. would probably be able to establish a case of such misconduct on the part of petitioner if he had the opportunity, the ct. allowed him to amend his answer by the insertion of various countercharges against petitioner, & reserved the question of the costs of the day until the merits of the case had been ascertained.—PLUMER *v.* PLUMER & BYGRAVE (1859), Sea. & Sm. 147 ; 4 Sw. & Tr. 257 ; 29 L. J. P. M. & A. 63 ; 164 E. R. 1514.

Annotation :—**Apld.** Seddon *v.* Seddon & Doyle (1860), 30 L. J. P. M. & A. 12.

3718. —— —— **Non-payment of petitioner's taxed costs.**]—A wife petitioned for judicial separation, on the ground of cruelty & adultery ; resp. traversed the charges, & afterwards obtained leave to amend his answer by adding a countercharge of adultery. Before leave to amend was granted, & after an order for payment of the wife's taxed costs, resp. became bkpt. on his own petition. An application to rescind the order for the amendment of the answer, on the ground that resp. had become bkpt. solely for the purpose of avoiding payment of his wife's costs, & that the order was made by the ct. in ignorance of the bkpcy., was rejected.—GREATOREX *v.* GREATOREX (1864), 4 New Rep. 122 ; 34 L. J. P. M. & A. 9.

3719. —— **Amendment of vague charges in answer—Insufficient information as to dates & places.**]—WELLS *v.* WELLS & HUMMERSTON (1863), 32 L. J. P. M. & A. 65, n.

3720. Charging petitioner with cruelty—Addition to co-respondent's answer after issue joined—Refused.]—In a husband's suit for dissolution, after the pleadings had been completed & issue joined, the ct. refused to allow co-resp. to add to his answer a charge of cruelty against the husband.—JAYNE *v.* JAYNE & PROTHERO (1869), 21 L. T. 401 ; 18 W. R. 53.

H. Amendment of Prayer.

3721. From judicial separation to dissolution—On payment of costs by petitioner.]—The ct. granted an application by a wife that a petition for a judicial separation filed by her might be dismissed, & that she might substitute for it a petition for dissolution of marriage upon the terms of her paying the costs.—LEWIS *v.* LEWIS (1860), 29 L. J. P. M. & A. 123.

3722. —— ——.]—Where both parties are before the ct., a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation, but there must be a re-service of the petition on resp.

The costs of the motion must not be taxed against the husband (*per* CUR.).—CARTLEDGE *v.* CARTLEDGE (1862), 4 Sw. & Tr. 249 ; 31 L. J. P. M. & A. 135 ; 8 Jur. N. S. 493 ; 164 E. R. 1511.

3723. —— **Non-payment of costs by respondent.**]—The ct. will allow a wife to withdraw her petition for judicial separation & file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit.—ASHLEY *v.* ASHLEY (1861), 2 Sw. & Tr. 388 ; 30 L. J. P. M. & A. 175 ; 5 L. T. 139 ; 164 E. R. 1046.

3724. —— **On same grounds as in first petition.**]—Leave granted to withdraw a petition for judicial separation & file a petition for dissolution of marriage upon the same grounds as those alleged in the first petition.—MASSEY *v.* MASSEY (1863), 32 L. J. P. M. & A. 141.

3725. —— **Cross-charges by wife.**]—Where a husband brought a suit for dissolution on the ground of adultery with co-resp., & the wife answered charging petitioner with adultery & cruelty, & prayed for a judicial separation, & the jury found for resp. on all the issues. The ct. allowed the prayer of the answer to be amended, & pronounced a decree *nisi* for dissolution on the application of resp.—CORPATAUX *v.* CORPATAUX & STAUB (1875), 23 W. R. 456.

3726. From dissolution to judicial separation—Charges proved.]—DENT *v.* DENT, No. 3183, *ante*.

3727. —— **Failure of proof.**]—SMITH *v.* SMITH, No. 2883, *ante*.

PART XIII. SECT. 8, SUB-SECT. 3.—F.

m. *No co-respondent named—Power of court to add name suo motu—Necessity for amendment of petition.*]—In a suit for divorce petitioner did not make any person a co-respondent but simply averred that his wife was generally leading an immoral life :—*Held :* the ct. should not add a person as co-respondent *suo motu* without calling on petitioner to amend the petition by making the necessary allegations against him.—HOWE *v.* HOWE (1913), I. L. R. 38 Mad. 466,—**IND.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 3, *H., I. & J.; sub-sect* 4, *A., B. & C.*]

3728. ·]—DUPLANY *v.* DUPLANY, No. 3628, *ante.*

3729. —— Intervention by King's Proctor—Plea of collusion & adultery.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante.*

3730. —— Countercharges established—Giving court discretion to refuse relief.]—BOREHAM *v.* BOREHAM, No. 3439, *ante.*

Discretionary bars to relief, *see* Sect. 7, sub-sect. 4, *ante.*

3731. —— Attempt to expunge countercharges.]—LEMPRIERE *v.* LEMPRIERE & ROEBEL, No. 3440, *ante.*

3732. —— Whether respondent's consent necessary—All charges proved.]—A wife, having presented a petition praying for a dissolution of her marriage by reason of the cruelty & adultery of her husband, at the hearing proved both charges. The decree was suspended at her request, & on applying for a decree for judicial separation instead of a decree *nisi* for dissolution, resp. opposed the application. The ct. refused to allow her to alter the prayer of her petition until resp. had had an opportunity of bringing before the ct. the facts on which he grounded his opposition.—MYCOCK *v.* MYCOCK (1870), L. R. 2 P. & D. 98; 39 L. J. P. & M. 56; 23 L. T. 238; 18 W. R. 1144.

3733. —— —— All charges not established.]—In a suit for dissolution of marriage on the ground of cruelty & adultery, if one of the charges only be established, petitioner has a right to a decree of judicial separation without the consent of resp.—BROMFIELD *v.* BROMFIELD (1871), 41 L. J. P. & M. 17; 26 L. T. 264.

3734. —— After decree nisi—Solicitor's costs.]—COLYER *v.* COLYER (1904), *Times*, NOV. 8.

Annotation:—**Folld.** Parsons *v.* Parsons (1907), 23 T. L. R. 749.

3735. —— —— Upon respondent's motion to dismiss for want of prosecution.]—A petitioner is entitled to a reasonable time after the expiration of the time at which the decree could, at the earliest possible date, be made absolute, in order to determine whether to proceed further or to have the petition dismissed.

Upon an adjourned motion by a resp. to dismiss a suit for want of prosecution, the ct. allowed petitioner to take a decree of judicial separation in place of the decree *nisi* previously obtained for dissolution of the marriage.—PARSONS *v.* PARSONS, [1907] P. 331; 76 L. J. P. 159; 23 T. L. R. 749.

I. Petitions Claiming Damages.

3736. Addition of claim.]—Leave granted to amend a petition for dissolution of marriage by adding a claim for damages.—BARTLETT *v.* BARTLETT & BALMANNO (1864), 34 L. J. P. M. & A. 64.

3737. —— Application made bonâ fide.]—Petitioner in a suit for divorce, after the petition, but before an answer was filed, applied for leave to amend his petition by adding a claim for damages. The ct., being satisfied that it was made in good faith without any collateral purpose, granted the application.—SYMONDS *v.* SYMONDS & HARRISON (1870), 23 L. T. 568; 19 W. R. 166.

3738. —— Fresh evidence.]—At the date of filing his petition the only evidence which petitioner had was the confession of resp. He subsequently obtained independent evidence of her alleged adultery with co-resp., & he then applied to amend his petition by adding a claim for damages. The ct. allowed the amendment.—HENSLOW *v.* HENSLOW & BEARDSLEY (1871), 40 L. J. P. & M. 31; 24 L. T. 846; 19 W. R. 786.

3739. Insertion of amount—Authority of counsel for co-respondent to consent.]—SPEDDING *v.* SPEDDING & SMITH, No. 3664, *ante.*

3740. Amendment after verdict—Award of larger sum than claimed.]—Petitioner in a suit for dissolution of marriage claimed £500 damages from co-resp. The jury having awarded £1,000, the ct. allowed petitioner to amend his claim to that amount.—MODERA *v.* MODERA & BARCLAY (1893), 10 T. L. R. 69.

3741. —— —— Undefended suit.]—Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by petitioner, if he desire to amend his claim, asking for leave to amend & re-serve the petition. The summons should be served upon co-resp., who, although not represented at the trial, will be entitled to be heard in opposition to the application.—BECKETT *v.* BECKETT & JONES, [1901] P. 85; 70 L. J. P. 17; 84 L. T. 272; 17 T. L. R. 120.

3742. Withdrawal of claim—Whether notice to opposite parties essential—Undefended suit.]—When no appearance has been entered by either resp. or co-resp., against whom damages are claimed, by leave of ct. & without notice to resp. or co-resp. the claim for damages may be withdrawn & the case transferred from the common jury to the undefended list.—CHAMBERLAIN *v.* CHAMBERLAIN & HARTWELL (1907), 51 Sol. Jo. 357.

3743. Reinsertion after withdrawal—Withdrawal by mistake—Fresh evidence.]—SYKES *v.* SYKES & SMITH, No. 4442, *post.*

J. Re-Service of Amended Petitions.

See Matrimonial Causes Rules, 1924, r. 25.

3744. Necessity for—No notice of motion to respondent.]—WRIGHT *v.* WRIGHT, No. 3683, *ante.*

3745. —— Non-appearance by respondents—Amendment making charge more distinct.]—AMBLER *v.* AMBLER & HOGHTON, No. 3651, *ante.*

3746. —— —— ——.]—A petition, by a husband, for dissolution of marriage did not charge adultery, but alleged that resp. & co-resp. were "living & cohabiting together." Neither of resps. appeared. At the hearing the ct. refused to allow the petition to be amended, by inserting a charge of adultery, without re-service.—FORMAN *v.* FORMAN & DAVIS (1863), 32 L. J. P. M. & A. 80; 11 W. R. 401.

3747. —— —— ——.]—SPILSBURY *v.* SPILSBURY, No. 3652, *ante.*

3748. —— —— Additional adultery "with person unknown."]—WALLACE *v.* WALLACE, GUITER & MACNAMARA, No. 3715, *ante.*

3749. —— —— Correction of respondent's name.]—KISCH *v.* KISCH, No. 3694, *ante.*

3750. —— —— Amendment of date of adultery.—The rule that when a petition has been amended by leave of the ct. it must be re-served will not be waived merely because resp. has not appeared. Therefore, where a charge of adultery was wrongly dated in a petition, the ct. allowed the petition

PART XIII. SECT. 8, SUB-SECT. 3.—J.

n. *Necessity for — Non-appearance by respondents.*]—Where an amendment is made in a petition to ... no appearance had been entered by resp., if it is clear that resp. cannot be prejudiced by the amendment, then the amended petition need not be served; but if it is not clear, then there must be re-service.—PATRICK *v.* PATRICK, [1921] N. Z. L. R. 514.—**N.Z.**

o. —— ——.]—A material amendment in a petition will not be allowed without re-service even where

to be amended by correcting the date, but ordered that the petition be re-served on resp. although he had not appeared.—CHARTER *v.* CHARTER (1889), 58 L. J. P. 44 ; 60 L. T. 872.

3751. —— —— Amendment of amount of damages claimed—Verdict for larger sum than prayed.]—BECKETT *v.* BECKETT & JONES, No. 3741, *ante*.

3752. —— Respondent cited by advertisement—Advertisement of amended petition not essential.]—Where a resp. is cited by advertisement, & leave to amend the petition is afterwards granted, the amended petition need not be advertised.—SMITH *v.* SMITH (1863), 3 Sw. & Tr. 216 ; 32 L. J. P. M. & A. 145 ; 9 L. T. 118 ; 7 Jur. N. S. 539 ; 11 W. R. 989 ; 164 E. R. 1257.

3753. —— Amendment of name of person with whom adultery alleged—Christian name.]—LOVE *v.* LOVE, No. 3692, *ante*.

3754. —— —— Undefended suit.]—When a resp. in India, who had been served with the citation & petition, had not appeared, & the petition was amended by changing the name only of the woman with whom adultery was alleged, the ct. allowed personal re-service of the amended petition to be dispensed with.—ROBERTS *v.* ROBERTS (1909), 53 Sol. Jo. 304.

3755. —— Substitution of new party with whom adultery alleged.]—HARDING-COX *v.* HARDING-COX, No. 3696, *ante*.

3756. —— Amendment of prayer—From judicial separation to dissolution.]—CARTLEDGE *v.* CARTLEDGE, No. 3722, *ante*.

Service generally, *see* Sub-sect. 5, *post*.

SUB-SECT. 4.—PARTIES.

A. In General.

Co-respondents.]—*See* Sub-sect. 4, E., *post*.

Parties by intervention.]—*See* Sub-sect. 4, F., *post*.

3757. Suit for dissolution—Parties recognised by court.]—Y—— *v.* Y—— (1860), No. 3831, *post*.

3758. —— Alien enemy.]—An alien enemy, who has been registered as such & who is domiciled in England, has a right to bring a petition for the dissolution of his marriage.—KRAUSS (OTHERWISE DES SALLES D'EPINOIX) *v.* KRAUSS (OTHERWISE DES SALLES D'EPINOIX) & ORBACH (1919), 35 T. L. R. 637 ; 63 Sol. Jo. 760.

Right of alien enemies to sue or initiate proceedings on own behalf.]—*See* ALIENS, Vol. II., pp. 154–162, Nos. 250–329.

3759. Suit for nullity on ground of affinity—Interested parties.]—Any interest, however slight, provided it be specific & pecuniary, whether to be secured in a contingent right, or released from a possible legal obligation, is sufficient to entitle a party to sustain a suit in the Ecclesiastical Ct. for nullity of a marriage, on the ground of affinity. Where, therefore, a father brought such suit to dissolve a marriage contracted by his daughter, after she was of age, by reason of incest :—*Held :* his possible liability, under Poor Relief Act, 1601 (c. 2), to maintain the issue of such marriage, if legitimate, in case of the death or impotency of the parents, was an interest sufficient to entitle him to sustain such suit ; & a sentence of nullity of marriage was pronounced therein.—SHERWOOD *v.* RAY (1837), 1 Moo. P. C. C. 353 ; 12 E. R. 848, P. C. ; *affg.* S. C. *sub nom.* RAY *v.* SHERWOOD & RAY (1836), 1 Curt. 193.

Annotations :—**Consd.** R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525. **Refd.** Bevan *v.* M'Mahon & Bevan (1859), 2 Sw. & Tr. 58 ; Wells *v.* Cottam (1863), 3 Sw. & Tr. 364 ; Sheppard *v.* Phillimore & Bennett (1869), L. R. 2 P. C. 450 ; Elphinstone *v.* Purchas (1870), L. R. 3 P. C. 245 ; Fagg *v.* Lee (1873), L. R. 4 A. & E. 135 ; Lowe *v.* Lowe (1899), 80 L. T. 575. **Mentd.** Harrison *v.* Sparrow (1842), 3 Curt. 1 ; Sanders *v.* Head (1843), 2 Notes of Cases, 355 ; Brookes *v.* Cresswell (1846), 4 Notes of Cases, 429 ; Fenton (or Livingstone) *v.* Livingstone (1856), 27 L. T. O. S. 18 ; Ditcher *v.* Denison (1857), 11 Moo. P. C. C. 324 ; Brook *v.* Brook (1861), 9 H. L. Cas. 193 ; Martin *v.* Mackonochie, Flamank *v.* Simpson (1868), L. R. 2 A. & E. 116 ; Winchester (Bp.) *v.* Wix (1869), L. R. 3 A. & E. 19 ; The Helenslea, The Catalonia (1882), 7 P. D. 57.

3760. Suit for judicial separation—Persons acting under power of attorney.]—In a suit by S., resident in India, against his wife, resident in England, for a separation by reason of her adultery, the question of the sufficiency of the authority from the husband arose, upon the ct.'s inquiry, previous to signing the sentence. There was a power of attorney authorising certain persons to commence proceedings on the part of the husband, ratifying & confirming what the attorneys had done, & agreeing to ratify & confirm what they should do : —*Held :* a sufficient authority.—SEWELL *v.* SEWELL (1840), 1 Notes of Cases, 33.

Suit for jactitation—Only maintainable by one of parties to alleged marriage.]—*See* Sect. 4, *ante*.

B. Minors.

See Matrimonial Causes Rules, 1924, r. 74, &, *generally*, INFANTS.

3761. Guardian ad litem—Appointment of father—Without consent.]—Appointment of the father of a minor, as curator *ad litem*, on election of the minor ; but without the consent of the father, in order to substantiate proceedings against the son in a suit of cruelty & adultery, not sustained.—BEAURAINE *v.* BEAURAINE (1808), 1 Hag. Con. 498 ; 161 E. R. 630.

Annotations :—**Distd.** Morgan *v.* Morgan (1841), 2 Curt. 679. **Consd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109. **Mentd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

3762. —— —— Need of proxy—Nullity suit.]—DENNIS *v.* DENNIS (1815), cited in 2 Curt. at p. 687 ; 163 E. R. 552.

Annotation :—**Consd.** Morgan *v.* Morgan (1840), 2 Curt. 679.

3763. —— In same position as next friend—Liability for costs.]—RUTTER *v.* RUTTER, No. 5044, *post*.

3764. Nullity suit by father of minor—Necessity to state capacity in which father sues—Whether as guardian or in own right.]—In a suit for nullity instituted by the father of a minor, it must appear upon the face of the petition whether the father has instituted the suit in his own right or as guardian of the minor.—WELLS *v.* COTTAM (FALSELY CALLED WELLS) (1863), 3 Sw. & Tr. 364 ; 33 L. J. P. M. & A. 41 ; 10 L. T. 138 ; 10 Jur. N. S. 444 ; 12 W. R. 672 ; 164 E. R. 1316.

Annotation :—**Refd.** Gilroy *v.* Gilroy, [1914] P. 122.

3765. Objection to minority—Time.]—ZYCKLINSKI *v.* ZYCKLINSKI, No. 3952, *post*.

C. Persons of Unsound Mind.

See Matrimonial Causes Rules, 1924, r. 75, &, *generally* LUNATICS.

3766. Suit by committee—Nullity.]—FUST *v.*

---

no appearance has been entered. Leave was asked to amend the petition in order to insert an earlier date of the alleged desertion :—*Held :* such leave could only be granted upon terms that the petition as amended was re-served.—GOW *v.* GOW, [1921] N. Z. L. R. 695.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 4.—C.

p. *Where respondent insane — Assignment of guardian.*]—When the ground of a petition for dissolution of marriage is the unsoundness of resp.'s mind, the ct. on proof of service of the petition & citation on the master in lunacy in accordance with Divorce (Insanity) Act, 1919, s. 5, will dispense

Sect. 8.—Institution and defence of proceedings: Sub-sect. 4, C., D. & E. (a) & (b) i. & ii.]

BOWERMAN (1790), cited in 2 Hag. Con. at pp. 170, 171; 2 Add. at p. 402; 161 E. R. 705.

Annotations:—**Expld.** Parnell *v.* Parnell (1814), 2 Hag. Con. 169. **Refd.** Nokes *v.* Milward (1824), 2 Add. 386.

3767. —— Dissolution.]—The committee of a lunatic may institute proceedings against the wife of a lunatic for adultery.—PARNELL *v.* PARNELL (1814), 2 Hag. Con. 169; 2 Phillim. 158; 161 E. R. 704.

Annotations:—**Consd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109. **Refd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

3768. —— ——.]—The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. Such a suit may be instituted by the committee of the lunatic.—BAKER *v.* BAKER (1880), 5 P. D. 142; 49 L. J. P. 49; 42 L. T. 332; 28 W. R. 630; *affd.* 6 P. D. 12.

Annotations:—**Expld.** Stanhope *v.* Stanhope (1886), 11 P. D. 103. **Folld.** Burrell *v.* Burrell & Blake (1900), 17 T. L. R. 41.

3769. —— Judicial separation.]—The committee of a lunatic may maintain a suit for judicial separation on the ground of the adultery of the wife of the lunatic.—WOODGATE *v.* TAYLOR (1861), 2 Sw. & Tr. 512; 30 L. J. P. M. & A. 197; 5 L. T. 119; 164 E. R. 1095.

Annotation:—**Consd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374.

—— Suit to perpetuate testimony—Illegitimacy of children.]—*See* BASTARDY, Vol. III., p. 371, Nos. 126, 127.

3770. Guardian ad litem—Appointment of.]—(1) A petition for divorce against a wife was met by an allegation of her insanity & consequent inability to defend herself. The ct. below appointed a guardian *ad litem* on her behalf. Upon a verdict of her insanity, proceedings were suspended; but with liberty to the husband to apply again to the ct. in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar, or impede, the investigation of the charge of adultery brought against her. The House adopted this view; &, reversing the order appealed against, sent the case back with directions to proceed.

Divorce may be asked & decreed on behalf of, or against, a lunatic, the ct. appointing a guardian *ad litem* for protection (KELLY, C.B., DENMAN, J., & POLLOCK, B., as consulted judges).

(2) By the law of England, adultery, though a grievous sin, is not a crime, & the analogies & precedents of criminal law have no authority in the Divorce Ct., a civil tribunal.

In the proceedings against a criminal, every step is arrested by his or her becoming a lunatic; but the procedure in divorce is not a criminal proceeding (LORD HATHERLEY).—MORDAUNT *v.* MONCREIFFE (1874), L. R. 2 Sc. & Div. 374; 43 L. J. P. & M. 49; 30 L. T. 649; 39 J. P. 4; 23 W. R. 12, H. L.; *revsg.* S. C. *sub nom.* MORDAUNT *v.* MORDAUNT (1870), L. R. 2 P. & D. 109, 382.

Annotations:—*As to* (1) **Consd.** Baker *v.* Baker (1880), 5 P. D. 142. **Refd.** Giles *v.* Giles (1899), 69 L. J. P. 26. *As to* (2) **Consd.** Redfern *v.* Redfern, [1891] P. 139. **Refd.** Branford *v.* Branford (1878), 4 P. D. 72.

3771. —— —— Not where dispute as to insanity.]—An order ought not to be made under rule 196, assigning a guardian *ad litem* to a person alleged to be of unsound mind, where there is a substantial & *bonâ fide* dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian. *Qu.:* whether rule 196 applies where the person has not been found lunatic by inquisition.—FRY *v.* FRY (1890), 15 P. D. 50; 62 L. T. 501; *sub nom.* ROUTH (OTHERWISE FRY) *v.* FRY, 59 L. J. P. 43; 38 W. R. 615, C. A.

Annotation:—**Consd.** Howell *v.* Lewis (1891), 61 L. J. Ch. 89.

3772. —— —— Application by petitioner.]—GILES *v.* GILES, No. 2318, *ante*.

3773. —— Petitioner appearing by—Decree for dissolution granted.]—The ct. granted a decree *nisi* for a dissolution of marriage on the petition of a person detained in a lunatic asylum under a reception order made by a magistrate, petitioner appearing by his guardian *ad litem*.—BURRELL *v.* BURRELL & BLAKE (1900), 17 T. L. R. 41.

3774. Where respondent insane—Adjournment to appoint guardian.]—GILES *v.* GILES, No. 2318, *ante*.

3775. —— Answer filed by official solicitor.]—JOHNSON *v.* JOHNSON, [1901] P. 193; 70 L. J. P. 44; 84 L. T. 725.

Annotations:—**Mentd.** Coppinger *v.* Coppinger & Lutwyche (1918), 34 T. L. R. 328; Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511.

3776. —— Notice to official solicitor.]—In a suit for dissolution of marriage where resp. is a lunatic, notice must be given to the official solr. in case he should think fit to appear & take part in the proceedings.—BURNETT *v.* BURNETT & PURDY (1922), 39 T. L. R. 111; 67 Sol. Jo. 147.

3777. Insanity at time of trial—Sanity of co-respondent at time of service.]—As co-resp. seems to have been sane when he was served & to have had an opportunity of appearing, it does not lie on petitioner to take steps to have co-resp. represented, & if costs on a finding of adultery are not asked for against him, I think the case may proceed (MCCARDIE, J.).—WHITING *v.* WHITING & BOTWRIGHT (1920), 36 T. L. R. 215.

D. Pauper Suitors.

See R. S. C., 1925, Ord. 16, rr. 22–31 a; Ord. 36 A.

Costs.]—*See* Sect. 18, sub-sect. 6, *post*.

3778. Assignment of counsel by court—Effect of.]—A person suing in *formâ pauperis*, to whom counsel has been assigned by the ct., cannot appear by another counsel, until there has been a renunciation, or a new assignment of counsel, or he has been dispauperised.—HAMER *v.* BOREHAM (1858), 1 Sw. & Tr. 26; 27 L. J. P. & M. 107; 164 E. R. 613.

E. Co-Respondents.

(a) *Jurisdiction of Court over Co-Respondents.*

Whether dependent on domicil of co-respondent.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 425, 426, Nos. 907–915.

Where co-respondent a foreign ruling prince.]—*See* ACTION, Vol. I., p. 48, No. 388.

(b) *Necessity to make every Alleged Adulterer Co-Respondent.*

i. *In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177.

Matrimonial Causes Rules, 1924, rr. 4, 5.

3779. General rule.]—Unless petitioner can satisfy the ct. on affidavit that he cannot or ought not to make a co-resp., Matrimonial Causes Act, 1857 (c. 85), s. 28, is imperative that he should

---

with service on resp. & will assign the master, where he consents to act as such, as guardian to resp. for the purposes of the suit.—BLACKBELL *v.* BLACKBELL, [1920] V. L. R. 356.—**AUS.**

q. *Where petitioner insane—Action for judicial separation.*]—An action of separation at the instance of an insane wife is incompetent.—THOMSON *v.* THOMSON (1887), 14 R. (Ct. of Sess.) 634 24 Sc. L. R. 450.—**SCOT.**

do so.—QUICKE *v.* QUICKE (1861), 2 Sw. & Tr. 419; 31 L. J. P. M. & A. 28; 5 L. T. 690; 10 W. R. 448.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89.

3780. ——.]—Petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-resp., unless he is excused from so doing by the ct. on special grounds.

Qu.: whether the fact that petitioner can only obtain evidence admissible against resp., but inadmissible against the alleged adulterer, would be such special ground.—CARRYER *v.* CARRYER & WATSON (1865), 4 Sw. & Tr. 94; 34 L. J. P. M. & A. 47; 13 L. T. 250; 11 Jur. N. S. 352; 13 W. R. 507.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89. **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316; Raymont *v.* Raymont & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3781. ——.]—When a petition charges adultery with a person unknown, & names no adulterer, it is necessary to obtain the leave of the ct. to proceed without making a co-resp.—PITT *v.* PITT (1868), L. R. 1 P. & D. 464; 37 L. J. P. & M. 24; 17 L. T. 671.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89. **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316.

3782. ——.]—A husband who petitions for dissolution of his marriage on the ground of his wife's adultery must join the alleged adulterer as a co-resp., though he possesses no legal evidence against the alleged adulterer, & though his only knowledge as to the man's name be derived from confessions made by the wife or from other *ex p.* statements.—JONES *v.* JONES, [1896] P. 165; 65 L. J. P. 101; 75 L. T. 190; 12 T. L. R. 416.

Annotations:—**Consd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. **Dbtd.** Saunders *v.* Saunders, [1897] P. 89.

3783. "Alleged adulterer"—Person alleged by petitioner.]—SAUNDERS *v.* SAUNDERS, No. 3784, *post*.

ii. *"Special Grounds" Dispensing with Necessity.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3784. Discretion of court as to—Unfettered—How exercised.]—(1) The discretion given to the judge, by Matrimonial Causes Act, 1857 (c. 85), s. 28, to allow a petition for a divorce to proceed, on special grounds, without making any co-resp. is to be exercised with regard to the principles laid down in or to be gathered from the Act & the rules, & to the circumstances of each particular case, & cannot be fettered by any general rule of practice.

A husband, who had been absent from England for more than two years, ascertained, when he returned home, that his wife had recently given birth to a child, of which he was not the father. She registered the birth of the child, giving her own name as the mother but without giving the name of any father. She took out a bastardy summons against H., whom she alleged to be the father of the child, but, at the time appointed for its hearing, she did not appear, & the summons was struck out. The husband did not believe that H. was the father of the child, & his solr., after making careful inquiry, was unable to obtain any evidence against H. H. was prepared to swear that he had never had intercourse with the wife. The husband presented a divorce petition, in which he alleged that the wife had committed adultery with a man whose name was unknown to him:—*Held:* the husband should be allowed to proceed with the petition without naming any co-resp.

(2) The words "alleged adulterer" in Matrimonial Causes Act, 1857 (c. 85), s. 28, & rule 4 of the Rules of 1863, mean only the person alleged by petitioner in the petition to be the adulterer.—SAUNDERS *v.* SAUNDERS, [1897] P. 89; 66 L. J. P. 57; 76 L. T. 330; 45 W. R. 583; 13 T. L. R. 328; 41 Sol. Jo. 404, C. A.

Annotations:—*As to* (1) **Consd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. **Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271. *As to* (2) **Refd.** Edwards *v.* Edwards & Wilson, [1897] P. 316. *Generally*, **Refd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242; Franklin *v.* Franklin & Minshall, [1921] P. 407. **Mentd.** Field *v.* Ommanney (1920), 36 T. L. R. 695.

3785. —— —— **When interfered with on appeal.**]—Petitioner, a British subject domiciled in England, who charged his wife with adultery committed at Lisbon with two foreigners, applied by motion for leave to proceed without citing either of co-resps., on the grounds that they had both left Portugal; that neither he nor resp. knew their addresses; & that he had wholly failed to trace them. The petition contained no claim for damages or costs against either of co-resps. Resp. had not been served with notice of the motion, but at her own request had received copies of the affidavits to be used at the hearing of the motion. At the hearing, counsel for petitioner objected to resp. being heard. The President held that resp. was entitled to be heard, &, on the facts, that petitioner had not shown that co-resps. could not be reached by one or other of the methods by which service or substituted service could be effected; & accordingly refused the motion. On appeal:—*Held:* (1) Matrimonial Causes Act, 1857 (c. 85), ss. 27, 28, 33, showed that a foreign co-resp. domiciled abroad was not entitled as of right to claim to be dismissed from the suit, & in the absence of special grounds the petition ought to be served upon him; but the matter was one entirely within the discretion of the judge of the Probate & Divorce Div., & the Ct. of Appeal would not interfere with the exercise of that discretion unless it appeared that the judge had acted upon a wrong principle, or under some misapprehension, or without consideration: (2) although it was the usual practice for motions for leave to proceed without citing a co-resp. to be made *ex p.*, there was no rule of practice which prevented a resp. from being heard on such an application.—RUSH *v.* RUSH, BAILEY & PIMENTA, [1920] P. 242; 89 L. J. P. 129; 122 L. T. 792; 36 T. L. R. 302; 64 Sol. Jo. 323, C. A.

Annotation:—*As to* (1) **Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3786. Absence or insufficiency of evidence—Whether sufficient to dispense with necessity.]—CARRYER *v.* CARRYER & WATSON, No. 3780, *ante*.

3787. ——.]—JONES *v.* JONES, No. 3782, *ante*.

3788. —— ——.]—The mere belief of petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-resp.; if, however, the ct. is satisfied that no evidence can be obtained against

Sect. 8.—Institution and defence of proceedings: Sub-sect. 4, E. (b) ii., iii. & iv.]

the accused person, it may exercise its discretion under sect. 28 of Matrimonial Causes Act, 1857 (c. 85), & allow petitioner to proceed without joining him as co-resp.—EDWARDS *v.* EDWARDS & WILSON, [1897] P. 316; 67 L. J. P. 1; 77 L. T. 406; 13 T. L. R. 592.

3789. —— Wife's confession sole evidence of guilt.]—*Semble:* if a husband, who has been allowed to proceed without making a co-resp., afterwards & before the trial acquire evidence as to the person with whom his wife committed adultery, & who was previously unknown, he ought to bring the matter before the ct. He need not do so when the sole evidence is the wife's confession.—MUSPRATT *v.* MUSPRATT (1861), 31 L. J. P. M. & A. 28.

Annotations:— **Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3790. —— ——.]—The ct. will allow petitioner to proceed without making the alleged adulterer a co-resp., where no evidence can be obtained against him, the only evidence that he is the adulterer being the wife's confession.—JINKINGS *v.* JINKINGS (1867), L. R. 1 P. & D. 330; 36 L. J. P. & M. 48; 15 L. T. 512.

Annotations:—**Folld.** Gill *v.* Gill (1889), 37 W. R. 623. **Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3791. —— ——.]—A husband presented a petition to the ct. praying for a dissolution of his marriage on the grounds of his wife's adultery with two men, R. & E., both of whom were mentioned by name in the petition. The charge against E. was made on the strength of certain rumours which reached petitioner, & which were confirmed by a statement made to petitioner's solr. by resp., to the effect that E. was the father of her illegitimate child. The man E. positively denied the truth of resp.'s statement, &, upon petitioner & his solr. making inquiries into the matter, no satisfactory evidence was forthcoming to support resp.'s confession. Petitioner was thereupon advised to apply to the ct. for leave to proceed without citing any co-resp. in respect of the adultery which resulted in the birth of resp.'s illegitimate child:—*Held:* resp. having given the name of E. as the father of her child, & his name having been inserted in the petition, he must be made a co-resp. & be served with the usual citation.—PAYNE *v.* PAYNE, RODWAY & EDDELS (1888), 60 L. T. 238.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3792. —— ——.]—On a husband's petition for dissolution of the marriage on the ground of his wife's adultery, of which the only evidence was a confession by the wife, the ct., on motion, excused the husband from making the alleged adulterer a co-resp.—GILL *v.* GILL (1889), 60 L. T. 712; 37 W. R. 623.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89.

3793. —— ——.]—In a petition by a husband for divorce, it appeared that the address & occupation of the alleged adulterer were known to petitioner, but there was no evidence against him except resp.'s confession:—*Held:* petitioner could not be excused from making the adulterer a co-resp., & the citation must be personally served upon him as such co-resp.—CORNISH *v.* CORNISH (1890), 15 P. D. 131; 59 L. J. P. 84; 62 L. T. 667.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3794. —— ——.]—Where no evidence was obtainable against the man whom resp. had indicated as the father of one of her illegitimate children, & who was believed to be in America, the ct. gave petitioner leave to proceed without citing the alleged adulterer as co-resp.—BAGOT *v.* BAGOT (1890), 62 L. T. 612.

Annotations:—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89.

3795. —— ——.]—JONES *v.* JONES, No. 3782, *ante*.

3796. —— ——.]—MILES *v.* MILES (1896), *Times*, Mar. 20.

Annotation:—**Consd.** Jones *v.* Jones, [1896] P. 165.

3797. —— ——.]—A wife, in answer to inquiries by her husband touching the paternity of a child with which she was pregnant, & of which he could not be the father gave the name of a man, & made certain statements which she said were within petitioner's knowledge, but of which he declared he knew nothing; neither did he know of the existence of such a man. After petition filed, & upon motion by the husband (petitioner) for leave to proceed without citing any person as co-resp., the ct. directed petitioner's solr. to write to resp. with a view to having a personal interview with & obtaining an explanation from her, & refused to make an order in petitioner's favour until this had been done & the result made known to the ct.—GROSE *v.* GROSE (1897), 78 L. T. 89.

Annotation:—**Consd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3798. —— —— Petitioner's belief in innocence of party accused.]—SAUNDERS *v.* SAUNDERS, No. 3784, *ante*.

3799. —— —— ——.]—EDWARDS *v.* EDWARDS & WILSON, No. 3788, *ante*.

3800. Verdict against co-respondent in previous suit.]—A. having in an action of crim. con. recovered damages against B., applied for leave to present a petition for the dissolution of his marriage without making B. co-resp. to such petition:—*Held:* the circumstances of A. having recovered damages against B. did not constitute such special ground, within sect. 28 of Matrimonial Causes Act, 1857 (c. 85), as to justify the ct. to grant the application.—*Ex p.* ARMITAGE (1858), 1 Sw. & Tr. 71; *sub nom. Re* ARMITAGE'S DIVORCE, 4 Jur. N. S. 56; *sub nom. Ex p.* ——, 27 L. J. P. & M. 4; *sub nom.* ANON., 30 L. T. O. S. 278; 6 W. R. 222.

3801. ——.]—A. had obtained sentence of divorce *a mensâ et thoro* in the Ecclesiastical Ct. by reason of the wife's adultery, & had recovered damages in an undefended action for crim. con. from B., the alleged adulterer, who was now at the Cape of Good Hope. A. was allowed to proceed with his petition for dissolution, without making B. a co-resp.—TOMKIN *v.* TOMKIN (1858), 1 Sw. & Tr. 182; 27 L. J. P. & M. 54; 31 L. T. O. S. 186.

Annotation:—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

3802. Adulterer dead.]—In a suit for dissolution of marriage, by reason of the wife's adultery, where the alleged adulterer is dead or unknown, petitioner should apply at once to the ct. for an order to be excused from making a co-resp. *Qu.:* whether the ct. has power to make such an order after the citation has been served on resp.—TOLLEMACHE *v.* TOLLEMACHE (1858), 28 L. J. P. & M. 2.

Annotations:—**Distd.** Hunter *v.* Hunter & Vernon (1858), 28 L. J. P. & M. 3. **Consd.** Jones *v.* Jones, [1896] P. 165; Saunders *v.* Saunders, [1897] P. 89; Slaytor *v.* Slaytor & Jackson, [1897] P. 85.

3803. —— **One of two alleged adulterers.**]—Where, in a petition for dissolution of marriage, adultery is charged with a person who died before the institution of divorce proceedings, petitioner must apply to the ct. for an order to be excused

from making him a co-resp., even though adultery be charged against a second person who has been made a co-resp. to the suit.—SLAYTOR *v.* SLAYTOR & JACKSON, [1897] P. 85 ; 66 L. J. P. 97 ; 77 L. T. 141 ; 13 T. L. R. 244.

3804. Wife leading life of prostitute.]—An application to proceed in a suit for dissolution, without making a co-resp. granted, on the ground that the wife was living in a brothel.

Qu. : whether the wife can object to such an application.—HOOK *v.* HOOK (1858), 1 Sw. & Tr. 183 ; 27 L. J. P. & M. 61 ; 31 L. T. O. S. 269 ; 6 W. R. 868.

Annotations :—**Consd.** Jones *v.* Jones, [1896] P. 165. **Refd.** Saunders *v.* Saunders, [1897] P. 89 ; Rush *v.* Bailey & Pimenta, [1920] P. 242.

3805. ——.]—Where the wife, resp., was alleged to be leading the life of a common prostitute & to have committed adultery with several persons, who were necessary witnesses to enable petitioner to establish the charges of adultery, petitioner was allowed to proceed without making a co-resp.—PETERS *v.* PETERS & WILLETT (1861), 3 Sw. & Tr. 264.

3806. Inability to trace co-respondent—Affidavit support.]—Where a petition for dissolution of marriage alleged that "in the month of July, 1857, resp., at Birkenhead, committed adultery with a man whose name is to petitioner unknown," the judge ordinary refused to excuse petitioner from making a co-resp., on an affidavit simply stating that petitioner was unable to learn the name of the alleged adulterer, but subsequently granted the application on an affidavit which stated that petitioner had been informed by H. that resp. & a man had taken furnished apartments, & slept together in her house, & that she had not since seen the man, & did not know his name, though she had made efforts to discover it.—EVANS *v.* EVANS (1859), 28 L. J. P. & M. 20.

3807. —— **Adultery admitted by wife.**]—A husband petitioned for a dissolution of his marriage with his wife on the ground of her adultery with a man unknown. No evidence could be obtained as to the adulterer, except that the wife had stayed with a man in an hotel in London, where their names were entered in the books as "Mr. & Mrs. E. L. G." The wife, whilst admitting her adultery, would give no information as to the adulterer, beyond that "he would marry her when the divorce was pronounced." The ct. refused to dispense with making a co-resp., but ordered the petition to be amended by charging adultery with "E. L. G." in the ordinary way, co-resp. to be served by advertisement : &, petitioner being in Western Australia, any further affidavit in support of the petition to be dispensed with.—NICOLAS *v.* NICOLAS (1899), 68 L. J. P. 66 ; 80 L. T. 422.

3808. —— —— **Birth of illegitimate child.**]—JEFFREYS *v.* JEFFREYS (1912), 28 T. L. R. 504.

3809. Adulterer domiciled & resident abroad—Notice of proceedings.]—A person whose name has been introduced into a divorce petition as an alleged adulterer is entitled to have notice of the proceedings so as to afford him an opportunity of clearing himself from the charge, if he should desire to do so. The ct., in relieving a petitioner from the necessity of citing an alleged adulterer on the ground that he was a foreigner domiciled & resident out of the jurisdiction, required petitioner to give him notice of the pending proceedings.—BOGER *v.* BOGER, [1908] P. 300 ; 77 L. J. P. 151 ; 99 L. T. 881 ; 24 T. L. R. 744 ; 52 Sol. Jo. 552.

Annotation :—**Consd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Bulst, [1910] P. 271.

3810. ·.]—RUSH *v.* RUSH, BAILEY & PIMENTA, No. 3785, *ante*.

iii. *Adultery alleged in Countercharges.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177 ; Matrimonial Causes Rules, 1924, rr. 4 & 5.

Parties by intervention, *see* Sub-sect. 4, F., *post*.

3811. Whether adulterer must be made co-respondent—Claim for cross-relief.]—In a wife's petition for divorce, her husband, in his answer, made a countercharge of adultery against his wife, & prayed for a divorce. On an application made on behalf of the husband, by direction of the registrar, to be allowed to proceed without making a co-resp., the ct. granted the application, but reserved the question whether it has power to make a man a co-resp. in such a suit.—CURLING *v.* CURLING (1888), 14 P. D. 13 ; 58 L. J. P. 20 ; 59 L. T. 899.

Annotation :—**Consd.** Kenworthy *v.* Kenworthy, [1919] P. 65.

3812. —— ——.]—WHEELER *v.* WHEELER & RHODES, No. 3838, *post*.

3813. —— ——.]—HARROP *v.* HARROP, No. 3840, *post*.

3814. —— ——.]—When a husband in his answer to his wife's petition makes a countercharge against her of adultery, & seeks a divorce in the prayer of his answer, pursuant to Matrimonial Causes Act, 1866 (c. 32), s. 2, he must, pursuant to Matrimonial Causes Act, 1857 (c. 85), s. 28, make any known man, with whom he charges his wife with committing adultery, a party to the proceedings by citation ; & as regards any unknown man, he must apply, in the manner obligatory upon a petitioning husband under the same sect., for leave to be excused from making such man a party. Until the husband has taken these steps the registrar's certificate under Divorce Rules, r. 206, that the pleadings & proceedings are correct & in order cannot be granted ; but a time should be limited within which the husband is to take such steps &, in default, the part of his answer asking for relief in respect of his countercharge should be struck out, so as to put the pleadings in order & enable the registrar to make his certificate.—KENWORTHY *v.* KENWORTHY, [1919] P. 65 ; 88 L. J. P. 38 ; 120 L. T. 263 ; 35 T. L. R. 67 ; 63 Sol. Jo. 99, C. A.

3815. Application for leave to proceed without naming co-respondent—Service of notice of motion on petitioner—Whether essential.]—Where a husband in his answer to his wife's petition for divorce alleges that petitioner had communicated to him a venereal disease in consequence of her adultery with some man or men unknown, & the husband moves to proceed without naming the alleged adulterers as parties cited, petitioner ought not to be served with notice of the motion.—MACKENZIE *v.* MACKENZIE (1916), 114 L. T. 564 ; 32 T. L. R. 318.

——.]—*See, generally*, Sub-sect. 4, E. (*c*), *post*.

iv. *Adultery alleged both with Specified and Unknown Persons.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177 ; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3816. General rule.]—If a husband's petition for a dissolution of marriage alleges adultery with A. & B., & also with divers persons unknown, leave must be obtained to dispense with making such unknown persons co-resps.—PENTY *v.* PENTY, JOHNSON & SABINGIE (1882), 7 P. D. 19 ; 47 L. T.

Sect. 8.—*Institution and defence of proceedings: Sub-sect. 4, E. (b) iv., (c), & F. (a) & (b).*]

131; *sub nom.* PENHY *v.* PENHY, JOHNSON & SABINGIE, 51 L. J. P. 24.

3817. Allegations of adultery with unknown persons struck out.]—A petition for dissolution of marriage alleged that the wife had committed adultery with A., who was made co-resp., & in the fifth paragraph charged her with having committed adultery with a person unknown. On motion that petitioner might be excused from making such unknown person a co-resp., or be allowed to strike the fifth paragraph out of the petition:—*Held:* either might be done. *Qu.:* whether, as there was one co-resp. there was any necessity for the application.—HUNTER *v.* HUNTER & VERNON (1858), 28 L. J. P. & M. 3.

Annotation:—**Consd.** Carryer *v.* Carryer & Watson (1865), 4 Sw. & Tr. 94.

3818. ——.]—Where a petition in an undefended suit contained allegations of adultery with two co-resps. & also with two unknown persons, the ct. ordered the paragraphs of the petition referring to the two unknown persons to be struck out.—PEACOCK *v.* PEACOCK (1894), 6 R. 656.

3819. Petitioner excused from making unknown person co-respondent.]—HUNTER *v.* HUNTER & VERNON, No. 3817, *ante.*

(c) *Leave to proceed without naming Co-Respondents.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177; Matrimonial Causes Rules, 1924, rr. 4 & 5.

3820. Application for leave—Time for.]—An application to dispense with making a co-resp. should be made at an early stage of the suit; but, except under special circumstances, it will be allowed even after resp. has filed her answer to the petition.—JEFFERS *v.* JEFFERS (1877), 2 P. D. 90; 46 L. J. P. 80; 25 W. R. 513.

Annotations:—**Reid.** Dobson *v.* Dobson & Paxton, [1916] P. 110; Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3821. —— Affidavit of petitioner in support—Necessity for.]—Upon a motion to dispense with citation of any person as a co-resp., an affidavit by petitioner is indispensable.—DRINKWATER *v.* DRINKWATER (1889), 60 L. T. 398.

3822. —— —— Must be corroborated.]—The ct. will not, upon the affidavit of petitioner only, allow him to proceed without making a co-resp.—LEADER *v.* LEADER (1863), 32 L. J. P. M. & A. 136.

3823. —— —— ——.]—Where, upon a motion for leave to proceed without making a co-resp., it appeared that the affidavit of petitioner was not corroborated, the ct. ordered an adjournment in order that an affidavit in corroboration might be filed, & stated that, in future, if the affidavit of petitioner were not corroborated, any such motion would probably be dismissed.—BARBER *v.* BARBER, [1896] P. 73; 65 L. J. P. 58.

3824. —— Whether respondent may be heard in opposition—Notice of motion served.]—On a motion to dispense with a co-resp.:—*Held:* resp. had no *locus standi*, &, notwithstanding the fact that notice of motion had been served on her solrs., she could not be heard in opposition to the application.—DOBSON *v.* DOBSON & PAXTON, [1916] P. 110; 85 L. J. P. 150; 114 L. T. 565; 60 Sol. Jo. 387.

Annotation:—**Consd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3825. —— —— Motions usually made ex parte.]—RUSH *v.* RUSH, BAILEY & PIMENTA, No. 3785, *ante.*

3826. Where leave granted—Application for discharge of order—Whether respondent competent to make.]—The ct. refused to treat a resp. as guilty of contempt for not having complied with an order respecting the custody of a child in the absence of an affidavit that the order had been personally served upon her.

Petitioner having obtained leave to proceed without service of the citation upon co-resp., the ct. held it was not competent to resp. to move to discharge that order, although she alleged that it had been obtained by fraud.—ALLEN *v.* ALLEN & D'ARCY (1859), 23 J. P. 360.

3827. —— Subsequent evidence as to adulterer—Must be disclosed to court.]—MUSPRATT *v.* MUSPRATT, No. 3789, *ante.*

3828. —— Notice of pending proceedings to alleged adulterer.]—BOGER *v.* BOGER, No. 3809, *ante.*

3829. Proper procedure where adulterer domiciled abroad.]—(1) Where, upon a husband's petition for divorce, the alleged adulterer is domiciled abroad, & so is not subject to the jurisdiction of the Divorce Ct. here, the proper practice is for petitioner to move for leave to proceed without citing him as co-resp.

(2) Where co-resp., domiciled in a foreign country, had been dismissed from a suit on his own motion, the ct. declined to give the husband his costs, although co-resp. had entered an unconditional appearance to the citation.—BAKER *v.* BAKER, BAKER *v.* BAKER & DWYER, [1908] P. 257; 77 L. J. P. 96; 99 L. T. 313; 24 T. L. R. 493; 52 Sol. Jo. 413.

Annotation:—*As to* (2) **Consd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

Jurisidiction over adulterers domiciled abroad.]—*See* CONFLICT OF LAWS, Vol. XI., p. 425, Nos. 907–915.

F. Parties by Intervention.

(a) *In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17 & 19.

Legitimacy declarations, *see* BASTARDY, Vol. III., p. 370, Nos. 110 *et seq.*

3830. Whether court will admit—Parties with estates expectant upon issue of marriage—When validity of marriage questioned.]—In a cause of divorce, where the alleged marriage is denied to be valid, the ct. may probably permit third parties, who have estates expectant (*inter alia*) upon the issue of such alleged marriage being illegitimate; & who consequently are interested in the question of its validity, to be cited to "see proceedings" in the cause, so far as relates to the marriage.—MONTAGUE *v.* MONTAGUE (1824), 2 Add. 372; 162 E. R. 331.

3831. —— Where no personal interest.]—In a suit for dissolution of a marriage, the only parties who are recognised by the rules of the ct. are petitioner, resp., & co-resp. The ct. has no authority to allow an individual, who has no personal interest, to suggest a charge against one of the parties which has not been imputed by the other, &, for that purpose, to intervene in the suit.—Y—— *v.* Y—— (1860), 1 Sw. & Tr. 598; 1 L. T. 414; 8 W. R. 273; 164 E. R. 877; *sub nom. Re* CHADDOCK *v.* CHADDOCK, *Ex p.* VERAX, 29 L. J. P. M. & A. 55; 6 Jur. N. S. 348.

Annotation:—**Distd.** Jessop *v.* Jessop (1861), 7 Jur. N. S. 609.

s. *Inability to discover co-respondent.*]—BUSH *v.* BUSH (1893), 12 N. Z. L. R. 269. **N.Z.**

3832. —— Alleged adulteress to be made a respondent—Petition by wife.]—In a suit by a wife for dissolution of marriage, the ct., upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a resp.—BELL *v.* BELL (1883), 8 P. D. 217.

3833. —— Assignee of damages.]—HUNT *v.* HUNT & COOPER, No. 5854, *post*.

3834. Time for intervention—After issue joined.]—An intervener may plead after issue joined by leave of the ct.—JONES *v.* WILLIAMS (1865), 4 Sw. & Tr. 19; 34 L. J. P. M. & A. 102; 29 J. P. 200; 11 Jur. N. S. 288.

3835. —— After decree nisi.]—In a divorce suit, between the decree *nisi* & the application to make it absolute, the ct. on terms, allowed the intervention of a lady who was not a party to the suit, but with whom resp. was alleged by the petition to have committed adultery.—FRENCH *v.* FRENCH (1914), 30 T. L. R. 584.

3836. Position of intervener—Opposite party—Within Married Women's Property Act, 1893, s. 2.]—A wife, having presented a petition for dissolution of marriage on the ground of cruelty & adultery, in her particulars alleged that the adultery had been committed with M. R. An order was made on Oct. 10, 1911, giving M. R. leave to intervene & directing her to file an answer within fourteen days. The intervener filed an answer, & at the trial the jury found that there had been no misconduct between her & resp., & petitioner was ordered to pay her costs. Under her marriage settlement petitioner was entitled to the income of realty for her life without power of anticipation. The intervener issued a summons for the appointment of a receiver of the life estate. Immediately after the conclusion of the first proceedings petitioner presented a second petition for dissolution of marriage. This was undefended, & a decree *nisi* was pronounced on July 9, 1912. On July 22 an order was made by the President that the trustees of petitioner's settlement should, notwithstanding the restraint on anticipation, pay half her income to the intervener from the date of the summons up to decree absolute, towards satisfaction of her costs. On Mar. 18, 1913, the summons was ordered to stand over until the decree *nisi* had been made absolute. Petitioner appealed & the intervener gave cross-notice of appeal:—*Held:* (1) the intervener was an "opposite party" within the above sect.; (2) the discretionary power of the ct. was not exhausted by the order of July 22, 1912; (3) the property which the ct. could deal with under sect. 2 was the whole property which was subject to the restraint on anticipation, & not merely the portion of the property which for the time being was effectually restrained from anticipation, that was to say, during coverture; & the matter must be remitted to the President to be dealt with according to his discretion.—STUDLEY *v.* STUDLEY, [1913] P. 119; 82 L. J. P. 65; 108 L. T. 657; 57 Sol. Jo. 425. C. A.

Annotation:—As to (3) **Refd.** Wood *v.* Lewis, [1914] 3 K. B. 73.

3837. No evidence offered against intervener at hearing—Dismissal from proceedings.]—In a petition by the wife for dissolution of the marriage on the ground of adultery & cruelty, one of the persons wth whom the husband was alleged to have committed adultery obtained leave to intervene, & her name was added to the title of the suit. Subsequently she obtained an order for a commission to examine witnesses abroad, & for the postponement of the trial of the issues affecting her until the return of the commission. Petitioner obtained a decree absolute, on evidence which satisfied the ct. that resp. had committed adultery with women other than intervener; & the issue affecting her was never tried:—*Held:* the name of intervener must be struck out of all pending & future proceedings.—CONNEMARA *v.* CONNEMARA, [1892] P. 102; 61 L. J. P. 96; 66 L. T. 592.

Costs.]—*See* Sect. 18, sub-sect. 5, *post*.

(*b*) *Adultery alleged in Countercharges.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17–19.

Whether adulterer must be made co-respondent, *see* Sub-sect. 4, E. (*b*) iii., *ante*.

3838. Whether alleged adulterer allowed to intervene—No claim for cross-relief.]—Where in a wife's suit for dissolution of marriage the husband in his answer charged his wife with having committed adultery with a specified person, but did not pray for a dissolution of the marriage, the ct. allowed the alleged adulterer to intervene & file an answer.

Under that sect. [29 & 30 Vict. c. 32, s. 2], where resp., the husband, has in answer to his wife's petition for a dissolution of marriage, made a countercharge of adultery against her, & prays for a dissolution of his marriage on the ground of the adultery, it is the clearly established practice of the ct. to require him to state who the person is who is charged with committing adultery with his wife, & to make him a party to the suit ((BUTT, J.).—WHEELER *v.* WHEELER & RHODES (1889), 14 P. D. 154; 58 L. J. P. 65; 61 L. T. 306.

Annotations:—**Distd.** Harrop *v.* Harrop, [1899] P. 61. **Apprvd.** Lowe *v.* Lowe, [1899] P. 204; Kenworthy *v.* Kenworthy, [1919] P. 65.

3839. —— ——.]—A petition by a husband claiming a divorce from his wife & damages against co-resp. was dismissed, by consent, before trial. Thereupon the wife filed a petition claiming a judicial separation, & the husband, in his answer, countercharged the adultery which he had alleged in the former suit, but he asked for no relief. The alleged adulterer applied for leave to intervene & defend: *Held:* the practice of the Ecclesiastical Cts. governed the case, &, as that practice afforded no precedent for allowing an intervention in such circumstances, the application must be refused.—FARRELL *v.* FARRELL (1896), 76 L. T. 167.

3840. —— —— ——.]—A husband, in his answer to a petition by his wife for dissolution of marriage, made a countercharge against her of adultery with a specified person, without claiming cross-relief, or "such further or other remedy as the nature of the case may require":—*Held:* the ct. had no power to allow the alleged adulterer to intervene.

Where the answer of resp. is, as in this case, merely an answer the ct. cannot make a decree for dissolution. This can only be done where the

PART XIII. SECT. 8, SUB-SECT. 4.—F. (a).

3832 i. *Whether court will admit—Alleged adulteress to be made a respondent—Petition by wife.*]—In a wife's petition for dissolution of marriage by reason of the husband's adultery, the alleged adulteress obtained a rule calling upon petitioner to show cause why she should not be allowed to intervene.—BAILEY *v.* BAILEY (1897), I. L. R. 30 Calc. 490, n.—**IND.**

t. —— —— —— *Incestuous adultery.*]—In a wife's suit for divorce against the husband on the ground of incestuous adultery, the ct. has no power under Indian Divorce Act (IV. of 1869) to allow the alleged adulteress to intervene.—RAMSAY *v.* BOYLE (1903), I. L. R. 30 Calc. 189; 7 C. W. N. 501.—**IND.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 4, *F.* (*b*) & (*c*); *sub-sect.* 5, *A.*, *B.*, *C.* & *D.* (*a*) & (*b*).]

answer contains a claim for cross-relief, & in that case resp., if a husband, is bound to make the alleged adulterer a co-resp., as he would have had to do if he had presented a cross-petition (GORELL BARNES, J.).—HARROP *v.* HARROP, [1899] P. 61; 68 L. J. P. 58; 80 L. T. 171; 15 T. L. R. 144.

Annotations:—**Follid.** Lowe *v.* Lowe, [1899] P. 204. **Apprvd.** Kenworthy *v.* Kenworthy, [1919] P. 65.

3841. Answer not treated as cross-petition.]—Where a husband in his answer to his wife's petition made a countercharge against her of adultery with a person named, but did not ask for any relief whatever beyond the simple dismissal of the petition:—*Held:* under the circumstances the answer could not be treated as a cross-petition under sect. 2 of Matrimonial Causes Act, 1866 (c. 32), but merely as an ordinary defence, & therefore the ct. had no jurisdiction, on the opposition of the husband, to allow the alleged adulterer to intervene.—LOWE *v.* LOWE, [1899] P. 204; 68 L. J. P. 60; 80 L. T. 575; 47 W. R. 553; 15 T. L. R. 360; 43 Sol. Jo. 495, C. A.

Annotation:—**Apld.** Kenworthy *v.* Kenworthy, [1919] P. 65.

(*c*) *Where King's Proctor has intervened.*

See, now, Supreme Court of Judicature Act, 1925 (c. 49), s. 197; Matrimonial Causes Rules, 1924, rr. 17–19.

Intervention by King's Proctor, generally, *see* Sect. 19, *post*.

3842. When petitioner charged with adultery—Whether intervention of alleged adulterer permitted.]—A wife obtained a decree *nisi*, but the Queen's Proctor subsequently intervened, & alleged that petitioner was living in adultery with one J.:—*Held:* J. was not a party to the suit, & could not be admitted to intervene.—GRIEVE *v.* GRIEVE, [1893] P. 288; 63 L. J. P. 29; 69 L. T. 462; 1 R.

Annotations:—**Follid.** Carew *v.* Carew, [1894] P. 31. **Consd.** Harrop *v.* Harrop, [1899] P. 61; Lowe *v.* Lowe (1899), 80 L. T. 575.

3843. ——— ———.]—Where a wife had obtained a decree *nisi*, dissolving her marriage on the ground of adultery & cruelty, & the Queen's Proctor intervened, alleging, in his plea, collusion, condonation, & suppression of material facts, leave was given to the Queen's Proctor, in the course of the trial, to add a charge of adultery, which he alleged had been committed by petitioner with one E. who thereupon moved for leave to intervene & defend himself from the charge:—*Held:* there was no jurisdiction to permit such an intervention.—CAREW *v.* CAREW, [1894] P. 31; 63 L. J. P. 74; 6 R. 662.

Annotations:—**Consd.** Harrop *v.* Harrop, [1899] P. 61; Lowe *v.* Lowe (1899), 80 L. T. 575.

See, now, Matrimonial Causes Act, 1907 (c. 12), s. 3.

3844. ——— ———.]—DAVISON *v.* DAVISON, No. 5169, *post*.

3845. Co-respondent dismissed from original suit—Whether intervention by co-respondent or respondent permitted—No charge of collusion.]—In a suit by a husband for dissolution of his marriage on the ground of his wife's alleged adultery with co-resp., the principal evidence consisted of the husband's statement on oath of a confession by his wife that she had committed adultery with co-resp. Co-resp. on the advice of his counsel did not tender himself as a witness. A decree *nisi* for dissolution of the marriage was pronounced, but the suit was dismissed as against the co-resp. with costs, the ct. holding that there was no evidence against him. The Queen's Proctor afterwards entered an appearance in the suit, & filed a plea wherein he alleged that it would be contrary to justice for the decree *nisi* to be made absolute, as certain material facts had not been brought to the attention of the ct.; that there was no corroboration of the confession; that certain witnesses who had been referred to in such confession, & whose evidence was material had not been called; & that, apart from the confession, there was no evidence of adultery. The pleas were held sufficient, though redundant.

An application was made by resp. for leave to enter an appearance in, & appear on the hearing of the proceedings by the Queen's Proctor. She also intimated that she intended to give evidence in support of the admission of adultery. A similar application was made on behalf of co-resp. who alleged that he would now have to meet the additional evidence of resp.:—*Held:* both applications must be refused.

The only issue in such a case is between resp. & petitioner; co-resp. on his dismissal from the suit, is no longer a party & neither he nor resp. (the ground of intervention not being collusion) has any *locus standi*.—CRAWFORD *v.* CRAWFORD & DILKE (1886), 55 L. T. 305; 34 W. R. 677; 2 T. L. R. 768, C. A.

Annotations:—**Consd.** Lowe *v.* Lowe (1899), 80 L. T. 575. **Refd.** Blackhall *v.* Blackhall (1888), 13 P. D. 94; Taplen *v.* Taplen (1891), 64 L. T. 870; Grieve *v.* Grieve, [1893] P. 288.

SUB-SECT. 5.—SERVICE.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 6–14, 28, 29.

3846. Commencement of proceedings.]—RAY *v.* SHERWOOD & RAY, No. 3647, *ante*.

3847. Petition for damages—Service on wife—Necessity for.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *ante*.

3848. Petition charging husband with adultery—Service on person with whom adultery alleged—Matrimonial Causes Rules, 1924, r. 17.]—TAYLOR *v.* TAYLOR, WHITE *v.* WHITE, No. 3663, *ante*.

3849. Questions put to respondent at time of service—Propriety.]—PURGOLD *v.* PURGOLD & LAMBART (1903), *Times*, Oct. 29.

Annotation:—**Refd.** Hallam *v.* Hallam (1903), 20 T. L. R. 34.

3850. ——— ———.]—HALLAM *v.* HALLAM (1903), 20 T. L. R. 34.

Annotation:—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

3851. Identification of persons served.]—SMITH *v.* SMITH & ARMSTRONG, No. 3919, *post*.

3852. Royal palaces exempt from service.]—NYERFORD *v.* WARREN (EARL) (1293), 3 Co. Inst. 141.

Annotations:—**Refd.** A.-G. *v.* Dakin (1867), L. R. 2 Exch. 290; Combe *v.* De la Bere (1882), 22 Ch. D. 316.

———.]—*See, further*, CONSTITUTIONAL LAW, Vol. XI., pp. 519 *et seq.*, Nos. 242 *et seq.*

PART XIII. SECT. 8, SUB-SECT. 5.—A.

a. *Where service impossible — Dismissal of co-respondent from suit.*]—On a petition for dissolution of marriage the proper course, when personal service or substituted service which may be trusted to reach the co-resp. is impossible, is to move to dismiss him from the suit.—SCOTT *v.* SCOTT (1913), 32 N. Z. L. R. 979.—**N.Z.**

B. Necessity for Personal Service.

See Matrimonial Causes Rules, 1924, rr. 7, 8.
Substituted service, *see* Sub-sect. 5, E., *post*.

3853. General rule.]—Sect. 42 of Matrimonial Causes Act, 1857 (c. 85), & the Rules founded thereon require personal service of the citation & copy of petition, unless the ct. authorises a substituted service, or gives petitioner leave to proceed without service. Acceptance of service by an attorney on behalf of resp. is not sufficient.—MILNE *v.* MILNE (1865), 4 Sw. & Tr. 183; 34 L. J. P. M. & A. 143; 164 E. R. 1487.

3854. Respondents abroad.]—In a suit for dissolution of marriage on the ground of the wife's adultery, the affidavits, in support of a motion to dispense with personal service of citations & copies of the petition, stated that the wife had deserted her husband at Liverpool in Aug. 1857; that there was reason to believe that she afterwards lived in this country with Q., co-resp., as his wife; that in Oct. 1857, two persons passing under the name of Mr. & Mrs. Q. sailed from London for Australia, & afterwards landed in Melbourne; that there was reason to believe that the said Mrs. & Mr. Q. were resp. & co-resp.; that inquiries had been made in Melbourne of the agent of the ship in which those persons went to Australia, & of other shipping agents there, also of the inspector of police at Sydney, but that no trace of them or of their movements could be discovered. Upon the above affidavits, service on the resp. & co-resp. was altogether dispensed with.

Semble: if there had been any certain information as to their movements in Australia, further inquiries would probably have led to their discovery, & would have, therefore, been necessary.—COOK *v.* COOK & QUAILE (1858), 28 L. J. P. & M. 5; *subsequent proceedings*, COOKE *v.* COOKE & QUAILE (1859), 2 Sw. & Tr. 50.

3855. Acceptance of service by respondent's solicitor.]—MILNE *v.* MILNE, No. 3853, *ante*.

3856. ——.]—An undertaking by resp.'s solr. to appear is not sufficient; the citation must be served upon resp.—DE NICEVILLE *v.* DE NICEVILLE (1868), 37 L. J. P. & M. 43.

C. Service on Persons under Disability.

3857. Convict—Prison official—Communication of contents.]—If resp. be in prison the ct. will not be satisfied with substituted service of the petition & citation to be made on an official of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to resp.—BLAND *v.* BLAND (1875), L. R. 3 P. & D. 233; 44 L. J. P. & M. 14; 32 L. T. 404; 23 W. R. 419.

3858. Lunatic—Not so found—Service on respondent—Presence of asylum officials.]—GILES *v.* GILES, No. 2318, *ante*.

3859. Minor—Service on respondent—Presence of guardians.]—Where resp. is a minor it is not necessary for petitioner to see that a guardian *ad litem* has been appointed. Service on a resp. who has no such guardian is good if effected in the presence of his natural guardians.

Semble: it would be good without their presence.—QUINN *v.* QUINN, [1920] P. 65; 89 L. J. P. 38; 122 L. T. 464; 36 T. L. R. 170; 64 Sol. Jo. 226.

D. Service out of the Jurisdiction.

(a) In General.

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Jurisdiction of court over foreign respondents & co-respondents.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 421 *et seq.*, Nos. 874 *et seq.*

3860. Effect of Matrimonial Causes Act, 1857 (c. 85), s. 42—Jurisdiction not extended.]—GRAHAM *v.* GRAHAM, No. 3867, *post*.

(b) In Suits for Dissolution of Marriage.

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Jurisdiction of court over foreigners—As regards petitioner & respondent.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 421 *et seq.*, Nos. 874 *et seq.*

—— **As regards co-respondent.**]—*See* CONFLICT OF LAWS, Vol. XI., pp. 425 *et seq.*, Nos. 907 *et seq.*

3861. On respondent—Service of citation.]—An attempt was made, at the suit of a wife for a divorce, to serve the husband with a citation taken out in Oct. 1848, at his last-known place of residence, which was within the jurisdiction of the ct. It subsequently appeared he left that residence in Mar. 1847. A decree by ways & means was, on the return of the citation, executed at that house, & at the parish church. On Feb. 5, 1849, he was personally served in the West Indies. The ct. on motion pronounced the husband in contempt, "for the purpose of carrying on the proceedings, & placing the evidence on record." It was stated there was no jurisdiction in the West Indies to enable the wife to institute a suit. Eventually a sentence of divorce was pronounced. The proceedings throughout were *in pœnam*.—DASENT *v.* DASENT (1850), 1 Rob. Eccl. 800; 7 Notes of Cases, 126; 14 L. T. O. S. 48; 13 Jur. 832; 163 E. R. 1218.

Annotations:—**Consd.** Yelverton *v.* Yelverton (1859), 1 Sw. & Tr. 574. **Refd.** Burton *v.* Burton (1873), 21 W. R. 648; Graham *v.* Graham, [1923] P. 31. **Mentd.** L. C. C. *v.* Dundas, [1904] P. 1.

3862. —— **Whether essential—Dissolution suit after dismissal of previous suit for nullity—Respondent resident abroad.**]—CATTERALL *v.* CATTERALL (1847), 1 Rob. Eccl. 580 5 Notes of Cases, 466; 11 Jur. 914; 163 E. R. 1142.

Annotations:—**Refd.** Anon. (1857), Dea. & Sw. 295. **Mentd.** Beamish *v.* Beamish (1861), 9 H. L. Cas. 274; Sichell *v.* Lambert (1864), 3 New Rep. 385.

3863. —— **On active service abroad—Service by registered letter—Practice in restitution suits not applicable.**]—The practice laid down in regard to service of decrees for restitution of conjugal rights upon resps. engaged on active service abroad does not apply to the service of citations & petitions in suits for dissolution of marriage; although it is recognised that where, after service of the citation, it appears that a resp. desires to contest the suit, the further proceedings may have to abide his return to this country, on leave or otherwise.

Where personal service of a citation & petition for divorce could not be effected upon a resp., who was serving as a seaman on board one of His Majesty's ships in the Far East in time of war, the ct. directed that service might be effected by sending the documents in a prepaid registered letter addressed to resp., & fixed the time for

PART XIII. SECT. 8, SUB-SECT. 5.—B.

3853 l. *General rule.*]—In a divorce action the trial judge may take into consideration the propriety of an order made dispensing with personal service of the writ of summons, & if in his opinion such order was made on insufficient material he may on that ground refuse a decree.—S. *v.* S., [1921] 2 W. W. R. 939.—**CAN.**

b. *Respondent abroad — In prison.*]—C. filed a petition for dissolution of marriage. Resp. was proved to be undergoing a sentence in a prison in N. S. W.:—*Held:* in the circumstances resp. should be personally served with the summons & petition.—L. (OTHERWISE C.) *v.* C. (1912), 31 N. Z. L. R. 1064.—**N.Z.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 5, *D.* (*b*), (*c*), (*d*) & (*e*), & *E.* (*a*) *i.*]

appearance at one hundred days.—TURNER *v.* TURNER, [1916] P. 324; 86 L. J. P. 13; 115 L. T. 790; 33 T. L. R. 33; 61 Sol. Jo. 58.

3864. Position of co-respondent.]—(1) Whatever it is that determines the jurisdiction of this ct. with regard to co-resps., that jurisdiction does not depend upon the domicil of co-resp., nor is it to be determined by the question whether co-resp. is or is not a British subject.

(2) So far as a co-resp. is concerned, the citation corresponds with what would have been, before Matrimonial Causes Act, 1857 (c. 85), came into operation, the writ in an action for *crim. con.*

(3) Service of the citation & sealed copy of the petition upon a co-resp., if out of England, places him on the same footing with regard to jurisdiction as a deft. properly served with a writ out of the jurisdiction under R. S. C., Ord. 11, in the K. B. or Ch. Div.

(4) The claim against a co-resp. in a divorce suit is merely a personal claim for money, & is not complicated with questions of international law arising out of status, as in the case of a petitioner & resp.

(5) Although a judgment, following on a verdict for damages in a divorce suit in this ct., could not be enforced against a foreigner in a foreign country, it might possibly be enforced against a Scotsman or an Irishman, in Scotland or Ireland, by means of Judgments Extension Act, 1868 (c. 54).

(6) The enactment in Matrimonial Causes Act, 1857 (c. 85), s. 42, providing for service of any person at any place is only a municipal law in favour of those who sue in this ct.; & the Legislature thereby does not concern itself with the question whether an order against a co-resp. for payment of damages or costs in a proceeding began by citation served abroad would or would not be enforceable as a foreign judgment in another country. The object of the provision is that this ct. may make the order & may enforce it against any property which the person against whom the order is made may have within its own jurisdiction or within its own reach.

(7) As the Act gives power to serve anybody as co-resp. anywhere, it gives jurisdiction to make any order against co-resp., & to issue process of execution to enforce the order in this country; & this can be done without in any way affecting any international comity or offending any international susceptibilities.—RAYMENT *v.* RAYMENT & STUART, CHAPMAN *v.* CHAPMAN & BUIST, [1910] P. 271; 79 L. J. P. 115; 103 L. T. 430; 26 T. L. R. 634; 54 Sol. Jo. 721.

Annotations:—*As to* (1) **Apprvd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242. **Refd.** Phillips *v.* Batho, [1913] 3 K. B. 25. *As to* (7) **Apprvd.** Rush *v.* Rush, Bailey & Pimenta, [1920] P. 242.

3865. Service in France—Requirements of Anglo-French Convention, 1922.]—Where there has been service in France of a divorce petition in accordance with the requirements of the Anglo-French Convention, 1922, that may be taken to be a sufficient compliance with Divorce Rules, rr. 11, 14.—REECE *v.* REECE (1924), 132 L. T. 349; 41 T. L. R. 24.

(*c*) *In Suits for Judicial Separation.*

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

3866. Service on respondent.]—A citation issued from this ct., addressed to a party then residing & being within the diocese. The party quitted England before service was affected. The citation was personally served on him in parts abroad. Protest to appearing overruled.—COLLETT *v.* COLLETT (1843), 3 Curt. 726; 2 Notes of Cases, 504; 7 Jur. 1164; 163 E. R. 881.

Annotations:—**Refd.** Yelverton *v.* Yelverton (1859), 1 Sw. & Tr. 574; Graham *v.* Graham, [1923] P. 31.

3867. ——.]—Statute of Citations, 1531 (c. 9), s. 2, which forbade the Ecclesiastical Cts. to cite any person out of the diocese where he was inhabiting or dwelling, must be taken to have limited the jurisdiction & not only the power of service of the Ecclesiastical Cts., & Matrimonial Causes Act, 1857 (c. 85), s. 42, which permits service within or without His Majesty's Dominions, cannot extend the jurisdiction.—GRAHAM *v.* GRAHAM, [1923] P. 31; 92 L. J. P. 26; 128 L. T. 639; 39 T. L. R. 139; 67 Sol. Jo. 316.

Annotations:—**Consd.** Eustace *v.* Eustace, [1924] P. 45. **Mentd.** Smith *v.* Smith, [1923] P. 128.

See, also, CONFLICT OF LAWS, Vol. XI., pp. 426, 427, Nos. 916–920.

(*d*) *In Suits for Restitution of Conjugal Rights.*

See Matrimonial Causes Rules, 1924, r. 10; &, *generally*, PRACTICE.

Whether residence within jurisdiction essential.]—*See* CONFLICT OF LAWS, Vol. XI., p. 427, Nos. 921–923.

3868. Service of petition & citation—Whether court has power to order.]—A wife's remedy for matrimonial wrongs must be usually sought in the place of her husband's domicil. The English Divorce Ct. has not jurisdiction against a foreigner, after he has quitted this country, for not rendering conjugal rights to his wife while he was here. The provisions of Matrimonial Causes Act, 1857 (c. 85), s. 42 (for service out of Her Majesty's dominions), do not apply to suits for restitution of conjugal rights.—FIREBRACE *v.* FIREBRACE (1878), 4 P. D. 63; 47 L. J. P. 41; 39 L. T. 94; 26 W. R. 617.

Annotations:—**Folld.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Consd.** Graham *v.* Graham, [1923] P. 31; Eustace *v.* Eustace, [1924] P. 45. **Refd.** Niboyet *v.* Niboyet (1878), 4 P. D. 1; Armytage *v.* Armytage, [1898] P. 178; Dicks *v.* Dicks, [1899] P. 275; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; Perrin *v.* Perrin, Powell *v.* Powell (1914), 83 L. J. P. 69.

3869. —— ——.]—The ct. has no power to allow service abroad of a petition for restitution of conjugal rights.—CHICHESTER *v.* CHICHESTER (1885), 10 P. D. 186; 34 W. R. 65.

Annotations:—**Consd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Refd.** Dicks *v.* Dicks, [1899] P. 275.

3870. —— — —.]—(1) A citation & petition in a suit for restitution of conjugal rights, as well as the previous letter of demand required by the rules, may now be served out of the jurisdiction; & where a decree is granted the decree may likewise be served out of the jurisdiction.

(2) In any further proceedings arising out of a non-compliance with the decree, petitioner must satisfy the ct. that resp. has been served therewith at a place from which he could reasonably have returned to his wife within the period named in the decree.

(3) If an agreement for separation has previously been entered into between the parties to a suit for restitution of conjugal rights, but such agreement has not been pleaded by resp. in bar to the petition, it is not the duty of the ct. to raise the point how far petitioner's rights to a decree for restitution are affected by such agreement. Nevertheless, if such decree is made the basis of

subsequent proceedings, it is open to the ct. to go into the whole matter.—BATEMAN *v.* BATEMAN, [1901] P. 136; 84 L. T. 64, 331; 17 T. L. R. 190; 45 Sol. Jo. 295; *sub nom.* HARDIE *v.* HARDIE, BATEMAN *v.* BATEMAN, 70 L. J. P. 29.

Annotations:—*As to* (1) **Consd. & Distd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Folld.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135. **Refd.** Eustace *v.* Eustace, [1924] P. 45. *Generally,* **Mentd.** Kennedy *v.* Kennedy, [1907] P. 49.

3871. —— ——.]—(1) The amendment of the law effected by Matrimonial Causes Act, 1884 (c. 68), relates to matters subsequent to the decree; the essence of the suit & of the decree for restitution of conjugal rights remains the same, but its consequences & effects are different.

(2) No power is given, either by Matrimonial Causes Act, 1857 (c. 85), s. 42, or by any other sect. or Act, to serve a citation & petition for restitution of conjugal rights beyond the jurisdiction of the ct.

Where service of the citation & of a sealed copy of a petition for restitution of conjugal rights had been effected abroad, an order setting aside the service was made.

(3) *Qu.:* whether, in a case where service is duly & properly effected, & where no question arises as to the jurisdiction of the ct. in pronouncing a decree for restitution of conjugal rights, such decree can be served out of the jurisdiction.

(4) Where neither party to a marriage was domiciled or resident within the jurisdiction, & their only connection with this country at the date of their marriage was that they came over here for one day for the purpose of being married, & their only matrimonial residences were abroad, the ct. cannot decree restitution of conjugal rights.—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), [1914] P. 53; 83 L. J. P. 40; 110 L. T. 121; 30 T. L. R. 329; 58 Sol. Jo. 341.

Annotation:—*As to* (4) **Distd.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135.

3872. —— —— **Both parties domiciled in England—Residence in England when suit instituted.**]—In a suit for restitution of conjugal rights, where it appears from the petition that the parties to the suit are domiciled in England at the date thereof, or that they had a matrimonial home in England at the time when cohabitation ceased, or that they were both resident in England at the time of the institution of the suit, the citation & sealed copy of the petition may be served either within or without His Majesty's dominions; & when a suit for restitution of conjugal rights has been duly instituted, & a decree has been made therein, such decree may be served on resp. either within or without His Majesty's dominions.—PERRIN *v.* PERRIN, POWELL *v.* POWELL, [1914] P. 135; 83 L. J. P. 69; 111 L. T. 335; 30 T. L. R. 497; 58 Sol. Jo. 513.

Annotation:—**Refd.** Eustace *v.* Eustace, [1924] P. 45.

3873. Service of decree—Respondent domiciled in England.]—A decree for restitution of conjugal rights made against a resp. who is domiciled in England may be served on him out of the jurisdiction.—DICKS *v.* DICKS, [1899] P. 275; 68 L. J. P. 118; 81 L. T. 462; 48 W. R. 302; 15 T. L. R. 482.

Annotations:—**Consd.** Bateman *v.* Bateman, [1901] P. 136; De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53. **Folld.** Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135. **Refd.** Eustace *v.* Eustace, [1924] P. 45.

3874. —— **Where service of petition & citation effected.**]—BATEMAN *v.* BATEMAN, No. 3870, *ante.*

3875. —— ——.]—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), No. 3871, *ante.*

3876. —— ——.]—PERRIN *v.* PERRIN, POWELL *v.* POWELL, No. 3872, *ante.*

3877. —— **Suspension of service—Till respondent's return to England.**]—PEARSON *v.* PEARSON, No. 2432, *ante.*

3878. —— —— **Until further order—Respondent on active service.**]—Where, in a suit for restitution of conjugal rights, resp. was on active service abroad, the ct. in pronouncing a decree, directed that the decree should not be served until further order.—MASON *v.* MASON (1915), 59 Sol. Jo. 530.

Annotations:—**Distd.** Turner *v.* Turner, [1916] P. 324. **Refd.** Lang *v.* Lang (1915), 113 L. T. 928.

3879. —— —— —— ——.]—In cases where a decree for the restitution of conjugal rights is made against a resp. who is on active service with His Majesty's forces the decree will be drawn up, but ordered to lie in the office until the ct. gives further directions as to its service.—LANG *v.* LANG (1915), 113 L. T. 928; 31 T. L. R. 467; 59 Sol. Jo. 561.

Annotation:—**Distd.** Turner *v.* Turner, [1916] P. 306.

Service of written demand for return to cohabitation.]—*See* Sect. 5, sub-sect. 1, D., *ante.*

3880. Whether leave of court essential.]—Where a sealed copy of a petition for the restitution of conjugal rights & a copy of the citation had been duly served upon resp., then resident in Ireland, the ct. granted a decree, although no leave had been previously obtained for service out of the jurisdiction.—BUCKLEY *v.* BUCKLEY (1912), 107 L. T. 590; 57 Sol. Jo. 9.

3881. Where service effected abroad—Order made setting aside service.]—CHICHESTER *v.* CHICHESTER (1885), 10 P. D. 186; 34 W. R. 65.

Annotations:—**Refd.** Dicks *v.* Dicks, [1899] P. 275; De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53.

3882. —— ——.]—DE GASQUET JAMES (COUNTESS) *v.* MECKLENBURG-SCHWERIN (DUKE), No. 3871, *ante.*

(*e*) *In Suits for Nullity of Marriage.*

See Matrimonial Causes Rules, 1924, r. 10; &, *generally,* PRACTICE.

Jurisdiction of court as to nullity proceedings, *see* CONFLICT OF LAWS, Vol. XI., p. 428, Nos.

3883. Personal service abroad. TENDUCCI'S CASE (1775), cited in 3 Phillim. at p. 595; 161 E. R. 1425.

Annotations:—**Consd.** Yelverton *v.* Yelverton (1859), Sea. & Sm. 49. **Refd.** Collett *v.* Collett (1843), 3 Curt. 726; Dasent *v.* Dasent (1849), 7 Notes of Cases, 126; H. (falsely called C——) *v.* C—— (1860), 29 L. J. P. M. & A. 81.

E. Substituted Service.

(*a*) *When Granted.*

i. *In Suits for Dissolution of Marriage.*

See Matrimonial Causes Rules, 1924, r. 9.

3884. Respondent's address withheld.]—A wife filed a petition for dissolution of marriage, but was unable to effect personal service of the citation, etc., in consequence of resp. having gone abroad, but whither she knew not. A. knowing where resp. was, though refusing to give his address, forwarded to him, by post, an office copy & a plain copy of the petition, & two copies of the

PART XIII. SECT. 8, SUB-SECT. 5.—E. (a) i.

c. *General rule.*]—An order for substituted service in divorce proceedings should not be made unless there is reasonable ground for supposing that the mode of service ordered will bring the proceedings to the knowledge of the party to be served.—LODGE *v.* LODGE (1906), 26 N. Z. L. R. 385.—**N.Z.**

d. *Power of local master to order.*]

Sect. 8.—Institution and defence of proceedings: Sub-sect. 5, E. (a) i., ii. & iii., (b) & (c) i., ii. & iii., & F.]

citation. Resp. returned, by post, to A. the plain copy of the petition & one of the copies of the citation, on which were indorsed memoranda signed by him, acknowledging the receipt of the office copy of the petition, & also a copy of the citation. Resp. not having entered an appearance, petitioner was allowed to proceed without further service.—CHANDLER *v.* CHANDLER (1858), 28 L. J. P. & M. 6.

3885. Failure to trace whereabouts after reasonable efforts.]—COOK *v.* COOK & QUAILE, No. 3854, *ante*.

3886. ——.]—The service of the citation upon co-resp. will be dispensed with if, after a sufficient search, he cannot be found.—PARKER *v.* PARKER & MACLEOD (1859), 5 Jur. N. S. 103.

3887. ——.]—Where every reasonable effort has been made to trace resp. for the purpose of effecting a personal service of the citation & petition in a matrimonial suit, but without success, the ct. will dispense with such personal service. —APPLEYARD *v.* APPLEYARD & SMITH (1875), L. R. 3 P. & D. 257.

3888. ——.]—Though the fact that resp.'s whereabouts cannot be discovered may be due to petitioner's delay in bringing his petition, substituted service of the petition & citation may be allowed.—JENSON *v.* JENSON (1898), 78 L. T. 764.

3889. Respondent abroad—Address unknown—Necessity to show that attempts at discovery made.] To entitle petitioner, in a suit for dissolution of marriage, to proceed without personal service of a citation, it is not sufficient to show that resp. is abroad, & that petitioner does not know where he is; some attempt should be made to discover & serve him.—SUDLOW *v.* SUDLOW (1858), 28 L. J. P. & M. 4.

3890. —— —— ——.] — COOK *v.* COOK & QUAILE, No. 3854, *ante*.

3891. —— **Probability of being in definite place —Personal service not impossible.**] — An application on behalf of a wife, who had presented a petition for dissolution of marriage, that a substitutional service of the citation on the father of her husband should be allowed, on the ground that she did not know her husband's address, but that his father was in communication with him, was rejected by the Judge Ordinary, as it appeared probable that the husband was in New York, & the impossibility of serving him personally was not made out.

Qu.: whether the Judge Ordinary has power to dispense with personal service of the citation in a proceeding for dissolution of marriage.—ROWBOTHAM *v.* ROWBOTHAM (1858), 1 Sw. & Tr. 73; 30 L. T. O. S. 326; 6 W. R. 328; 164 E. R. 635; *sub nom.* ROBOTHAM *v.* ROBOTHAM, 27 L. J. P. & M. 33; 4 Jur. N. S. 148.

3892. —— **Right of action against process server by lex loci.**]—In a petition for divorce it appeared that resp. & co-resp. were residing together abroad, & that by the law of the place where they resided co-resp., a foreigner, had a right of action against any person serving him with English process:—*Held:* the citation might be served on co-resp. by inclosing it in a registered letter addressed to him, another copy being sent to resp. so as to make it more probable that it would come to his knowledge.—TRUBNER *v.* TRUBNER & CRISTIANI (1889), 15 P. D. 24; 59 L. J. P. 56; 62 L. T. 186; 54 J. P. 167; 38 W. R. 464.

3893. Refusal of foreign authorities to serve or allow service.]—Co-resp. in a suit for dissolution of marriage was resident in a sanatorium in the Canton of Neufchatel in Switzerland. The principal of such sanatorium refused to serve him with the citation & petition, or to allow him to be served with them. The Procureur-General of Neufchatel stated that service must be effected through a diplomatic source, but the Foreign Office refused to act in the matter except under an order of the ct. It was shown on affidavit that the mother & uncle of co-resp. resided in Switzerland, & that petitioner was acquainted with their addresses. The ct., after observing that the usual practice was to serve through the foreign tribunal, made an order for the service of the citation & petition on co-resp. by registered letters addressed to his mother & uncle.—STUMPEL *v.* STUMPEL & ZEPFEL (1900), 70 L. J. P. 6; 17 T. L. R. 17.

3894. —— **Letters of request refused.**]—Where, upon a citation & petition for dissolution of marriage, it appeared that resp. & co-resp. were known to be residing at certain addresses in Portugal, the ct., after letters of request had been applied for & refused, dispensed with personal service & ordered substituted service to be effected by registered letters.—WRAY *v.* WRAY & D'ALMEIDA, [1901] P. 132; 70 L. J. P. 32; 84 L. T. 64; 17 T. L. R. 242.

Annotation:—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

3895. —— **Active service.**]—TURNER *v.* TURNER, No. 3863, *ante*.

3896. Co-respondent's name unknown—Citation in name known to respondent.]—NICOLAS *v.* NICOLAS, No. 3807, *ante*.

ii. *In Suits for Judicial Separation.*

See Matrimonial Causes Rules, 1924, r. 9.

3897. Respondent's address unknown—After due inquiries made—Affidavits in support.]—In a suit by the wife for judicial separation, application having been made for an order that service of the citation & copy of the petition upon the father of the husband should be deemed good service, upon affidavits which stated that the wife did not know where the husband was, & that his father, though it was believed he knew his address, would not disclose it, & that the wife had last heard from her husband in 1854, when he wrote to her; the Judge Ordinary refused to make the order without an affidavit that inquiries had been made for the husband at the place from which the letter was addressed, but subsequently granted it on an affidavit that such inquiries had been made there, & that he had left & gone to another place which he had also left, & that the person in whose employ he had been at the latter place did not know whither he had gone.—LACEY *v.* LACEY (1858), 28 L. J. P. & M. 24.

iii. *In Suits for Restitution of Conjugal Rights.*

See Matrimonial Causes Rules, 1924, r. 9.

Service of written demand for return to cohabitation.]—*See* Sect. 5, sub-sect. 1, D., *ante*.

3898. Power to order substituted service—Of demand, petition & decree.]—PALMER *v.* PALMER, *Re* THOMASSON'S PETITION, No. 4767, *post*.

3899. When court will order—Respondent's address unknown—Service on solicitor.]—WATERS *v.* WATERS, No. 2445, *ante*.

3900. —— **Respondent's address withheld.**]—If the ct. is satisfied that the residence of an in-

—The making of an order for substitutional service of the writ of summons in a divorce action is within the jurisdiction of a local master.—S. *v.* S. & H. (1922), 63 D. L. R. 279; 15 Sask. L. R. 132; [1922] 1 W. W. R. 221.—CAN.

tended resp. is wilfully kept from the knowledge of petitioner, it will order substituted service of the demand for cohabitation required by Additional Rules & Regulations, Jan. 30, 1869, r. 175, as well as of the petition & citation.—*Re* SHEEHY (1876), 1 P. D. 423; *sub nom.* O'SHEEHY *v.* O'SHEEHY, 34 L. T. 367.

Annotation:—**Apld.** Palmer *v.* Palmer (1921), 125 L. T. 864.

3901. —— —— Service on solicitor.]—In a suit by the husband for restitution of conjugal rights, a decree was made that the wife should return to cohabitation. The wife was abroad; her address was kept secret by her friends, & personal service of the decree could not be effected. Substituted service on her attorney was in consequence allowed, & the decree remaining unobeyed, the ct., without requiring a previous writ of attachment to issue, granted a writ of sequestration against the wife's separate estate, for the purpose of enforcing obedience to its order.—MILLER *v.* MILLER (1870), L. R. 2 P. & D. 54; 39 L. J. P. & M. 38; 22 L. T. 418; 18 W. R. 585.

Annotations:—**Mentd.** Allen *v.* Allen (1885), 10 P. D. 187; Hyde *v.* Hyde (1888), 13 P. D. 166; R. *v.* Wigand, *Re* Wigand (1913), 82 L. J. K. B. 735.

(b) *Application for Leave to Effect.*

See Matrimonial Causes Rules, 1924, rr. 12, 13.

3902. Affidavit in support—Necessity for—By petitioner.]—On an application to allow substituted service of a petition on a co-resp., there should be an affidavit by petitioner.—WILLIAMS *v.* WILLIAMS & POCOCK, [1896] P. 153; 65 L. J. P. 98.

3903. —— Respondent's address unknown.]—LACEY *v.* LACEY, No. 3897, *ante*.

3904. —— ——.]—An affidavit by petitioner of his ignorance of the address of the parties to be served should be filed with applications for substituted service.—MARTIN *v.* MARTIN & VELLEMAN (1898), 78 L. T. 170.

3905. Divorce bill—Time for making application.]—In proceedings upon a divorce bill application was made in May, 1886, to dispense with personal service on resp. on the ground that his address was unknown to petitioner, that a solr. who had previously acted for the resp. had admitted that he knew of his address but had refused to divulge it & that resp. had been last heard of in Feb. 1886, being then at Montreal, in Canada:—*Held:* the application was premature, & must be refused.—GIFFORD'S DIVORCE BILL (1886), 12 App. Cas. 361, H. L.

(c) *Methods of Substituted Service.*

i. *In General.*

See Matrimonial Causes Rules, 1924, rr. 11, 12.

3906. Service at address in appearance book.]—NUTTALL *v.* NUTTALL, No. 4191, *post*.

3907. Last known address.]—NUTTALL *v.* NUTTALL, No. 4191, *post*.

3908. Service on relations.]—STUMPEL *v.* STUMPEL & ZEPFEL, No. 3893, *ante*.

ii. *By Registered Post.*

3909. Service complete on proof of receipt by respondent.]—The ct. made an order for substituted service of a divorce petition & citation upon a husband by registered letter; but directed that such service should not be treated as complete service until the ct. should be satisfied that the letter was actually received by the proposed resp.—COX *v.* COX (1889), 61 L. T. 698.

3910. Respondent abroad—Protected by foreign law from service.]—TRÜBNER *v.* TRÜBNER & CRISTIANI, No. 3892, *ante*.

3911. —— Refusal of authorities to serve or allow service—Service on relations.]—STUMPEL *v.* STUMPEL & ZEPFEL, No. 3893, *ante*.

3912. —— Letters of request refused.]—WRAY *v.* WRAY & D'ALMEIDA, No. 3894, *ante*.

3913. —— Active service.]—TURNER *v.* TURNER, No. 3863, *ante*.

By Advertisement in the Press.

See Matrimonial Causes Rules, 1924, r. 12.

3914. Respondent's address unknown—Fruitless inquiries made.]—Where the husband had had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, & could gain no information of her by inquiring of her relations or at the places she was last supposed to have been at, the ct. directed the citation to be left in the registry, & advertisements of that fact to be inserted in newspapers.—PECKOVER *v.* PECKOVER & JOLLY (1858), 1 Sw. & Tr. 219; 31 L. T. O. S. 269; 164 E. R. 700.

Annotation:—**Folld.** Appleyard *v.* Appleyard (1875), L. R. 3 P. & D. 257.

3915. Co-respondent's name unknown—Service by advertisement in name given.]—NICOLAS *v.* NICOLAS, No. 3807, *ante*.

3916. Sufficiency of insertions—Twice with the interval of a week.]—(1) When an order has been made, dispensing with personal service upon a resp., a copy of it should be brought in with the other papers, when the ct. is moved to direct the mode of trial.

(2) The insertion in a newspaper of advertisements on the 7th & 14th of a month, is a sufficient compliance with an order to advertise twice with the interval of a week.—ELSLEY *v.* ELSLEY, BEACHAM & BAGSHAW (1863), 32 L. J. P. M. & A. 145.

Re-service of amended petitions.]—*See* Sub-sect. 3, J., *ante*.

F. Proof of Service—Affidavits.

See Matrimonial Causes Rules, 1924, rr. 11, 13, 14.

3917. Affidavit of service—Contents—Delivery of certified copy of petition.]—The original citation, together with a copy, as also a certified copy of the petition, were forwarded to Australia, with full directions, for service on resp. On the return of the citation it was found that the affidavit of service made no mention of the certified copy of the petition having been left with resp.:—*Held:* nevertheless pltf. might proceed to prove her petition.—MOON *v.* MOON (1859), 5 Jur. N. S. 1365.

3918. —— —— —— Allegation that party served is party to suit.]—An affidavit of service of the citation, etc., should allege that the party served is a resp. in the suit.—TEMPLE *v.* TEMPLE & LAING (1861), 31 L. J. P. M. & A. 34.

PART XIII. SECT. 8, SUB-SECT. 5.—E. (c) iii.

c. *Form of advertisement—Where to be circulated.*]—If an application for leave to advertise a petition for dissolution of marriage in lieu of service is granted, the advertisement should be circulated in the district where resp. most acquaintances, & should contain a footnote requesting friends to bring it to resp.'s notice.—HURLEY *v.* HURLEY (1909), 28 N. Z. L. R. 725.—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 5.—F.

3917 i. *Affidavit of service—Contents—Delivery of certified copy of petition.*]—Where the affidavit of service on resp. states that the deponent served "a certified copy of the petition under the seal of the ct." & that "a true copy of which petition . . . is hereunto annexed," these statements are not inconsistent.—UPTON *v.* UPTON, [1924] 2 W. W. R. 1092; 34 Man. L. R. 333; 3 D. L. R. 975.—**CAN.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 5, *F. & G.; sub-sects.* 6 & 7, *A. & B.*]

3919. —— —— Identification of party served.]—It is necessary that the person who serves the petition & citation on resp. & co-resp. should have resp. & co-resp. properly identified to him, & he must depose to this fact in his affidavit of service. SMITH *v.* SMITH & ARMSTRONG (1919), 64 Sol. Jo.

3920. No appearance of respondents.]—In all cases in which a party served with the petition, whether resp. or co-resp., does not appear, the affidavit of service must prove the identity of the person served with the party to the action. If the affidavit fails to do this, the identity must be proved at the hearing.—SPENDLEY *v.* SPENDLEY & GOARD, HOBBS *v.* HOBBS, [1920] P. 40; 89 L. J. P. 64, 80; 122 L. T. 464; 36 T. L. R. 121, 187.

3921. —— —— Definite statement of service—Reference to indorsement of service on citation insufficient.]—An affidavit of service of a citation which refers to the certificate of service indorsed on the citation, & states that such indorsement is true, is insufficient. It should state in terms that the citation was served.—RICH *v.* RICH (1863), 32 L. J. P. M. & A. 77.

3922. —— —— Identification of citation served.]—In a matrimonial suit, an affidavit of service which stated that deponent had served resp. with "a citation against the above-named resp., bearing date," etc., was rejected for not stating that it was the citation in the suit.—DICK *v.* DICK (1863), 32 L. J. P. M. & A. 94, n.

3923. Service of divorce bill—Affidavit of personal service out of the jurisdiction—Whether received in lieu of personal attendance—Petitioner in poor circumstances.]—Resp. in a divorce bill being out of the jurisdiction & petitioner in poor circumstances, the House of Lords dispensed with the attendance at the bar of a witness to prove personal service of the bill & the several orders of the House on resp., & ordered that an affidavit proving such personal service, & sworn under 18 & 19 Vict. c. 42, before the British minister or consul at the place where resp. resided should be deemed sufficient proof of such service.—JOYNT'S DIVORCE BILL (1888), 13 App. Cas. 741, H. L.

3924. Admission by respondent—By identified signature in citation.]—The duly identified signature of resp. in the citation admitting service, is, in general, sufficient proof of service.—ALTON *v.* ALTON (1920), 64 Sol. Jo. 308.

3925. —— Signed admission.]—In suits for dissolution of marriage, after non-compliance with a decree for restitution of conjugal rights, the ct. will not in all cases insist on oral proof of service of the restitution decree by the person who served the decree, but the fact of service may be proved by proof of an admission of service signed by resp.—DROGHEDA (COUNTESS) *v.* DROGHEDA (EARL) (1921), 38 T. L. R. 113.

3926. Oral proof of service—Necessity for.]—In suits for dissolution of marriage, after non-compliance with a decree for restitution of conjugal rights, the person who served the decree for restitution on resp. should be called to prove that fact.—PEARMAIN *v.* PEARMAIN (1921), 126 L. T. 223; 38 T. L. R. 21.

Annotation:—**Expld.** Drogheda *v.* Drogheda (1921), 38 T. L. R. 113.

3927. —— ——.]—DROGHEDA (COUNTESS) *v.* DROGHEDA (EARL), No. 3925, *ante*.

G. Dispensation with Service.

Substituted service in lieu of personal service, *see* Sub-sect. 5, E., *ante*.

3928. Whether leave to dispense with service essential—Death of party to be served—Petition for damages only.]—A motion for leave to dispense with service on the wife of a husband's petition for damages only, in a case in which the wife has died, is unnecessary.—KENT *v.* ATKINSON (1922), 127 L. T. 559; *subsequent proceedings*, [1923] P. 142.

3929. Order made on ground of inability to trace respondents—Rescinded on subsequent discovery.]—WORTH *v.* WORTH (1859), Sea. & Sm. 109.

SUB-SECT. 6.—FILING.

See Matrimonial Causes Rules, 1924, r. 11.

3930. Necessity for return & filing of citation—Although personal service dispensed with.]—(1) The citation must be returned into & filed in the registry, even when personal service has been dispensed with, before the ct. will give directions as to the mode of trial.

I cannot accede to this application. I think I ought not to depart from the old practice in the registry. According to the old practice the proceedings could not go on until the citation had been returned. The requiring the citation to be returned is not a mere matter of form, it is necessary in order that evidence may be preserved that the proper steps have been taken. There would be nothing to show in the registry that a citation had ever issued, unless it were returned & filed (*per* CUR.).

(2) Where the only witnesses to the acts of adultery relied upon are resident in a brothel, & there is consequently a risk of their evidence being been made, & from whom they have been made, & that a reasonable search has been made to discover the whereabouts of resp. in the place where he or she was last heard of.—BOYD *v.* BOYD, HUTCHINSON *v.* HUTCHINSON, WELLSMAN *v.* WELLSMAN (1905), 25 N. Z. L. R. 260.—**N.Z.**

3919 i. —— —— *Identification of party served.*]—UPTON *v.* UPTON, [1924] 2 W. W. R. 1092; 34 Man. L. R. 333; 3 D. L. R. 975.—**CAN.**

3919 ii. —— —— —— ——.]—In a suit for dissolution of marriage where there is no appearance of resp., the ct. will insist on proof of the identity of the latter with the person served with the summons & petition before making a decree.—JELLY *v.* JELLY (1902), 22 N. Z. L. R. 550.—**N.Z.**

3926 i. *Oral proof of service—Necessity for.*]—In divorce proceedings, where resp. does not appear, it is not a safe practice to rely on an affidavit of service, for if there is doubt the ct. will require oral evidence of the service of the citation.—HENDERSON *v.* HENDERSON (1885), 4 N. Z. L. R. 211 (S. C.).—**N.Z.**

PART XIII. SECT. 8, SUB-SECT. 5.—G.

f. *Order made on ground of inability to trace respondents.*]—Service of citation upon resp. or co-resp. may be dispensed with if after a *bonâ fide* effort has been made to trace them, they cannot be found.—PARKER *v.* PARKER & GORST (1922), 30 B. C. R. 560.—**CAN.**

g. *Application to dispense with service—Affidavit in support—Requirements of.*]—Where an application is made to dispense with personal service of the writ of summons & petition in a suit for dissolution of marriage an affidavit by petitioner is necessary, & his statements must be corroborated by the affidavit or affidavits of some reputable independent person or persons, & the affidavits must show sufficient facts to satisfy the judge that every effort has been made to find out resp. & to give him or her an opportunity of appearing, & must show with particularity the inquiries that have

h. *Principles on which exercised.*]—Although the ct. has power to dispense with service of a petition for dissolution of marriage on the ground of adultery on a co-resp., who is beyond the jurisdiction, even against his wish, & although he does not submit to the jurisdiction, that power ought not under ordinary circumstances to be exercised, for the co-resp. is entitled to have the charge made against him brought to his knowledge in order that he may have an opportunity of denying it.—HUBBARD *v.* HUBBARD (1909), 28 N. Z. L. R. 551.—**N.Z.**

lost, the ct. will allow a commission to issue for their immediate examination.

(3) In the absence of resps., the ct., & not petitioner, should select the comr. before whom the evidence is to be taken.—COOKE *v.* COOKE & QUAILE (1859), 2 Sw. & Tr. 50 ; 28 L. J. P. & M. 37 ; 23 J. P. 72 ; 164 E. R. 910.

3931. Indorsement of service—Power of court to dispense with.]—A citation cannot be filed in the registry without an indorsement thereon of personal service, as required by Rule 13 ; but the ct. can dispense with that rule, & direct the citation to be filed, notwithstanding the absence of such indorsement.—COGHILL *v.* COGHILL & LAURIERO (1865), L. R. 1 P. & D. 26 ; 35 L. J. P. & M. 32.

3932. Lost citation—Loss by petitioner—Filing of duplicate.]—The citation was personally served on resp. by petitioner's attorney, but the clerk who was directed to file it with certificate of service in the registry misappropriated the fee & lost the citation. The ct. ordered a duplicate to be filed in the registry.—CHILLCOTT *v.* CHILLCOTT & SMITH (1873), 43 L. J. P. & M. 8 ; 29 L. T. 548 ; 22 W. R. 166.

3933. —— —— Dispensation with filing—Proof of service.]—The ct. will not make an order dispensing with the necessity for the return of a citation into the registry as required by Rule 14, even where it is satisfied that the original citations have been lost by the carelessness or fraud of a defaulting solr., without proof of the service thereof upon both resp. & co-resp.—PERRET *v.* PERRET & ALLT (1876), 35 L. T. 910.

3934. —— Alleged loss in registry—Refusal of certificate by registrar.]—In a case where, after repeated searches in the principal Probate Registry at Somerset House, the original citation could not be found, & a clerk to the solr., who was, at the time of the alleged service on resp., acting for petitioner, made an affidavit setting out the facts & stating that, on the day following the alleged service, he lodged the original citation in the principal registry, the registrar, after personally cross-examining the said clerk as to his affidavit, refused to certify that the case was in order & ready for trial. On appeal to the judge, upon motion :—*Held :* the registrar was right in refusing his certificate.—CRIDLAND *v.* CRIDLAND (1889), 60 L. T. 398.

3935. Order made of change of solicitor—Must be drawn up & filed—Before new solicitor can take steps.]—Where an order has been made for the change of the attorney in a suit, the order must be drawn up & filed in the registry, before any step can be taken by the fresh attorney.—GRICE *v.* GRICE & PENFOLD (1863), 32 L. J. P. M. & A. 134.

SUB-SECT. 7.—APPEARANCE.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 15, 16.

Notice to appear—Necessity for indorsement on petition.]—*See* Matrimonial Causes Rules, 1924, r. 2.

3936. Effect of appearance without answer—No right of audience.]—(1) When co-resp. has appeared to the citation, but has given in no answer to the petition, he cannot be heard even on the question of costs.

(2) In decreeing dissolution of marriage, on the ground of the wife's adultery, the ct. has no power, under Matrimonial Causes Act, 1857 (c. 85), s. 45, to alter a settlement made on the marriage.—NORRIS *v.* NORRIS & GYLES (1858), 1 Sw. & Tr. 174 ; 27 L. J. P. & M. 72 ; 31 L. T. O. S. 139 ; 6 W. R. 640 ; 164 E. R. 680.

Annotations :—As to (2) **Expld.** Michell *v.* Michell, [1891] P. 208. **Consd.** Morgan *v.* Morgan & Kirby, [1923] P. 1. **Refd.** Loraine *v.* Loraine & Murphy, [1912] P. 86.

3937. —— —— —.]—A co-resp. who has appeared but not answered is not entitled to cross-examine witnesses, or to address the jury on the question of damages ; but the ct. will allow him on the close of the case, & with reference to the question of costs, to examine the witnesses as to his knowledge that resp. was a married woman.—LYNE *v.* LYNE & BLACKNEY (1867), L. R. 1 P. & D. 508 ; 37 L. J. P. & M. 9 ; 17 L. T. 297 ; 16 W. R. 159.

Annotation :—**Mentd.** Bernstein *v.* Bernstein, [1893] P. 292.

3938. Appearance after long delay.]—A petition for dissolution had been filed so far back as 1867, & co-resp. had not answered. He had been living abroad, & was entirely without means. In order that he might be heard as to costs, the ct. now allowed him to come in & file an answer, on the condition that it should simply traverse the petition.—ROWLAND *v.* ROWLAND & MILES (1870), 21 L. T. 733.

3939. Appearance by wrong co-respondent.]—A husband's divorce petition alleged that resp. had committed adultery with one F., who was named as co-resp. W., the father of F., was served with the petition & citation, but F. took the papers to a solr. & an appearance was entered for F. An amended petition was served on F. The evidence showed that W., & not F., had committed adultery with resp. :—*Held :* the appearance for F. was a nullity, & as no appearance had been entered for W. the case against him was undefended.—DILLON *v.* DILLON, LESTER, & CHAMBERLAIN (1920), 36 T. L. R. 250.

Effect of intervention by King's Proctor—Non-disclosure of material facts—Right of respondent & co-respondent to appear.]—*See* No. 3845, *ante*.

B. Time for Appearance.

See Matrimonial Causes Rules, 1924, rr. 2, 16 A.

3940. Within twenty-one days of service of citation.]—An appearance may be entered in a matrimonial suit at any time within twenty-one days of the service of the citation.—CHILD *v.* CHILD (1864), 3 Sw. & Tr. 537 ; 33 L. J. P. M. & A. 156 ; 12 W. R. 992 ; 164 E. R. 1384.

3941. Time mentioned in citation—Eight days—Motion for directions before expiry of time for answer.]—If a resp. does not enter an appearance within the time (generally eight days) named in the citation, petitioner can move for directions as to the mode of trial without waiting for the expiration of the time (twenty-one days) allowed by Rule 28 for filing an answer.—WOOD *v.* WOOD & HUTCHINS (1866), L. R. 1 P. & D. 266 ; 36 L. J. P. & M. 48 ; 15 L. T. 418.

3942. Not day before trial of issue.]—An issue raised by resp. in a suit by the husband for dissolution of marriage, in which damages were claimed against co-resp., having been set down for trial by a jury, the ct. refused to allow co-resp., on the day previous to that fixed for the trial, to enter an appearance, on the ground that the application was then too late.—POUNSFORD *v.* POUNSFORD & BULPIN (1861), 30 L. J. P. M. & A. 188.

3943. Conditional leave to appear after expiration of time—Respondent prevented by poverty from appearing earlier—Costs not taxed against petitioner.]—In a suit, by the husband, for dissolution of marriage the wife did not appear. Co-resp. filed an answer, & the issue raised was set down for trial. The ct. subsequently allowed the wife

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 7, *B., C. & D.; sub-sect.* 8, *A. & B.*]

to enter an appearance upon an affidavit by her denying the adultery, & stating that she had been prevented by poverty from appearing earlier, but directed that the costs should not be taxed against the husband.—BENT *v.* BENT & FOOTMAN (1861), 30 L. J. P. M. & A. 160.

3944. —— Co-respondent ignorant of suit—Security for costs.]—STONE *v.* STONE & APPLETON, No. 5246, *post*.

3945. —— Confrontation for identification.]—Resp. was allowed to appear & answer, after the expiration of the time for entering an appearance, on condition that she would allow herself to be confronted with the witnesses for petitioner, for the purpose of being identified.—HINDMARSH *v.* HINDMARSH & HUSSEY (1865), L. R. 1 P. & D. 24; 35 L. J. P. & M. 31.

C. Absolute Appearance.

See, generally, PRACTICE.

3946. Effect of—Submission to jurisdiction—Further time to answer.]—ZYCKLINSKI *v.* ZYCKLINSKI, No. 3952, *post*.

3947. —— —— Objection at trial.]—A resp. in a suit for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the ct., nor can she raise such objection by act on petition.

If a resp. intends to plead to the jurisdiction of the ct., she should appear under protest.

Semble: at the hearing she may, notwithstanding object to the jurisdiction.—FORSTER *v.* FORSTER & BERRIDGE (1862), 3 Sw. & Tr. 144; 31 L. J. P. M. & A. 185; 9 L. T. 147; 164 E. R. 1229.

Annotations:—**Folld.** Garstin *v.* Garstin (1865), 4 Sw. & Tr. 73; Wilson *v.* Wilson (1871), L. R. 2 P. & D. 341. **Refd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139.

3948. —— —— Amendment of appearance.]

A resp. who appears absolutely thereby admits the jurisdiction of the ct., & cannot afterwards amend his appearance in order to plead to the jurisdiction.—GARSTIN *v.* GARSTIN (1865), 4 Sw. & Tr. 73; 34 L. J. P. M. & A. 45; 13 W. R. 508; 164 E. R. 1443.

Annotations: **Refd.** Cavendish *v.* Cavendish & Rochefoucauld (1866), 15 W. R. 182. **Mentd.** Gordon *v.* Gordon, [1904] P. 163.

3949. —— —— Delay in filing answer on merits.]—WILSON *v.* WILSON & HOWELL, No. 2325, *ante*.

3950. —— —— Dismissal from suit.]—A co-resp., after entering an appearance unconditionally, filed an answer alleging that his domicil was German, that the adultery charged, if committed at all, was committed in Germany, & that the citation had been served on him in the United States & claiming to be dismissed from the suit:—*Held:* the co-resp. might be dismissed from the suit, but as he had not taken the earliest opportunity of disputing the jurisdiction, he was entitled only to his costs of appearance.—GRANGE *v.* GRANGE & ARENDT, [1892] P. 245; 61 L. J. P. 125; 67 L. T. 360.

Annotations:—**Folld.** Baker *v.* Baker, Baker *v.* Baker & Dwyer (1908), 24 T. L. R. 493. **Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

3951. —— —— ——.]—BAKER *v.* BAKER, BAKER *v.* BAKER & DWYER, No. 3829, *ante*.

—— ——.]—*See, further*, CONFLICT OF LAWS, Vol. XI., pp. 423, 425, 426, Nos. 890–892, 911–913.

D. Appearance under Protest.

See Matrimonial Causes Rules, 1924, r. 16 B.

3952. General rule.]—According to the practice of the Ecclesiastical Courts an objection to the jurisdiction might be taken at any time, though it was more usual that it should be taken at the commencement of the proceedings. The proper course for a resp. who intends to object to the jurisdiction is to appear under protest, & if he wishes for time to plead to the jurisdiction to apply expressly for time to do so.

Wife filed petition for dissolution of marriage which was served on the husband, who appeared absolutely, & obtained further time to answer. He filed an answer, objecting to the jurisdiction of the ct. by reason of his want of an English domicil, & the incapacity of petitioner to institute a suit in her own name by reason of her infancy. On motion to take this answer off the file:—*Held:* it was too late for resp. to raise such objection.

A minor should sue by guardian & not by attorney.—ZYCKLINSKI *v.* ZYCKLINSKI (1862), 2 Sw. & Tr. 420; 31 L. J. P. M. & A. 37; 5 L. T. 690; 164 E. R. 1059.

Annotation:—**Folld.** Wilson *v.* Wilson & Howell (1871), L. R. 2 P. & D. 341.

3953. Application to set aside service out of jurisdiction—Submission to jurisdiction.]—Pltf. brought an action against deft. in the High Ct. of the Isle of Man claiming damages for crim. con. with pltf.'s wife. Deft. was at no material time domiciled or resident in the Isle of Man. Pltf. obtained leave to serve deft. with a writ of summons out of the jurisdiction & deft. was duly served with a writ in England. Deft. subsequently appeared "conditionally" & applied to the ct. to set aside the order for service out of the jurisdiction & the writ on the ground (*inter alia*) that deft. was domiciled in England. The ct. dismissed the application. Deft. took no further part in the proceedings & pltf. eventually recovered judgment in the action for damages & costs. Pltf. then brought this action against deft. to enforce the judgment:—*Held:* deft. by reason of his application to the Isle of Man Ct. had voluntarily submitted to the jurisdiction of that ct. & the judgment was, therefore, enforceable against him in England.—HARRIS *v.* TAYLOR, [1915] 2 K. B. 580; 84 L. J. K. B. 1839; 113 L. T. 221, C. A.

Annotation:—**Mentd.** Moreland *v.* Eley, Eley *v.* Moreland, [1916] 1 K. B. 85.

3954. By co-respondent—Plea to jurisdiction—Application to dismiss from suit.]—On a petition for dissolution of marriage brought by the husband, resp. appeared absolutely, co-resp. under protest. Co-resp. filed an act on petition, in which he set out facts to show that the ct. had no jurisdiction to entertain the suit. Petitioner filed an answer thereto; & there was a replication; & the act on petition was set down for hearing. Petitioner then applied to the ct. to be allowed to withdraw his answer to the act on petition, & that co-resp. should be dismissed from the suit on the payment of his costs. The ct. granted the application, notwithstanding the opposition of co-resp.—WILSON *v.* WILSON & HOWELL (1872), L. R. 2 P. D. 353; 41 L. J. P. & M. 33; 26 L. T. 139; 20 W. R. 373.

Annotations:—**Refd.** Grange *v.* Grange, [1892] P. 245; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

—— ——.]—*See, further*, CONFLICT OF LAWS, Vol. XI., p. 425, Nos. 908–910.

3955. By husband—Plea to jurisdiction—Wife's costs.]—A husband cannot refuse to pay & give

security for his wife's costs of divorce suit or Act on Petition on the ground that he disputes the jurisdiction. A husband who appears under protest to a wife's petition & disputes the jurisdiction on the ground of his having a foreign domicil may be ordered to pay his wife's costs of suit up to the setting down of the Act on Petition & to give security for her costs attendant on the Act on Petition.—SMITH *v.* SMITH, [1923] P. 128; 92 L. J. P. 107; 129 L. T. 187; 39 T. L. R. 294.

SUB-SECT. 8.—PARTICULARS OF PLEADINGS.

A. In General.

See Matrimonial Causes Rules, 1924, r. 27.

Striking out particulars, *see* Sub-sect. 9, *post*.

3956. Right of respondent to—Although further time obtained to plead.]—By obtaining further time to plead resp. waives any objection to the sufficiency of the charge of adultery in the petition. He is still, however, entitled to particulars of the charge.—HEPWORTH *v.* HEPWORTH (1860), 30 L. J. P. M. & A. 215; 6 Jur. N. S. 831.

3957. Explanatory affidavit on failure to give particulars.]—HIGGS *v.* HIGGS & HOPKINS, No. 3968, *post*.

3958. —— Deponent must have seen & questioned witnesses.]—C. *v.* C. & M. (1910), No. 3972, *post*.

3959. Previous marriage.]—SILVER *v.* SILVER, No. 4007, *post*.

B. Particulars of Charges of Adultery.

See Matrimonial Causes Rules, 1924, r. 27.

3960. Leave to deliver particulars—Granted on application of petitioner—Though respondent making no request.]—Petitioner having made a general charge of adultery against resp., was granted leave to deliver particulars of the charge though resp. did not ask for particulars.—E. *v.* E. (1907), 23 T. L. R. 364; *subsequent proceedings*, *sub nom.* VON ECKHARDSTEIN *v.* VON ECKHARDSTEIN, 23 T. L. R. 539, 593, C. A.

Annotations:- **Refd.** Walker *v.* Walker (1912), 107 L. T. 655. **Mentd.** Von Eckhardstein *v.* Von Eckhardstein (1907), 23 T. L. R. 539.

3961. Whether particulars ordered—Instead of amendment.]—KING *v.* KING & DENT (1862), 32 L. J. P. M. & A. 64, n.

3962. —— ——.]—Where co-resp. charged petitioner with having committed adultery with three females, named, without time or place, in one & the same paragraph of the answer, the ct. refused to let the answer be amended by alleging the adultery with each of the three females in three distinct paragraphs, with time & place, on the ground that the inconvenience arising from the mode of pleading might be corrected by applying for particulars.—HUNT *v.* HUNT & DUKE (1862), 2 Sw. & Tr. 574; 31 L. J. P. M. & A. 163; 6 L. T. 727; 164 E. R. 1120.

3963. —— ——.]—WODEHOUSE *v.* WODEHOUSE & FARROW (1863), 32 L. J. P. M. & A. 90, n.

3964. —— ——.]—PORTER *v.* PORTER & JAGGARD, No. 3656, *ante*.

As to amendment of pleadings, *see* Sub-sect. 3, *ante*.

3965. —— Of dates—Adultery alleged between specified dates.]—A petition for dissolution of marriage alleged a specific act of adultery, on Aug. 25, & then went on to allege other acts of adultery between that day & Oct. 31. The Judge Ordinary declined to order particulars of the dates of these latter acts of adultery.—BODDY *v.* BODDY & GROVER (1858), 28 L. J. P. & M. 16; *subsequent proceedings* (1861), 30 L. J. P. M. & A. 23, 95.

3966. —— Of dates & places—Frequent opportunities for committing offence.]—GRAVES *v.* GRAVES, No. 2807, *ante*.

3967. —— —— ——.]—A petition for dissolution of marriage alleged that co-resp. had lived in the same house with petitioner & his wife for two years, & that the adultery was committed "on divers occasions during that period." The ct. refused to order the petition to be amended by the insertion of further particulars of the acts of adultery, being of opinion that it gave sufficient information of the charge to enable resp. to meet it.—SMITH *v.* SMITH & LIDDARD (1859), Sea. & Sm. 1; 29 L. J. P. M. & A. 62; 23 J. P. 809; 5 Jur. N. S. 1318.

3968. —— —— Adultery alleged on divers occasions after specified date.]—(1) A petition by a husband for dissolution of marriage alleged that on divers occasions since a specified date resp. had accompanied co-resp. to divers places in Bristol & its neighbourhood unknown to petitioner, & had committed adultery with co-resp. The ct. ordered that particulars of this charge should be given or that petitioner should file an affidavit that he was unable to do so.

(2) It is the practice to ask for an order for particulars by summons before the judge in chambers, & not by motion in open ct. When an application is made in ct. which might have been made in chambers, appel., if successful, is only entitled to such costs as would have been incurred in chambers.—HIGGS *v.* HIGGS & HOPKINS (1862), 32 L. J. P. M. & A. 64; 11 W. R. 154.

3969. —— —— ——.]—LIDSTONE *v.* LIDSTONE & EDMONDS (1863), 32 L. J. P. M. & A. 66, n.

3970. —— —— Adultery alleged at divers times in particular year—In respondent's answer.]—WELLS *v.* WELLS & HUMMERSTON (1863), 32 L. J. P. M. & A. 65, n.

3971. —— —— —— Respondent charged with being habitually visited—After specified date.]—PORTER *v.* PORTER & JAGGARD, No. 3656, *ante*.

3972. —— Of dates & times of day—Adultery alleged at two addresses between various dates.]—In a petition for divorce petitioner alleged adultery by resp. at two addresses between various dates. On an application for further & better particulars, the registrar ordered particulars of "dates & times of day, or explanatory affidavit." Petitioner's solr. filed an affidavit that he personally or through his agent had caused the witnesses who

PART XIII. SECT. 8, SUB-SECT. 8.—A.

k. *Right of defendant to—Affidavit of innocence necessary—Action for criminal conversation.*]—In an action of crim. con., after pleading & examination of pltf. for discovery, particulars of the matters complained of should not be ordered except upon a full & satisfactory affidavit of deft. showing his innocence & ignorance of the ground of complaint.—MURRAY *v.* BROWN (1894), 16 P. R. 125.—**CAN.**

l. —— —— ——.]—In an action for crim. con., an order for particulars of the times & places of the illicit acts alleged in the statement of claim will not be made unless deft. makes an affidavit denying his guilt, & establishing his good faith in making the demand for particulars. Deft. should have particulars a reasonable length of time before the trial; & pltf. should have every opportunity to ascertain, in a proper manner, all the facts so obtainable, before being compelled to give particulars.—SOMERS *v.* KINGSBURY, [1924] 2 D. L. R. 195; 54 O. L. R. 166.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 8.—B.

m. *Whether particulars ordered—Allegation of adultery—Suit for alimony.*]—The statement of claim in an alimony suit contained the following clause: "Pltf. alleges & charges adultery on the part of deft. as a further ground for relief in the premises." Pltf. was ordered to give particulars

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 8, *B. & C.; sub-sect.* 9.]

would be subpœnaed to be carefully questioned & that they were unable to fix the dates:—*Held:* a person who swears an explanatory affidavit must himself have seen & questioned the witnesses; & therefore the affidavit sworn by petitioner's solr. was insufficient.—C. *v.* C. & M. (1910), 27 T. L. R. 161: 55 Sol. Jo. 141.

3973. Further & better particulars—What are—General charge dependent on wife's admissions—Giving name of alleged adulterer insufficient.]—In answer to an order for particulars of a general charge of adultery, petitioner gave the name of M., as the alleged adulterer, in respect of such general charge. On application for further particulars of time & place, it was stated that petitioner depended on written admissions of the wife as to this charge, & the Judge Ordinary ordered that if particulars were not given to resp.'s attorney earlier than ten days before the trial, petitioner should be confined to documentary evidence. Issue being joined, & directions as to the mode of trial taken, resp. applied for & obtained a commission to examine M., then in India, as a material witness; petitioner then moved to amend his petition by making M. second co-resp., but the ct. refused, holding that in the circumstances of the case the application was not *bonâ fide*, but with a view to shut M.'s mouth after petitioner knew of respondent's intention to examine him as a witness.

Semble: if M. had himself applied to be made a co-resp., so as to enable him to take part in the suit, the ct. would have granted the application.—CODRINGTON *v.* CODRINGTON & ANDERSON (1864), 3 Sw. & Tr. 368; 33 L. J. P. M. & A. 62; 10 L. T. 139; 164 E. R. 1317; *subsequent proceedings*, 3 Sw. & Tr. 496; (1865), 4 Sw. & Tr. 63.

3974. —— —— Best particulars obtainable from witnesses.]—Under an order to give further & better particulars of the dates & places when & where alleged acts of adultery extending over ten months were committed, petitioner must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case. It is not a sufficient compliance with such an order to allege generally that resp. & co-resp. were constantly meeting & were in resp.'s boudoir & bedroom together, & that they were frequently out riding & driving alone together, from which the ct. will be asked to infer that they committed adultery.—HARTOPP *v.* HARTOPP & COWLEY (EARL) (1902), 71 L. J. P. 78; 87 L. T. 188, C. A.

3975. —— Affidavit by petitioner of inability to give—Order restraining evidence of acts not included in particulars—In absence of notice before hearing.]—When particulars of a general charge of adultery contained in a petition have been ordered & delivered, petitioner, if he intends at the hearing to prove acts of adultery not included in the particulars, should give notice of them to the other side a reasonable time before the hearing. If he omits to do so the hearing will be adjourned. Where, in answer to an application for better particulars, petitioner makes an affidavit that he is unable to furnish them, the party applying ought to obtain an order that no evidence shall be given of any acts of adultery not included in the particulars, unless notice of it is given a reasonable time before the hearing.

Where a trial was adjourned on the ground that the evidence tendered in support of a general charge of adultery took the opposite party by surprise, the ct. refused to make any order as to the costs of the adjournment, being of opinion that the state of the pleadings & of the record was the fault of both parties.—BANCROFT *v.* BANCROFT & RUMNEY (1864), 3 Sw. & Tr. 610; 34 L. J. P. M. & A. 31; 11 L. T. 515; 13 W. R. 506; 164 E. R. 1411.

C. Particulars of Charges of Cruelty.

See Matrimonial Causes Rules, 1924, r. 27.

3976. General rule.]—SUGGATE *v.* SUGGATE, No. 2641, *ante*.

3977. ——.]—It is not necessary that every paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the ct. could found a sentence. Some allegations short of this are admissible, as showing the habits & *animus* of the party charged. Allegations of actual violence, however general as to time & place, can only be met by an application on summons for particulars.

Semble: a party is not at liberty to traverse & demur at the same time, without leave of the ct.—LEETE *v.* LEETE (1862), 2 Sw. & Tr. 568; 31 L. J. P. M. & A. 121; 6 L. T. 507; 164 E. R. 1118.

Annotation:—**Expld.** Green *v.* Green (1864), 33 L. J. P. M. & A. 64.

3978. Whether court will order particulars—Or amendment of petition—Charge of "divers acts of cruelty."]—A petition for judicial separation on the ground of cruelty should specify all the acts of resp. intended to be relied on as constituting cruelty. A general allegation, that during a specified time resp. "committed divers acts of cruelty," is bad, & is ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given.—GOLDNEY *v.* GOLDNEY (1862), 32 L. J. P. M. & A. 13.

3979. General charge—Evidence of specific act.]—BROOK *v.* BROOK, No. 2669, *ante*.

3980. Humiliation—Names of persons before whom committed.]—Where in a petition by the wife against the husband he was, for the purpose of establishing cruelty, charged with using insulting language to her in the presence of servants & guests, with the object of humiliating & degrading her, petitioner was ordered to give particulars, setting forth the names of such servants & guests.—BISHOP *v.* BISHOP, [1901] P. 325; 70 L. J. P. 93; 85 L. T. 173; 17 T. L. R. 616.

SUB-SECT. 9.—STRIKING OUT PLEADINGS AND PARTICULARS.

3981. General rule—Where legal effect of allegations doubtful.]—In answer to a petition by the

of the acts of adultery to be proved within a month, & limited to those only at the hearing. In default no evidence to be given under the general charge. Such allegation, without specifying particulars, is bad.—ROSENSTADT *v.* ROSENSTADT (1882), 9 P. R. 311. —**CAN.**

n. —— *Action for criminal conversation—On application of defendant.*]—In an action for crim. con. deft. is to particulars before pleading without filing an affidavit denying guilt.—RHINARD *v.* GINTHER (1916), 34 W. L. R. 69; 10 W. W. R. 181; 28 D. L. R. 628.—**CAN.**

o. —— *Allegations by respondent & co-respondent.*]—In a action for divorce resp. alleged against petitioner adultery, condonation of or connivance at resp.'s alleged adultery, abuse, assault, use of vile language, etc. Co-resp. alleged against petitioner condonation of & connivance at resp.'s alleged adultery. Resp. & co-resp. were ordered to give particulars of their allegations, including, where it was alleged the acts were done before others, the names of such other persons.—B. *v.* B., [1920] 1 W. W. R. 514; 30 Man. L. R. 366.—**CAN.**

PART XIII. SECT. 8, SUB-SECT. 9.

p. *General rule—Distinction between pleadings of petitioner & respondent.*]—A distinction must be made in

wife for restitution of conjugal rights, the husband pleaded that the petition was not presented in good faith with the object of obtaining the relief sought for, inasmuch as petitioner had alleged in a former suit for judicial separation, in which she had failed, & inasmuch as she still alleged, that her husband had been guilty of an abominable crime. Resp. further pleaded that this amounted to cruelty on petitioner's part, & he prayed for a judicial separation on this ground. Upon a summons to strike out the answer on the ground that it contained no allegation of a matrimonial offence & disclosed no bar to the prayer of the petition:—*Held:* the case ought to be left to be dealt with on the merits, it being the practice of the ct. not to strike out a pleading where a reasonable doubt existed as to the legal effect of the allegation therein contained, &, where such legal effect could properly be discussed after all the facts had been elicited in evidence at the trial.—RUSSELL *v.* RUSSELL (1894), 71 L. T. 268.

3982. Irrelevancy.]—The answer of the wife, in a suit for dissolution of marriage, by reason of adultery, stated, in para. 2, that the wife, prior to the marriage, had been living with A. another man; that petitioner had frequently visited her, & had induced her to leave A. & cohabit with him, & had lived with her at a house of ill fame:—*Held:* para. 2 should be struck out, as opening too wide a field of inquiry, & being irrelevant; the conduct therein charged was not "wilful misconduct," which must be taken to be misconduct after the marriage.—ALLEN *v.* ALLEN & D'ARCY (1859), 28 L. J. P. & M. 81; 5 Jur. N. S. 128.

3983. ——.]—WELLS *v.* WELLS & HUMMERSTON (1863), 32 L. J. P. M. & A. 65, n.

3984. ——.]—Where, in answer to petition by the wife, the husband alleged, in one paragraph, that the wife had been incontinent before marriage, & in another that she had been incontinent before & had committed adultery with the same person after marriage, the ct. ordered the whole of the former paragraph, & so much of the latter as related to incontinence before marriage to be struck out as irrelevant.—MAWFORD *v.* MAWFORD (1866), 14 W. R. 516.

3985. ——.]—BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS, No. 3560, *ante*.

3986. —— **Whether respondent may raise objection—Where default made in not answering.**]—Where resp. is in default by failing to file an answer in due course, he cannot object to a paragraph of the petition on the ground of irrelevancy.—BURRELL *v.* BURRELL (1863), 32 L. J. P. M. & A. 136.

3987. Pleading evidence.]—A petition by a wife for a judicial separation on the ground of adultery, contained a paragraph alleging that resp. had had two illegitimate children, the issue of an adulterous connection with H. M., born on certain specified days:—*Held:* the paragraph was objectionable as pleading merely evidence, & should be struck out.—MATISON *v.* MATISON (1860), 29 L. J. P. M. & A. 80.

3988. Charge abandoned.]—HUDSON *v.* HUDSON, No. 2598, *ante*.

3989. Want of prosecution—Failure to obey court's orders.]—WARWICK *v.* WARWICK & GIOVANNI (1907), *Times*, July 25.

3990. Wife's petition for restitution—Answer alleging circumstances & evidence in former suit for judicial separation—Allowance to petitioner.]—RADFORD *v.* RADFORD, No. 3021, *ante*.

3991. Particulars—Containing fresh charges.]—Where resp. filed as particulars of cruelty alleged in her answer allegations of cruelty which did not correspond with the charge in the answer but were fresh charges, the ct. ordered them to be struck out.—SANDERSON *v.* SANDERSON, STEPHENS & HISCOX (1871), 41 L. J. P. & M. 24; 25 L. T. 857; 20 W. R. 261.

3992. —— ——.]—In a wife's petition for judicial separation on the ground of cruelty, particulars were ordered to be given, but as they did not correspond with the original charges, the ct. ordered them to be struck out. Subsequently they were allowed to be added to the petition as new charges.—GRAFTON *v.* GRAFTON (1873), 28 L. T. 144.

3993. —— —— **King's Proctor's intervention.**]—Upon intervention by the Queen's Proctor, alleging (*inter alia*) that petitioner (husband) had committed adultery with A. & B., particulars were ordered & delivered, relating to the said adultery. Subsequently, the Queen's Proctor delivered additional particulars, in which, for the first time, petitioner was said to have committed adultery with C.:—*Held:* the additional particulars were bad, & must be struck out.—PIERCE *v.* PIERCE (1892), 66 L. T. 861.

3994. Cross-petitions similar to those made in previous suit.]—The husband prayed for a dissolution on the ground of adultery, & the wife, in her answer, pleaded that in his former suit the issue of cruelty had been found in her favour. The ct. refused to strike out this plea.—YEATMAN *v.* YEATMAN & RUMMELL (1869), 21 L. T. 401.

3995. ——.]—In a suit for dissolution brought by the wife, resp. made countercharges of adultery against her. On the allegation that the charges so made were identically same as those made in a previous suit brought by the husband in which a jury had decided that the wife had not been guilty of adultery, the ct. on motion was asked to strike out the paragraphs containing such charges:—*Held:* in order that all the facts should appear on the pleadings, the proper course was for petitioner to file a replication, so that resp. might reply to it.—ROBINSON *v.* ROBINSON (1877), 2 P. D. 75; 46 L. J. P. 47; 36 L. T. 414; 25 W. R. 376.

3996. Answer alleging conduct conducing—Discretion of court.]—COX *v.* COX, No. 3417, *ante*.

Discretionary bars to relief.]—*See* Sect. 7, subsect. 4, *ante*.

striking out the pleadings of a person who voluntarily asks the assistance of the ct. as a pltf., & a person who is haled before the ct. against his will as a deft. In the former case the ct. can impose conditions before lending assistance; in the latter, it is the duty of the ct. to refuse to permit injustice to be done, even against a person who may be in actual contempt.

Petitioner obtained against resp. an order for alimony & for payment into ct. of a sum of money to cover her costs. Resp. resided beyond the jurisdiction & he had no property within the jurisdiction. He did not obey the order but filed an answer disputing the jurisdiction of the ct. Petitioner made an application to strike out the answer on the ground of resp.'s default & contempt in not obeying the order of the ct.:—*Held:* even if it could be said that resp. was in contempt there was no authority for a proceeding so drastic as striking out resp.'s answer, thus leaving a divorce action undefended.—YATES *v.* YATES, [1924] 2 W. W. R. 64; 2 D. L. R. 1175; 34 Man. L. R. 170.—**CAN.**

q. *Answer alleging wife's adultery—Discretion of court—Refusal to strike out—Public morality.*]—Where a petition for divorce *a mensâ et thoro* was brought by a wife, & also a cross-petition by the husband, & the latter had not complied with an order for alimony made in the wife's petition, the ct. refused in the exercise of its discretion on the ground of public morality, to strike out a paragraph in the husband's answer in which the wife's adultery was alleged.—ANNESLEY *v.* ANNESLEY (1913), 47 I. L. T.

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 10, *A., B., C., D. & E.*]

SUB-SECT. 10.—ANSWER TO PETITION.

A. In General.

See Matrimonial Causes Rules, 1924, rr. 21, 22, 24.

Bars to relief, *see* Sect. 7, *ante.*

3997. Time for filing—Twenty-one days after citation.]—Notwithstanding Rule 14 provides that where resp. does not answer the petition within twenty-one days, petitioner may proceed with the evidence, petitioner cannot at once proceed to give evidence, but before doing so must serve resp. with a summons to show cause.—WARD *v.* WARD (1858), 27 L. J. P. & M. 34; 4 Jur. N. S. 366.

3998. —— Leave to file after hearing begun—Previous filing prevented by petitioner.]—ALEXANDER *v.* ALEXANDER & AMOS, No. 2720, *ante.*

3999. —— Effect of filing answer after expiry of time—Nullity.]—An answer filed, without the leave of the judge ordinary, after the time allowed by the rules for filing it has elapsed, may be treated by petitioner as a nullity.—AVILA *v.* AVILA (1861), 30 L. J. P. M. & A. 104.

4000. Petition for damages—Conduct of petitioner.]—In an action for criminal conversation:—*Held:* it was not matter of defence, but only in mitigation of damages, that pltf. having married an actress, concealed the marriage from her mother, & very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, & allowed her to continue her theatrical performances in her maiden name.—CALCRAFT *v.* HARBOROUGH (EARL) (1831), 4 C. & P. 499, N. P.

Annotations:—**Consd.** Lord *v.* Lord, [1900] P. 297; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Watson *v.* Watson & Watts (1905), 21 T. L. R. 320.

4001. Completeness of traverse.]—WALLSCOURT *v.* WALLSCOURT, No. 2684, *ante.*

4002. ——.]—TOURLE *v.* TOURLE, No. 3672, *ante.*

4003. Statement of respondent's case—Reasonable brevity.]—An answer to a petition for dissolution of marriage must not necessarily be in conformity with a common law plea, either by way of traverse, or confession & avoidance. It is intended to be a substantial statement of resp.'s case, but should be within a reasonable degree of brevity. Therefore, the ct. directed an answer to be reformed, which detailed with needless particularity the history of the married life, & pleaded matters which might be given in evidence under a simple traverse.—GASTON *v.* GASTON (1865), 13 L. T. 412.

B. In Suits for Dissolution of Marriage.

Defences to charges of desertion, *see* Sect. 5, sub-sect. 8, G., *ante.*

Defences to charges of cruelty, *see* Sect. 5, sub-sect. 2, E., *ante.*

Proof of adultery, *see* Sect. 5, sub-sect. 3, B., *ante.*

Bars to relief, *see* Sect. 7, *ante.*

4004. Answers open to co-respondent.]—A co-resp. may set up, in answer to a petition for dissolution, conduct of petitioner, which, under the proviso to Matrimonial Causes Act, 1857 (c. 85), s. 31, would give the ct. a discretionary power to dismiss the petition; but he cannot give evidence of it unless it be pleaded. He is not precluded by sect. 33 from pleading it by the insertion in the petition of a claim for damages, though such a defence could not have been pleaded to an action for crim. con.; the meaning of that sect. being, that in such a case the question of damages is to be dealt with, not that the record is to be framed, in the same manner as in actions for crim. con.—SEDDON *v.* SEDDON & DOYLE (1860), 30 L. J. P. M. & A. 12; 7 Jur. N. S. 147.

Annotation:—**Consd.** Bernstein *v.* Bernstein, [1893] P. 292.

4005. Nullity of marriage sought to be dissolved.]—Nullity of marriage being asserted in answer to a libel, charging adultery, the question of nullity is first to be disposed of.—MAYHEW *v.* MAYHEW (1812), 2 Phillim. 11; 3 M. & S. 266, n.; 161 E. R. 1062.

Annotations:—**Apld.** *Re* Rutter Donaldson *v.* Rutter, [1907] 2 Ch. 592. **Refd.** Anon. (1857), Dea. & Sw. 295.

4006. ——.]—S. *v.* S. & R. (1912), No. 4033, *post.*

4007. —— Prior existing marriage.]—A husband, in answer to his wife's petition for divorce, pleaded that she was not his lawful wife as he had contracted a previous marriage. On motion for particulars of the previous marriage the ct. ordered them to be set out in the pleas, & not by way of particulars, but dispenses with their averment on oath on the ground that it might form the basis of a prosecution for bigamy.—SILVER *v.* SILVER (1870), 21 L. T. 734.

4008. Misconduct subsequent to marriage—Pleas of denial & condonation.]—On debating the admission of a defensive allegation in a suit for divorce by reason of adultery:—*Held:* (1) a charge of cruelty is not rendered admissible by an averment, that it was designedly committed with the view of inducing the adultery, &, thereby enabling the husband to obtain a separation from his wife; (2) declarations of the husband, expressive of a desire to get rid of his wife, are admissible, as tending to elucidate his conduct in reference to the facts of the case; (3) it is competent to a party charged with adultery, first, to deny such charge specifically; secondly, to plead condonation.

(4) A husband receiving information, impugning his wife's fidelity, sufficient to induce him to investigate her conduct, is bound, pending the inquiry, to abstain from cohabitation, although not bound to remove her from his house.

(5) Cruelty cannot be pleaded in bar to adultery. No cruelty can justify the violation of the marriage bed (DR. LUSHINGTON).—DILLON *v.* DILLON (1842), 3 Curt. 86; 1 Notes of Cases, 415; 6 Jur. 422; 163 E. R. 663.

Annotations:—*As to* (1) **Consd.** Otway *v.* Otway (1888), 13 P. D. 141. **Refd.** Lempriere *v.* Lempriere (1868), L. R. 1 P. & D. 569; Hodgson *v.* Hodgson & Turner, [1905] P.

4009. Not ante-nuptial connection with petitioner.]—ALLEN *v.* ALLEN & D'ARCY, No. 3982, *ante.*

4010. Countercharges—Disentitling petitioner to relief—Must be pleaded.]—(1) When a petitioner prays for a dissolution of marriage on the ground of adultery, resp. must plead any countercharges by reason of which the ct. is to be asked in its discretion not to grant petitioner's prayer, in the answer to the petition. If they are not so pleaded the ct. will not allow resp. to give evidence of them, nor to amend the answer by inserting them, after issue joined, & previous to decree, unless a satisfactory reason be given for the omission to plead them in the first instance.

(2) The ct., before dissolving a marriage, on the husband's petition by reason of the wife's adultery, ordered him, under the circumstances of the case, to make a provision for her maintenance.

(3) The ct. will order a wife's costs in a divorce & matrimonial suit to be taxed & paid by her

husband *de die in diem* in order that she may have an opportunity of having her case heard. But where no application for her costs was made until after issue had been joined & a verdict entered against her, the ct. would not, between that verdict & the decree, order her costs to be paid by the husband, because her case had been heard, & it had been proved to be without foundation.

The principle of the Ecclesiastical Cts. with regard to the wife's costs was this: the wife having no money to defend herself the ct. caused the husband to pay her costs, & therefore she had a right to have her costs taxed *de die in diem* (*per* CUR.).—BRITTAIN *v.* BRITTAIN & CAMP (1859), Sea. & Sm. 83; 23 J. P. 455.

4011. Mere denial of jurisdiction.]—WILSON *v.* WILSON & HOWELL, No. 4536, *post.*

4012. Dissolution of marriage by court of competent jurisdiction—Not plea to jurisdiction.]—Resp. in a suit for dissolution pleaded that the marriage had already been dissolved by a ct. of competent jurisdiction in New York:—*Held:* this was not a plea to the jurisdiction, & might be pleaded after the entry of an absolute appearance.—COHEN *v.* COHEN (1876), 34 L. T. 33; 24 W. R. 283.

Necessity to raise question of paternity by specific answer—When custody of children claimed by petition.]—*See* No. 4252, *post.*

C. In Suits for Judicial Separation.

Defences to charges of desertion.]—*See* Sect. 5, sub-sect. 8, G., *ante.*

Defences to charges of cruelty.]—*See* Sect. 5, sub-sect. 2, E., *ante.*

Proof of adultery.]—*See* Sect. 5, sub-sect. 3, B., **Bars to relief.**]—*See* Sect. 7, *ante.*

4013. On ground of cruelty—Pleading habits of provocation & exaggeration in general terms—Contradiction of all charges not essential.]—WALLSCOURT *v.* WALLSCOURT, No. 2684, *ante.*

—— Separation of parties.]—*See* Sect. 5, sub-sect. 2, A., D., *ante.*

4014. On ground of cruelty & desertion—Petitioner's adultery—Must be specially pleaded.]—A. petitioned for judicial separation by reason of her husband's cruelty & desertion. The record for the jury merely stated his denial of these allegations, & the ct. refused to admit evidence with the view to prove the wife's unchastity since marriage.—STOATE *v.* STOATE (1859), 32 L. T. O. S. 394.

4015. On ground of adultery—Whether non-consummation can be pleaded—Invalidity of marriage between parties—Imprisonment of husband.]—BROWN *v.* BROWN, No. 2698, *ante.*

4016. —— Impediment to marital intercourse—Arising after marriage.]—An impediment to marital intercourse supervening after marriage in consequence of the disease of the wife cannot be pleaded in bar to a suit by her for judicial separation on the ground of adultery.—M—— *v.* M—— (1861), 31 L. J. P. M. & A. 168.

4017. —— Petitioner's cruelty.]—TUTHILL *v.* TUTHILL, No. 4035, *post.*

4018. On ground of desertion—Reasonable cause.]—HILL *v.* HILL, No. 3000, *ante.*

4019. —— Offer to resume cohabitation.]—Where the answer to a petition alleging desertion merely traverses the charge, evidence is not, in strictness, admissible of an offer to return subsequent to the alleged desertion, nor is evidence admissible of facts showing the insincerity of such offer to return. The offer to return should be pleaded in the answer, & the facts relied upon to show its insincerity should be pleaded in the replication. Where resp., in a suit by a wife for judicial separation on the ground of desertion, was called to prove that he had made petitioner an offer to return to cohabitation before her right to a judicial separation had accrued, the ct. allowed questions to be put to him in cross-examination, tending to show that at the time when the alleged offer was made, he was adulterously cohabiting with another woman.—MALLINSON *v.* MALLINSON (1866), L. R. 1 P. & D. 93; 14 W. R. 353.

D. In Suits for Restitution of Conjugal Rights.

Bars to relief.]—*See* Sect. 7, *ante.*

Defences to suits for restitution of conjugal rights.]—*See* Sect. 5, sub-sect. 1, F., *ante.*

4020. Denial of withdrawal from cohabitation without reasonable cause—Necessity to state actual cause.]—An answer to a petition for restitution of conjugal rights, denying that resp. withdrew from cohabitation without just cause, should state the cause of such withdrawal. If it does not, it is bad on demurrer, but the objection is waived by filing a replication.—WARD *v.* WARD (1861), 32 L. J. P. M. & A. 120.

4021. —— Separation deed pleaded.]—Although a deed of separation is no bar to a suit for restitution of conjugal rights, it may be alleged in answer to an allegation in the petition, that from the date of the deed resp. has without just cause refused to cohabit with petitioner.—ANQUEZ *v.* ANQUEZ (1866), L. R. 1 P. & D. 176; 35 L. J. P. & M. 93; 14 L. T. 635; 14 W. R. 972.

4022. —— Inference of affirmative allegations of reasonable cause—Respondent entitled to particulars.]—In a suit for restitution of conjugal rights, the wife by her petition alleged that the husband withdrew from cohabitation with her, & had kept & continued away from her without any just cause whatsoever, & had refused & still refused to render her conjugal rights. The husband by his answer denied that he had without any just cause withdrawn from cohabitation or that he had refused or still refused "without reasonable cause" to render to petitioner conjugal rights. On an application by petitioner for particulars of resp.'s answer on the ground that such pleading was embarrassing:—*Held:* the answer was not a mere traverse by resp. of the allegation in the petition, but involved affirmative allegations by him that he had "just cause" for withdrawing from cohabitation & "reasonable cause" for refusing to render conjugal rights, & petitioner was therefore entitled to particulars of any charges or facts on which resp. relied as justifying his conduct.—MACLULICH *v.* MACLULICH, [1920] P. D. 439; 89 L. J. P. 242; 124 L. T. 66, C. A.

4023. Willingness to resume cohabitation—Affidavit in support of averment.]—The wife having filed a petition for restitution of conjugal rights, the husband, in his answer, stated his willingness to take his wife home. The ct. refused to give directions as to the mode of trial, but ordered the matter to be adjourned into chambers, & that resp. should file an affidavit in support of the averments in his answer.—CROTHERS *v.* CROTHERS (1868), L. R. 1 P. & D. 568; 19 L. T. 661.

4024. Conduct conducing to cruelty—Subsequent separation by mutual consent.]—WOODEY *v.* WOODEY, No. 2479, *ante.*

E. In Suits for Nullity of Marriage.

4025. By reason of previous marriage—Whether nullity of first marriage may be pleaded.]—It is

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 10, *E., F. & G.; sub-sect.* 11, *A., B., C., D. & E.; sub-sect.* 12.]

competent to a party to set up the nullity of a first marriage, in bar of a sentence prayed of the nullity of a second by reason of that first; though he is convict, already, of bigamy in respect of the said two marriages.—BRUCE *v.* BURKE (1825), 2 Add. 471; 162 E. R. 367.

4026. —— Misconduct, deception & fraud of petitioner—No bar.]—MILES *v.* CHILTON (FALSELY CALLING HERSELF MILES), No. 3646, *ante*.

4027. On ground of respondent's impotence—Whether petitioner's adultery may be pleaded in answer.]—ANON. (1857), No. 3565, *ante*.

4028. Petitioner's insincerity—Must be specifically alleged.]—S. (OTHERWISE G.) *v.* S. (1907), No. 3569, *ante*.

Whether petitioner's adultery bar to nullity suits on ground of impotence, *see* Sect. 7, sub-sect. 4, D. (*d*), *ante*.

F. In Suits for Jactitation of Marriage.

See Sect. 4, *ante*.

G. Affidavit verifying Answer.

See Matrimonial Causes Rules, 1924, rr. 22, A., B.

4029. Necessity for—Answer going beyond simple denial.]—TOURLE *v.* TOURLE, No. 3672, *ante*.

Affidavit verifying petition.]—*See* Sub-sect. 2, *ante*.

SUB-SECT. 11.—CROSS-PETITIONS AND CROSS-PRAYERS.

A. In Suits for Dissolution of Marriage.

4030. Judicial separation.]—ELDRED *v.* ELDRED, No. 3575, *ante*.

4031. —— Deed of separation.] — BROWN *v.* BROWN & SHELTON, No. 3042, *ante*.

4032. Restitution of conjugal rights—Answer denying adultery—Petitioner charged with desertion & wilful separation.]—A decree of restitution of conjugal rights is not the relief for desertion contemplated by the Matrimonial Causes Act, 1866 (c. 32), s. 2; therefore a wife who filed an answer to a petition for dissolution of marriage, wherein she denied the adultery charged, & alleged desertion & wilful separation, was not allowed to add a prayer for restitution to the answer.—DRYSDALE *v.* DRYSDALE, DRYSDALE *v.* DRYSDALE, CORBET & GANE (1867), L. R. 1 P. & D. 365; 36 L. J. P. & M. 39; 15 L. T. 512.

4033. Nullity—On ground of petitioner's impotence.]—The answer to a petition for dissolution of marriage may set up a claim for a decree of nullity on the ground of the impotence of petitioner, & the issue as to nullity will be tried first.—S. *v.* S. & R., [1912] P. 16; 81 L. J. P. 16; 106 L. T. 464.

B. In Suits for Judicial Separation.

4034. On ground of adultery—Cross prayer for judicial separation—On ground of adultery.]—HUNT *v.* HUNT, No. 2733, *ante*.

4035. —— —— On ground of cruelty.]—Cruelty is no answer to a suit for judicial separation on the ground of adultery.

Qu.: whether resp., in a suit for judicial separation on the ground of adultery, is at liberty to introduce a charge of cruelty into the answer, & to pray for a judicial separation, & to give evidence in support of that charge in the event of petitioner's failure to establish the charge of adultery.—TUTHILL *v.* TUTHILL (1862), 31 L. J. P. M. & A. 214.

4036. On ground of cruelty—Answer denying cruelty & claiming restitution—Necessity to file cross-petition.]—A wife petitioned for a judicial separation on the ground of resp.'s cruelty. Resp., in his answer, denied the cruelty, & claimed a decree for restitution of conjugal rights:—*Held*: resp.'s proper course would have been to file a cross-petition, & the relief prayed for could not be granted on a mere counter-claim in the answer not verified by affidavit.—WINGFIELD *v.* WINGFIELD (1898), 78 L. T. 568.

4037. Claim for damages against alleged adulterer — Cross-charge of adultery — Separate petition not necessary.]—A husband, in answer to his wife's petition for judicial separation, which he resists on the ground of her adultery, may claim damages against the alleged adulterer. A separate petition is not necessary.

An answer in this form having been rejected in the Divorce Registry, the judge in chambers, upon an *ex p.* application, directed same to be accepted & filed as originally tendered.—N. *v.* N., [1913] P. 75; 82 L. J. P. 56; 108 L. T. 271; 29 T. L. R. 321; 57 Sol. Jo. 343.

C. In Suits for Restitution of Conjugal Rights.

4038. Judicial separation — On ground of adultery.]—RAIBOULD *v.* RAIBOULD (1788), 2 Curt. 214, n.; 163 E. R. 389.

Annotations:—**Refd.** Barry *v.* Butlin (1836), 1 Moo. P. C. C. 98; Anichini *v.* Anichini (1839), 2 Curt. 210.

4039. —— —— Admissibility of evidence of parties—Proceeding instituted in consequence of adultery.]—If the answer to a suit for restitution of conjugal rights charges adultery, & on that ground prays for a judicial separation, the evidence of the parties is admissible if resp. contents himself with resisting the suit for restitution, but not if he seeks to obtain a decree of judicial separation, as the answer will then be considered a proceeding instituted in consequence of adultery within Evidence Act, 1851 (c. 99), s. 4. When resp. upon such a state of pleadings is examined at the hearing, & the ct. finds the charge of adultery established, it will dismiss the petition, but will not decree a judicial separation. In a suit for dissolution of marriage on the ground of the wife's adultery, resp. & co-resp. denied the charge, & resp. further charged petitioner with adultery. It appeared at the hearing that this latter charge was substantially the joint defence of resp. & co-resp. A jury found that resp. & co-resp. had not been guilty of adultery, & also that petitioner had not been guilty of adultery:—*Held*: resp. was entitled to the whole of her costs incurred in supporting the first issue, although they should exceed the sum deposited in the registry, but that as to the second issue she was entitled only to a moiety of the costs incurred.—BURROUGHS *v.* BURROUGHS, BURROUGHS *v.* BURROUGHS & SILCOCK (1862), 31 L. J. P. M. & A. 124; 8 Jur. N. S. 624.

Annotation:—**Folld.** Blackborne *v.* Blackborne (1868), L. R. 1 P. & D. 563.

PART XIII. SECT. 8, SUB-SECT. 11.—A.

r. *Cross-petition by husband on ground of wife's adultery—Separate petition not necessary.*]—A husband may, in his defence to the wife's petition, cross-petition for divorce against the wife on the ground of her adultery. A separate petition is not necessary.—HILL *v.* HILL (1923), I. L. R. 47 Bom. 657.—**IND.**

PART XIII. SECT. 8, SUB-SECT. 11.—C.

s. *Dissolution of marriage—Amendment to counterclaim.*]—Under the Alberta practice, in an action for restitution of conjugal rights deft. may

4040. —— On ground of desertion.]—(1) *Semble:* in a suit for restitution of conjugal rights, if it be before a jury, resp.'s counsel has a right to begin; if it be tried by a judge, without a jury, petitioner's counsel has the right to begin.

(2) Where the ct. refused to decree a restitution of conjugal rights on the ground of desertion alleged in the answer, & proved in the evidence, it granted a decree for judicial separation prayed for by resp. on the same ground.—MEARA *v.* MEARA (1865), 14 W. R. 50.

Suit for nullity on ground of impotence—Trial of issue by jury.]—*See* No. 4340, *post.*

D. In Suits for Nullity.

4041. Dismissal of respondent from suit—Petition by father of infant son—Son of age at hearing.]—In nullity of marriage, by reason of minority, at the suit of the father, a prayer, on the part of the wife, "that the minor, now of age, might be called to declare, whether he would carry on the suit, or that otherwise she might be dismissed." Not sustained.—BOWZER *v.* RICKETTS (FALSELY CALLING HERSELF BOWZER) (1795), 1 Hag. Con. 213; 161 E. R. 529.

4042. Restitution of conjugal rights.]—A libel, by a husband, in a suit of nullity of marriage having been rejected:—*Held:* it was competent to the wife, in that suit, without taking out a cross-petition to sue the husband for restitution of conjugal rights.—CLOWES *v.* JONES (FALSELY CALLING HERSELF CLOWES) (1843), 3 Curt. 185; 2 Notes of Cases, 77; 7 Jur. 908; 163 E. R. 697.

Annotations:—**Apld.** Catterall *v.* Catterall (1847), 5 Notes of Cases, 466. **Refd.** Anon. (1857), Dea. & Sw. 295. **Mentd.** Gosling *v.* Veley (1853), 4 H. L. Cas. 679.

4043. Judicial separation—On ground of cruelty.]—A charge of cruelty, with a prayer for judicial separation, cannot be made in answer to a petition for sentence of nullity of marriage.—HUMPHREY *v.* WILLIAMS (FALSELY CALLING HERSELF HUMPHREY) (1860), 29 L. J. P. M. & A. 62; *sub nom.* WILLIAMS *v.* HOMFRAY (FALSELY CALLING HERSELF WILLIAMS), 6 Jur. N. S. 151.

4044. Cross-prayer for nullity.]—T. (OTHERWISE W.) *v.* T. (1895), cited in Halsbury's Laws of England, Vol. XVI., p. 515, n.

E. Withdrawal of Original Petition.

4045. Prosecution of cross-petition.]—Where a husband petitions for a dissolution of marriage on the ground of his wife's adultery, & she in her answer prays for a judicial separation on the ground of desertion, the ct. will not at the husband's instance, the wife opposing, terminate the suit by dismissing the petition.—SCHIRA *v.* SCHIRA & SAMPAJO (1868), L. R. 1 P. & D. 466.

4046. ——.]—The answer to a petition for restitution of conjugal rights charged adultery & prayed for a judicial separation. At the trial, petitioner abandoned his prayer for restitution, & offered no evidence:—*Held:* (1) such abandonment did not take away resp.'s right to go for a judicial separation; (2) the evidence of the parties was admissible upon the question of adultery, there being no "suit or proceeding instituted in consequence of adultery" within Evidence Act, 1851 (c. 99), s. 4.—BLACKBORNE *v.* BLACKBORNE (1868), L. R. 1 P. & D. 563; 37 L. J. P. & M. 73; 18 L. T. 450.

4047. ——.]—The ct. will allow an allegation praying for relief to be added to the prayer of an answer containing charges of adultery & cruelty in a suit for dissolution of marriage for the purpose of allowing the suit to be continued.—FIRMINGER *v.* FIRMINGER & OLLARD (1869), 17 W. R 335.

SUB-SECT. 12.—REPLIES.

See Matrimonial Causes Rules, 1924, r. 13.

4048. General rule.]—In debating the admissibility of a third plea in a suit for divorce, it is to be recollected, first, that the husband bears the whole expense of the suit; secondly, that the wife is at liberty to plead every fact in her original libel which may tend to support her charge, however apparently incapable of proof; & the facts stated in her responsive allegation should be either in reply to the defence set up, or strictly supplemental to the facts originally stated.—STONE *v.* STONE (1843), 7 Jur. 1094.

4049. ——.]—Answers to an allegation responsive to a libel in a suit for cruelty contained averments of acts of ill-treatment previous to those charged in the libel:—*Held:* this amounted to a redundancy, & the answers must be reformed in those particulars.

Each party is at liberty to set out all the facts which may be of benefit to his cause, provided that they can be stated legitimately; but this must be done in plea. The purpose of answers is for the benefit of the party requiring them, in order that if the facts pleaded be admitted he may place this matter before the ct., which otherwise he could only do at a great expense by taking evidence, or upon which possibly no evidence at all could be procured. The answers are never for the benefit of the party giving them in; still he is not compelled to answer simply to the facts pleaded: he is at liberty to offer explanation, & such explanation may consist of matter already pleaded, or to be pleaded or not. This he has a perfect & complete right to insist upon. If matters capable of proof are stated in the answers, they will not be proof in the cause, unless established by other evidence; & putting them in answer will not dispense with the necessity of proving them, stating them in plea & by evidence, or the admission of the other side. I doubt if the answers can ever be for the benefit of the party who gives them in. . . . These answers in fact speak to this effect: "You have been guilty of cruelty towards me; I will go on & state every act, whether pleaded or no." This goes beyond the bounds of explanation. . . . The answers should be confined strictly to the allegation, & they must be referred back for reformation (DR. LUSHINGTON).—SAUNDERS *v.* SAUNDERS (1847), 1 Rob. Eccl. 549; 9 L. T. O. S. 496; 11 Jur. 738; 163 E. R. 1131.

Annotations:—**Refd.** Smallwood *v.* Smallwood (1861), 2 Sw. & Tr. 397; Waddell *v.* Waddell (1862), 2 Sw. & Tr. 584; Sant *v.* Sant (1874), L. R. 5 P. C. 542; Russell *v.* Russell, [1897] A. C. 395.

4050. Ante-nuptial incontinence.] — JOHN *v.* JOHN (*circa* 1820), cited 3 Curt. at p. 238; 163 E. R. p. 715.

Annotation:—**Refd.** Graves *v.* Graves (1842), 3 Curt. 235.

4051. ——.]—GRAVES *v.* GRAVES, No. 2807, *ante.*

4052. Restitution suit—Cross-charge of adultery—Reply charging respondent with adultery.]—KIRBY *v.* KIRBY (1801), 2 Curt. p. 214, n.; 163 E. R. 389.

Annotations:—**Refd.** Anichini *v.* Anichini (1839), 2 Curt. 210; Hope *v.* Hope (1858), 1 Sw. & Tr. 94; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80.

---

counterclaim asking for dissolution of marriage. A plea for such relief was allowed to be added by amendment to the counterclaim. The question raised by such a proposed amendment is one of procedure rather than of substantive law or jurisdiction.—G. *v.* G., [1922] 3 W. W. R. 1159.—**CAN.**

Sect. 8.—*Institution and defence of proceedings: Sub-sect.* 12. *Sect.* 9: *Sub-sect.* 1, *A.* & *B.* (*a*) & (*b*).]

4053. .]—BROOKING-PHILLIPS *v.* BROOKING-PHILLIPS, No. 3560, *ante*.

4054. Dissolution suit—Cross-charge of adultery—Power to exclude answers by wife—Or to compel fuller answers.]—In a suit for divorce by the wife, by reason of cruelty & adultery, where the wife, being charged with adultery, chooses to give, uncalled for, her personal answers to such charge, the ct. has no power to exclude them, or to compel her to answer fully.—KING *v.* KING (1846), 5 Notes of Cases. 59.

4055. —— ——.]—ROBINSON *v.* ROBINSON, No. 3995, *ante*.

4056. Suit for judicial separation—On ground of cruelty—Reply charging respondent with ill-treatment previous to acts charged in petition.]—SAUNDERS *v.* SAUNDERS, No. 4049, *ante*.

SECT. 9.—PROCEEDINGS PENDING SUIT.

SUB-SECT. 1.—ALIMONY PENDENTE LITE.

A. Jurisdiction to Grant.

4057. Marriage must be proved or admitted.]—It is incompetent to the ct., under any circumstances to make a formal allotment to the wife of any sum, in the nature even, or as on account, of alimony; until a fact of marriage, at least, is either proved against or admitted by, the husband.—SMYTH *v.* SMYTH (1824), 2 Add. 254; 162 E. R. 287.

4058. —— **Suit for divorce.**]—Until the marriage is either proved or confessed, in a suit for divorce, the ct. cannot enforce, but only recommend, a payment to the wife in the nature of alimony *pendente lite*.—MITCHELL *v.* MITCHELL (1853), 1 Ecc. & Ad. 102; 164 E. R. 59.

4059. Where husband has not appeared.]—The ct. has no power to allot alimony *pendente lite* in a suit in which the husband has not appeared.—DEANE *v.* DEANE (1858), 28 L. J. P. & M. 23; 22 J. P. 180.

Annotation:—**Refd.** Tomkins *v.* Tomkins (1858), 1 Sw. & Tr. 163.

4060. ——.]—Where the husband has appeared to the wife's citation in a suit for judicial separation, the ct. will entertain an application for alimony *pendente lite*. *Secus*: where no appearance has been given by the husband.—TOMKINS *v.* TOMKINS (1858), 1 Sw. & Tr. 163; 31 L. T. O. S. 104; 6 W. R. 545; 164 E. R. 675.

4061. —— **Though application consented to.**]—Where the husband, resp., has not entered an appearance, alimony *pendente lite* by consent will not be allotted.—CLARKE *v.* CLARKE (1862), 31 L. J. P. M. & A. 165.

4062. Where husband pleads to the jurisdiction.]—The fact that there is a plea to the jurisdiction of the ct. in a matrimonial suit does not affect the power of the ct. to allot alimony *pendente lite*. Where there was a substantial question of jurisdiction, & some months were to pass before it could be determined, the ct., in the exercise of its discretion, allotted alimony *pendente lite*.—RONALDS *v.* RONALDS (1875), L. R. 3 P. & D. 259.

4063. In nullity suit—Marriage within prohibited degrees.]—FODEN *v.* FODEN, No. 4101, *post*.

Jurisdiction after decree nisi.]—*See* Sub-sect. 1, I. (*a*), *post*.

B. When Granted.

(*a*) *In General.*

4064. General rule.]—(1) All persons who stand in the relation of husband & wife in any way that the law allows have a claim to relief on the violation of any matrimonial duty. The husband's conduct is legal cruelty if by cohabitation the

PART XIII. SECT. 9, SUB-SECT. 1.—A.

t. *General rule.*]—*Semble*: the ct. will, in a proper case, grant *interim* alimony.—SOULES *v.* SOULES (1851), 3 Gr. 113.—**CAN.**

4057 i. *Marriage must be proved or admitted.*]—In an alimony case where the marriage is admitted, or proved, *interim* alimony will be granted almost as of course, though deft. swears he is willing to receive & maintain pltf.—CARR *v.* CARR (1866), 2 Ch. Ch. 71.—**CAN.**

4057 ii. ——.]—On an application for *interim* alimony & costs, proof of the marriage is all that is required; it is not necessary to prove any of the other allegations in the bill.—NOLAN *v.* NOLAN (1866), 1 Ch. Ch. 368.—**CAN.**

4057 iii. ——.]—*Interim* alimony will be granted on *primâ facie* proof of marriage, although the validity of the marriage is disputed.—MCGRATH *v.* MCGRATH (1869), 2 Ch. Ch. 411.—**CAN.**

4057 iv. ——.]—On an application for *interim* alimony, the validity of the alleged marriage cannot be tried. If a marriage *de facto* is proved, it is sufficient.—BRADLEY *v.* BRADLEY (1871), 3 Ch. Ch. 329.—**CAN.**

4057 v. —— .]—The allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*. The ct. exercises a discretion in granting or withholding alimony *pendente lite* which is regulated by the circumstances of each case.—WALKER *v.* WALKER (1885), 10 P. R. 633.—**CAN.**

a. —— *What particulars must be given.*]—On an application for an order for *interim* alimony, the affidavit as to the marriage should state such particulars (by whom solemnised, etc.) as would enable the ct. to judge whether it has been duly solemnised or not.—TAYLOR *v.* TAYLOR (1864), 1 Ch. Ch. 234.—**CAN.**

b. *In suit for restitution of conjugal rights.*]—The ct. for Divorce & Matrimonial Causes in Nova Scotia has jurisdiction in respect to a suit for the restitution of conjugal rights, & can order alimony for the wife *pendente lite*.—KING *v.* KING (1904), 37 N. S. R. 204.—**CAN.**

c. —— The ct. has jurisdiction in a suit by a husband for restitution of conjugal rights to grant alimony to the wife *pendente lite*.—DONGI *v.* DONGI (1909), 28 N. Z. L. R. 768.—**N.Z.**

d. *In suit for divorce.*]—The Supreme Ct. of British Columbia has jurisdiction to grant *interim* alimony pending an action for divorce.—MELLOR *v.* MELLOR (1905), 11 B. C. R. 327.—**CAN.**

e. *In suit for alimony.*]—In 1897 a wife brought an action against her husband for alimony & to set aside a judgment pronounced by consent in a former action for alimony begun in 1884, under which the wife had received $200. Deft. pleaded the judgment as a bar, & also adultery by the wife, & a deed of separation. Pltf. disputed the deed of separation, & impeached the judgment as obtained by fraud & without her knowledge or consent; the payment of $200 she attributed to a release of dower given by her. She also alleged expulsion & desertion by her husband, & that he had been living in adultery after the judgment:—*Held*: pltf. was entitled to an order for *interim* alimony.—LAFRANCE *v.* LAFRANCE (1898), 18 P. R. 62.—**CAN.**

f. ——.]—In an action for alimony the ct. has jurisdiction to, & as a rule will, grant to the wife an order for *interim* alimony & disbursements.—BROWN *v.* BROWN, [1920] 3 W. W. R. 1072.—**CAN.**

Ct. of King's Bench, in Saskatchewan has jurisdiction to grant *interim* alimony in an action brought for permanent alimony.—ROBERTS *v.* ROBERTS, [1921] 1 W. W. R. 251; 55 D. L. R. 256; 14 Sask. L. R. 29.—**CAN.**

h. ——.]—In an action, under King's Bench Act, R. S. S., 1920, c. 39, s. 22, for alimony independent of any other relief, pltf. is not entitled to *interim* alimony.—ADELKIND *v.* ADELKIND, [1922] 2 W. W. R. 521; 66 D. L. R. 70; 15 Sask. L. R. 422.—**CAN.**

k. ——.]—In an action for alimony alone, as in other matrimonial cases where alimony is merely incidental, a wife is entitled to an order for *interim* alimony.—MCMAIN *v.* MCMAIN, [1924] 1 W. W. R. 102; 1 D. L. R. 338; 18 Sask. L. R. 303.—**CAN.**

l. *In suit for judicial separation.*]—In an action for judicial separation & alimony a wife is entitled to an order for *interim* alimony.—COOK *v.* COOK, [1924] 1 W. W. R. 1162; 2 D. L. R. 112.—**CAN.**

m. *Where husband has no property within jurisdiction.*]—The Supreme Ct. of Alberta has jurisdiction to order the payment of *interim* alimony. Deft. was ordered to pay *interim* alimony to pltf. who was without means & owing to her state of health unable to earn anything, although he swore that he was not the owner of any property in Alberta.—SECREST *v.* SECREST (1912), 22 W. L. R. 51; 5 Alta. L. R. 389; 2 W. W. R. 928.—**CAN.**

wife is exposed to bodily hazard & intolerable hardships. Words of abuse & reproach are not, but words of menace intimating a malignant intention of doing bodily harm & even affecting the security of life are legal cruelty. (2) The ct. must not wait till threats are carried into execution, but must interpose when words raise a reasonable apprehension of violence. If words of menace raise a reasonable apprehension it matters not whether they are addressed to the wife or to a third person. (3) Spitting on the wife is a gross act of cruelty.

(4) All condonations by operation of law are expressly or impliedly conditional, for the effect is taken off by repetition of misconduct; & this may be so even though the misconduct would not support an original cause. (5) Condonation is not held so strictly against a wife as against a husband. (6) Conjugal cohabitation after an act of adultery avowed by the husband may be condonation, but it is not a legal consequence that the wife pardons all other acts.

(7) There may be relative cruelty, & what is tolerable by one may not be by another (SIR WILLIAM SCOTT).

(8) In general the husband is bound to defray the wife's costs & to provide alimony *pendente lite*, but when the wife has separate means sufficient for her defence & subsistence she is not entitled to alimony nor costs during suit; she then stands on the common footing of a litigant party, &, on proving her case, has a *primâ facie* right to costs. It is, however, discretionary with cts. on a consideration of all the circumstances to relax the rule.—D'AGUILAR *v.* D'AGUILAR (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E. R. 748.

Annotations:—As to (1) **Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Neeld *v.* Neeld (1831), 4 Hag. Ecc. 263; Gale *v.* Gale (1852), 2 Rob. Eccl. 421. *As to* (2) **Refd.** Dysart *v.* Dysart (1847), 1 Rob. Eccl. 470. *As to* (3) **Consd.** Russell *v.* Russell, [1897] A. C. 395. **Refd.** Saunders *v.* Saunders (1847), 1 Rob. Eccl. 549; Sant *v.* Sant (1874), L. R. 5 P. C. 542. *As to* (4) **Consd.** Durant *v.* Durant (1825), 1 Hag. Ecc. 733; Snow *v.* Snow (1842), 2 Notes of Cases Supp. I.; Curtis *v.* Curtis (1858), 1 Sw. & Tr. 192. **Refd.** Sopwith *v.* Sopwith (1861), 2 Sw. & Tr. 160; Cooke *v.* Cooke (1863), 3 Sw. & Tr. 126; Collins *v.* Collins (1884), 9 App. Cas. 205; Moss *v.* Moss, [1916] P. 155; Cramp *v.* Cramp & Freeman, [1920] P. 158. *Generally*, **Refd.** Clowes *v.* Jones (falsely calling herself Clowes) (1843), 3 Curt. 185.

4065. Wife in possession of husband's property.]—LLOYD *v.* LLOYD (1839), 8 L. T. 612, n.

4066. Appeal pending.]—KEATS *v.* KEATS (1859), cited in Halsbury's Laws of England, Vol. XVI., p. 561.

4067. ——.]—ROBINSON *v.* ROBINSON (1859), cited in Halsbury's Laws of England, Vol. XVI., p. 561.

4068. Wife in prison.]—KELLY *v.* KELLY, No. 4230, *post*.

Compare No. 5281, *post*.

4069. Wife charged with adultery—Petition not answered.]—Where a wife is charged in her husband's petition with adultery, & has filed no answer to it, she is still entitled to have alimony *pendente lite* allotted to her.—SMITH *v.* SMITH & TREMSAUX (1863), 4 Sw. & Tr. 228; 32 L. J. P. M. & A. 91; 11 W. R. 257; 164 E. R. 1503.

4070. Whether allowed pending hearing of petition.]—A suit was instituted by the wife for restitution of conjugal rights. She also filed a petition for alimony & then applied [before answer made by husband] on the ground of present distress & destitution, that resp. be ordered to pay her a small sum of money pending its hearing. The ct. declined to entertain the application.—FORDE *v.* FORDE (1867), 15 L. T. 595.

4071. What court will consider—Wife living with co-respondent.]—An averment in the husband's answer to the wife's petition for alimony *pendente lite* that she is living with the co-resp. is immaterial & need not be noticed by her; but, otherwise, where the allegation is that she is supported by him: *Semble:* such allegation, if well founded, would be a bar to alimony.—MADAN *v.* MADAN & DE THOREN (1867), 37 L. J. P. & M. 10; 17 L. T. 326; 16 W. R. 211.

Annotation:—**Consd.** Bass *v.* Bass, [1915] P. 17.

4072. ——.]—(1) Resp. is not entitled to alimony whilst she is living with co-respondent as his wife & supported by him.

(2) Resp. in a matrimonial suit cohabited with & was supported by co-resp. for some time after the filing of the petition & service of the citation. In allotting alimony *pendente lite* the ct. ordered that the alimony should run from the date at which resp. ceased to cohabit with co-resp. instead of from service of citation.—HOLT *v.* HOLT & DAVIS (1868), L. R. 1 P. & D. 610; 38 L. J. P. & M. 33; 19 L. T. 662.

Annotation:—**Refd.** Bass *v.* Bass, [1915] P. 17.

4073. —— **Conduct of wife.**]—LESLIE *v.* LESLIE, No. 5281, *post*.

4074. Where husband pleads to the jurisdiction—Delay in decision.]—RONALDS *v.* RONALDS, No. 4062, *ante*.

(b) Where Husband has Small or No Means.

4075. Husband without means.]—Where, upon the husband's answer to a petition for alimony to an application for *interim* alimony.—WILSON *v.* WILSON (1873), 6 P. R. 129.—**CAN.**

4071 i. *What court will consider—Wife living with co-respondent.*]—Upon an application for *interim* alimony, the question whether appct. has been guilty of adultery cannot be inquired into, unless it has already been judicially decided, but the question whether an appct. is living & supported by a co-respondent can be inquired into on the inquiry as to what means of support appct. has.—CUNNINGHAM *v.* CUNNINGHAM (1907), 5 W. L. R. 514.—**CAN.**

4073 i. —— *Conduct of wife.*]—The question whether pltf. has been guilty of adultery cannot be raised on an application for *interim* alimony.—CAMPBELL *v.* CAMPBELL (1873), 6 P. R. 128.—**CAN.**

o. —— *Merits of defence.*]—The merits of the defence set up should not be looked into or considered on an application for *interim* alimony.—MCARTHUR *v.* MCARTHUR (1905), 15 Man. L. R. 151.—**CAN.**

p. *Necessity for notice.*]—An application for *interim* alimony must be upon notice.—SWINARTON *v.* SWINARTON (1869), 2 Ch. Ch. 453.—**CAN.**

q. *Motion allowed to lapse—Whether bar to second motion—Allegation of cruelty—Offer to resume cohabitation.*]—A motion for *interim* alimony which has been allowed to lapse without a decision thereon is not a bar to a subsequent motion for the same purpose. Where cruelty is alleged, an offer to resume cohabitation is not an answer to a motion for *interim* alimony.—STANDALL *v.* STANDALL (1912), 22 W. L. R. 512 22 Man. L. R. 591.—**CAN.**

PART XIII. SECT. 9, SUB-SECT. 1.—B. (a).

4065 i. *Wife in possession of husband's property.*]—*Interim* alimony was stayed until pltf. had produced on oath, books, papers, etc., belonging to her husband, which she had taken with her when leaving his house, & which deprived him of the means of paying it.—OLD *v.* OLD (1883), 9 P. R. 552.—**CAN.**

4065 ii. ——.]—An order directing deft. in an alimony action based upon desertion to pay *interim* alimony was affirmed, though the wife was in occupation of the deft.'s homestead; she having established that she was in need of *interim* alimony, & deft. not showing that she was in receipt of annual income from the farm.—LALONDE *v.* LALONDE (1885), 11 P. R. 143.—**CAN.**

n. *Wife charged with desertion—Whether answer to application.*]—The fact that pltf. has left deft., & refuses to return to him although he is willing to take her back to live with him, is no

PART XIII. SECT. 9, SUB-SECT. 1.—B. (b).

4075 i *Husband without means.*]—An order for *interim* alimony will not be made against a deft. where it is not shown that he has the means to comply

Sect. 9.—Proceedings *pending suit*: *Sub-sect.* 1, *B.*

pendente lite, it appears that he has no means, the ct. will refuse to allot alimony; but the wife will be entitled to her costs of moving for an allotment.—GAYNOR *v.* GAYNOR & DEGLIANTONI (1862), 31 L. J. P. M. & A. 144.

4076. —— Other than voluntary allowance—Alimony ordered.]—MALO *v.* MALO (1786), 2 Sw. & Tr. 657, n.; 32 L. J. P. M. & A. 67, n.; 7 L. T. 437, n.; 164 E. R. 1153.

Annotations:—**Consd.** Haviland *v.* Haviland (1863), 3 Sw. & Tr. 114. **Apld.** Martin *v.* Martin, [1919] P. 283.

4077. —— —— Maintenance ordered.]—The husband being an insolvent debtor, & possessed of no property, & in no business or profession, the ct. refused to make any allotment of alimony to the wife, although the father of the husband had considerable property, & had supported his son. But the ct. suspended the proceedings until something by way of maintenance should be given to the wife.—BRUERE *v.* BRUERE (1837), 1 Curt. 566; 163 E. R. 198.

Annotation:—**Consd.** Beavan *v.* Beavan (1862), 31 L. J. P. M. & A. 166.

4078. —— —— ——.]—Although the husband's income consists only of a voluntary allowance from his father, yet, upon motion by wife for alimony *pendente lite*, the ct. will order the husband to make her some allowance, & will stay the suit by the husband till he has undertaken to do so.—Moss *v.* Moss & BUSH (1867), 15 W. R. 532.

Annotations:—**Consd.** Bonsor *v.* Bonsor, [1897] P. 77. **Apld.** Martin *v.* Martin, [1919] P. 283.

Whether voluntary allowance calculated as part of husband's income, *see* No. 4129, *post*.

4079. Fraudulent assignment by husband—After suit.]—An assignment, apparently fraudulent & colourable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot affect her title to alimony *pendente lite*.—BROWN *v.* BROWN (1828), 2 Hag. Ecc. 5; 162 E. R. 766.

Annotation:—**Expld.** Jagger *v.* Jagger (1926), 42 T. L. R. 315.

4080. Husband's income in kind.]—Where a husband in his answer alleged that he was in insolvent circumstances, & that his only income was weekly wages of meat, drink, washing & lodging, & 4*s.* a week, the ct. refused to allot alimony *pendente lite*. *Semble*: a wife, by applying to the ct. for an allotment of alimony, upon the husband's answer is not precluded from afterwards examining witnesses in support of her petition.—CAPSTICK *v.* CAPSTICK, FURNESS & WINDER (1864), 33 L. J. P. M. & A. 105.

4081. Husband temporarily unemployed.]—Where a husband, being a master pilot in Her Majesty's Bengal Pilotage Service, on six months' leave of absence without pay, was in the receipt of no income, & was possessed of no property whatever, the ct. refused to allot to the wife alimony *pendente lite*.—FLETCHER *v.* FLETCHER (1862), 2 Sw. & Tr. 434; 31 L. J. P. M. & A. 82; 6 L. T. 132; 10 W. R. 448; 164 E. R. 1064.

4082. —— Alimony allowed on average annual earnings.]—On an application for alimony *pendente lite* on the husband's answers, from which it appeared that he was a master mariner & a part-owner in a sailing vessel, but that he had not had any employment for three months, the ct. nevertheless, allotted alimony on the average of his earnings during the previous three years.—THOMPSON *v.* THOMPSON & JOHNSON (1868), L. R. 1 P. & D. 553; 37 L. J. P. & M. 33; 18 L. T. 212.

Annotation:—**Mentd.** R. *v.* Davidson, etc., Durham JJ. (1889), 5 T. L. R. 199.

4083. Husband's sole property contingent reversionary interest.]—(1) In a suit for dissolution of marriage, instituted by an infant husband, by his guardian, it appeared from the answer to a petition for alimony *pendente lite* that the sole property to which the husband was entitled was a contingent reversionary interest: *—Held*: the wife was not entitled to alimony.

(2) The guardian who institutes a suit on behalf of an infant husband will be ordered to pay into the Registry, or give security for a sum of money to meet the wife's costs of the hearing.—BEAVAN *v.* BEAVAN (1862), 2 Sw. & Tr. 652; 31 L. J. P. M. & A. 166; 7 L. T. 435; 8 Jur. N. S. 769; 164 E. R. 1151.

Annotations:—*As to* (1) **Refd.** Martin *v.* Martin, [1919] P. 283. *As to* (2) **Folld.** Rutter *v.* Rutter, [1921] P. 136.

4084. Husband's sole property & legacy payable at future date.]—Where the husband had no property, & his only property was a legacy of £500, not payable until eleven months after the application for alimony, the ct. refused to allot alimony *pendente lite*.—BROWN *v.* BROWN & SIMPSON (1863), 3 Sw. & Tr. 217; 32 L. J. P. M. & A. 144; 9 L. T. 118; 164 E. R. 1257.

4085. Husband a "poor suitor."]—GRINHAM *v.* GRINHAM & PASCOE, No. 4290, *post*.

Where wife has separate income.]—*See* Sub-sect. 1, B. (*c*), *post*.

(*c*) *Where Wife has Separate Property.*

See Matrimonial Causes Rules, 1924, r. 60.

4086. Where wife has adequate means of subsistence.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *ante*.

4086 i. *Where wife has adequate means of subsistence.*]—If the husband opposes an application for *interim* alimony on the ground that the wife has ample means of support, unless she can show the contrary to be the case, her application will be refused.—SMITH *v.* SMITH (1873), 6 P. R. 51.—**CAN.**

4086 ii. ——.]—Alimony *pendente lite* should be allowed only on the ground of necessity; & will not be allowed to a pltf. who is known to have property sufficient for her maintenance until

4075 ii. ——.]—Where husband has neither property nor earning capacity the ct. will not award *interim* alimony *pendente lite*.—WHITE *v.* WHITE (1912), 21 O. W. R. 515; 3 O. W. N. 929; 2 D. L. R. 885.—**CAN.**

4075 iii. ——.]—*Interim* alimony will not be ordered where deft.'s inability to pay is shown.—STANDALL *v.* STANDALL (1912), 22 W. L. R. 512; 22 Man. L. R. 591.—**CAN.**

4075 iv. ——.]—An order for *interim* alimony against a penniless deft. resident out of the jurisdiction refused.—MCNAIR *v.* MCNAIR (1913), 24 O. W. R. 390; 4 O. W. N. 1093; 10 D. L. R. 829.—**CAN.**

4075 v. ——.]—A wife is not entitled to alimony where although the husband has property of some value, he derives no income from it nor from any other source.—GILBERT *v.* GILBERT (1914), 29 W. L. R. 714.—**CAN.**

4075 vi. ——.]—Deft.'s statement on oath that he has no means out of which payment can be compelled is no ground for setting aside an order for payment of *interim* alimony. Pltf. has the right to test the truth of the statement by an execution.—PEEL *v.* PEEL (1918), 42 O. L. R. 165; 13 O. W. N. 439.—**CAN.**

r. —— *Discretion of court.*]—In a suit against a wife for divorce in which she had obtained an order for *interim* alimony & payment of money for *interim* costs the ct., dealing with an appeal from such order on the ground of the husband's poverty, expressed its opinion that the discretion of the judge who made the order should not be interfered with; whatever caution may be exercised in England before an order for alimony is made owing to the fact that failure to comply with the order may entail imprisonment, as no such consequences can follow in Saskatchewan different considerations apply.—PERADSKY *v.* PERADSKY, [1921] 3 W. W. R. 532; 63 D. L. R. 337; 14 Sask. L. R. 493.—**CAN.**

PART XIII. SECT. 9, SUB-SECT. 1.—B. (*c*).

4086 i. *Where wife has adequate means of subsistence.*]—If the husband opposes an application for *interim* alimony on the ground that the wife has ample means of support, unless she can show the contrary to be the case, her application will be refused.—SMITH *v.* SMITH (1873), 6 P. R. 51.—**CAN.**

4086 ii. ——.]—Alimony *pendente lite* should be allowed only on the ground of necessity; & will not be allowed to a pltf. who is known to have property sufficient for her maintenance until

4087. —— Though derived from co-respondent.]—MADAN *v.* MADAN & DE THOREN, No. 4071, *ante*.

—— **Wife's income self-earned—Husband & wife living apart.**]—*See* No. 4097, *post*.

See, also, No. 4195, *post*.

4088. Husband of little or no means.]—PIERCE *v.* PIERCE (undated), cited in 2 Hag. Con. at p. 206, n.; 161 E. R. 717.

Annotation :—**Consd.** Davis *v.* Davis (1789), 2 Hag. Con. 204, n.

4089. ——.]—Where the husband's income did not exceed £60 a year, & the wife had a sum of £70 in her possession at the commencement of the suit, the ct. refused to make an allotment of alimony *pendente lite*.—COOMBS *v.* COOMBS (1866), L. R. 1 P. & D. 218; 14 L. T. 294; 12 Jur. N. S. 673.

4090. — — —.]—The father of resp., on her marriage with petitioner, undertook, in a letter to petitioner, to make her an allowance of £100 *per annum* during his life. Such allowance had been paid for some years in one sum in a particular month of the year. The ct. refused to grant to resp. alimony out of her husband's income, which did not much exceed her allowance, the month in which it might be expected that the allowance would be paid not having arrived.—EATON *v.* EATON (1870), L. R. 2 P. & D. 51; 21 L. T. 733.

Annotation :—**Refd.** Martin *v.* Martin, [1919] P. 283.

Compare Nos. 5311–5316, *post*.

(d) Where Parties have been Separated before Proceedings.

4091. Effect of grant—Wife in better position than before separation.]—GEORGE *v.* GEORGE, No. 4097, *post*.

4092. Separation under decree by ecclesiastical court—Divorce a mensâ et thoro.]—HOLT *v.* HOLT & FLEEMING, No. 4296, *post*.

4093. Separation by deed—Allowance discontinued—Discovery of adultery.]—Where a husband had, under a deed of separation, allowed his wife a certain sum, & had ceased to pay it after the date on which he alleged that he had obtained evidence of her adultery, the Judge Ordinary, on the wife's petition for alimony *pendente lite*, directed payment by way of alimony *pendente lite*, to be made at the same rate.

The practice of the House of Lords on divorce bills warrants the ct. in directing the wife's costs to be taxed from time to time against the husband in his suit for dissolution of marriage.—WEBER *v.* WEBER & PYNE (1858), 1 Sw. & Tr. 219; 28 L. J. P. & M. 11; 31 L. T. O. S. 302; 6 W. R. 867; 164 E. R. 701.

Annotation :—**Expld.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186.

4094. —— —— **Molestation.**]—By a separation deed the husband covenanted to pay £9 a month to the wife for her maintenance, & she covenanted not to molest him. The wife afterwards petitioned for a judicial separation. The husband had refused to continue the allowance on the ground that the wife had broken her covenant not to molest him:—*Held :* the wife was entitled to alimony *pendente lite*.—WOOD *v.* WOOD (1887), 57 L. J. Ch. 1; 57 L. T. 746; 36 W. R. 33; 4 T. L. R. 39, C. A.

4095. —— **Allowance not discontinued.**]—When a husband & wife at the time of the institution of a matrimonial suit are living apart under a deed of separation by which an allowance is secured to the wife, the mere fact of the institution of the suit does not entitle the wife to an increased allowance by way of alimony *pendente lite* estimated on the husband's present income.—POWELL *v.* POWELL (1874), L. R. 3 P. & D. 186; 43 L. J. P. & M. 9; 29 L. T. 466; 22 W. R. 62.

Annotations :—**Distd.** Wood *v.* Wood (1887), 57 L. J. Ch. 1. **Mentd.** Bishop *v.* Bishop, Judkins *v.* Judkins (1897), 76 L. T. 409.

4096. Effect of protection order.]—(1) By obtaining an order of protection, a wife does not deprive herself of her right to alimony *pendente lite* in a suit subsequently instituted by her for dissolution of marriage.

(2) The institution of vexatious suits, by the wife against the husband, is a ground for allotting alimony *pendente lite* at less than the usual rate.—HAKEWILL *v.* HAKEWILL (1860), 30 L. J. P. M. & A. 254.

4097. Wife self-supporting.]—Alimony *pendente lite* refused to a wife, who, for some time before the institution of the suit had been, & still was, supporting herself in service.—GEORGE *v.* GEORGE (1867), L. R. 1 P. & D. 553; 37 L. J. P. & M. 17; 17 L. T. 152; 16 W. R. 112.

Annotations :—**Folld.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186. **Refd.** Wood *v.* Wood (1887), 36 W. R. 33.

4098. ——.]—BURROWS *v.* BURROWS (1867), L. R. 1 P. & D. 553.

See, also, No. 4256, *post*.

the trial of the action.—ALLISON *v.* ALLISON (1913), 23 W. L. R. 570; 6 Alta. L. R. 127; 9 D. L. R. 418.—**CAN.**

4086 iii. ——.]—When applicants own material filed on a motion for *interim* alimony & disbursements showed that she had sufficient means to maintain herself until the trial of the action the motion was refused.—ROSSWORM *v.* ROSSWORM (1914), 26 O. W. R. 207; 6 O. W. N. 226.—**CAN.**

s. *Where wife's means inadequate.*]—Upon an application for *interim* alimony deft. set up that pltf. was able to maintain herself out of land which he had conveyed to her & out of moneys which her children might allow her. Although pltf. lived in the house upon the land conveyed to her, the land was tied up by the registration of a certificate of *lis pendens*, & the allowances from the children would, if made, be no more than compassionate gifts:—*Held :* what was thus alleged was no ground for setting aside an order for the payment of *interim* alimony.—PEEL *v.* PEEL (1918), 42 O. L. R. 165; 13 O. W. N. 439.—**CAN.**

t. ——.]—Where a wife, married out of community of goods, was possessed of funds sufficient to maintain her, the ct. refused to order the husband to pay alimony *pendente lite*.—BROWN *v.* BROWN (1919), 10 N. L. R. 358.—**S. AF.**

PART XIII. SECT. 9, SUB-SECT. 1.—B. (d).

4095 i. *Separation by deed—Allowance not discontinued.*]—In May, 1875, a deed of separation was executed between deft. & pltf., husband & wife, by which deft. was to pay pltf. $100 a year, quarterly, as maintenance. In Sept. 1875, pltf. filed a bill for alimony, & deft. served a notice, agreeing to allow her $100 a year quarterly, for *interim* alimony. In May, 1876, a decree was made for specific performance of the agreement:—*Held :* pltf. must give credit for the sums paid as *interim* alimony; & executions issued for the whole sum payable under the agreement, were set aside.—MAXWELL *v.* MAXWELL (1876), 7 P. R. 63.—**CAN.**

a. *Desertion without cruelty—Offer to resume cohabitation.*]—A wife is not entitled to *interim* alimony & disbursements where she sues on the ground of desertion not alleging cruelty, & where the husband offers by his defence & by affidavit to resume cohabitation with her.—SNIDER *v.* SNIDER (1885), 11 P. R. 140.—**CAN.**

b. ——.]—When desertion but no cruelty is alleged & deft. offers by defence & affidavit to resume cohabitation, no order for *interim* alimony will be made.—KARCH *v.* KARCH (1912), 21 O. W. R. 883; 3 O. W. N. 1032; 3 D. L. R. 658.—**CAN.**

4097 i. *Wife self-supporting.*]—Where the wife had been living apart from her husband for five years, & had been supporting herself out of the rents of houses owned by her, & by taking boarders, & through assistance rendered by members of her family, the ct. refused to award *interim* alimony.—KNAPP *v.* KNAPP (1887), 12 P. R. 105.—**CAN.**

c. *Leaving home unjustifiably—& unwilling to return.*]—If a wife leaves her husband's home without justification & is unwilling to return, she is not entitled to alimony, even though her husband's attitude is that, were she willing he would be unwilling to receive her.—MCNAIR *v.* MCNAIR, [1923] 1 W. W. R. 1022; 1 D. L. R. 1111.—**CAN.**

Sect. 9.—Proceedings pending suit: Sub-sect. 1, B. (e), C. & D. (a) & (b).]

(e) In Suits for Nullity of Marriage.

4099. General rule.]—Alimony allotted pending [nullity] suit.—BIRD (*alias* BELL) *v.* BIRD (1753), 1 Lee, 418; 161 E. R. 154; *subsequent proceedings* (1754), 1 Lee, 572, 621.

Annotations:—**Refd.** Foden *v.* Foden, [1894] P. 307. **Mentd.** Miles *v.* Chilton (1849), 1 Rob. Eccl. 684.

4100. —— De facto marriage.] — MILES *v.* CHILTON (FALSELY CALLING HERSELF MILES), No. 3646, *ante*.

4101. —— —— Marriage within prohibited degrees.]—As a rule a marriage *de facto* carries the right to alimony *pendente lite* until it is finally declared to be void. There is jurisdiction to order alimony *pendente lite* in a husband's suit for nullity of marriage, on the ground that the wife was within the prohibited degrees. The application may be made by the wife after a decree *nisi* has been pronounced, if the decree has not been made absolute, even though the time at which it might have been made absolute has passed.—FODEN *v.* FODEN, [1894] P. 307; 63 L. J. P. 163; 71 L. T. 279; 42 W. R. 689; 10 T. L. R. 608; 38 Sol. Jo. 662; 6 R. 633, C. A.

Annotation:—**Mentd.** Childers *v.* Childers (otherwise Burford) (1899), 68 L. J. P. 90.

4102. —— —— Charge of fraud against wife.]—In a suit of nullity of marriage by the husband the wife *de facto* is entitled to alimony *pendente lite*, & to payment of the costs incurred in her defence even though fraud in procuring the marriage is charged against the wife & the husband asks that she may be condemned in costs & they may ultimately be awarded against her.—PORTSMOUTH (EARL) *v.* PORTSMOUTH (COUNTESS) (1826), 3 Add. 63; 162 E. R. 404; *subsequent proceedings, sub nom.* PORTSMOUTH (COUNTESS) *v.* PORTSMOUTH (EARL) (1828), 1 Hag. Ecc. 355.

4103. Exception to general rule—Marriage clearly void on pleading.]—In suits for a decree of nullity of marriage the court will not grant alimony *pendente lite*, should the marriage be plainly null & void on the face of the petition & answer taken together.—BLACKMORE *v.* MILLS (FALSELY CALLED BLACKMORE) (1868), 18 L. T. 586; 16 W. R. 893.

Annotation:—**Expld.** Foden *v.* Foden, [1894] P. 307.

C. Amount.

4104. General rule.]—This suit is brought by the wife for cruelty & adultery. She now applies for alimony pending the suit; & certainly the ct. will not allow the same as if such a charge was established; yet, I think, the nature of the suit is to be considered; the charge is made, the answers are given in; as yet there is no allegation on the part of the husband; there is no ground to consider the suit as vexatious, no proceednge appear to have been had for the purpose of unnecessary delay. Therefore, the wife has a right to be maintained with some reference to her former comfortable state, yet with moderation (SIR JOHN NICHOLL).—SMITH *v.* SMITH (1813), 2 Phillim. 152; 161 E. R. 1105; *subsequent proceedings* (1814), 2 Phillim. 235.

4105. ——.]—LESLIE *v.* LESLIE, No. 5281, *post*.

4106. Proportion of husband's income allowed.]—MALO *v.* MALO (1786), 2 Sw. & Tr. 657, n.; 32 L. J. P. M. & A. 67, n.; 7 L. T. 437, n.; 164 E. R. 1153.

Annotations:—**Consd.** Haviland *v.* Haviland (1863), 3 Sw. & Tr. 114. **Apld.** Martin *v.* Martin, [1919] P. 283.

4107. ——.]—BIGGS *v.* BIGGS (1791), cited in 2 Phillim. at p. 43; 161 E. R. 1073.

Annotation:—**Consd.** Cooke *v.* Cooke (1812), 2 Phillim. 40.

4108. ——.]—DE MONTMORENCY (VISCOUNT) *v.* DE MONTMORENCY (VISCOUNTESS) (1844), 3 Notes of Cases, 68; 3 L. T. O. S. 41; *subsequent proceedings*, 3 Notes of Cases, 432.

4109. ——.]—(1) In the Ecclesiastical Ct. one-fifth of the husband's net income was usually allotted as alimony *pendente lite*, & was made payable from the date of the return of the citation, the statement in the husband's answers to the wife's allegations of faculties being assumed to be correct unless the wife disputed it & examined witnesses. Where £50 had been paid on account of alimony *pendente lite* before the decree, the ct. made the sum allotted payable from the date of the decree instead of from the date of the return of the citation.

(2) The husband is liable for necessaries supplied to his wife pending the suit, & before the decree of alimony, but he is liable only to a reasonable amount, & therefore, if the wife during that period incurred debts to an extravagant amount, that circumstance cannot be taken into account as a ground for diminishing the amount of alimony.

(3) A husband may deduct from income derived from real property the expense of ordinary current repairs, but not of extraordinary & permanent improvements, which ought to be charged on the fund of the income.—HAYWARD *v.* HAYWARD (1858), 1 Sw. & Tr. 85; 28 L. J. P. & M. 9; 31 L. T. O. S. 25; 6 W. R. 639; 164 E. R. 640.

Annotation:—*As to* (1) **Expld.** Nicholson *v.* Nicholson & Ratcliffe (1862), 31 L. J. P. M. & A. 165.

4110. ——.]—In allotting alimony *pendente lite* the ct. will not look minutely into the figures when the income to be dealt with is of large amount.

On an annual income of £8,000, the ct. allotted alimony at the rate of £1,000 a year, pending the wife's suit for restitution of conjugal rights.—EDWARDS *v.* EDWARDS (1868), 17 L. T. 584.

4111. ——.]—(1) Upon a petition before the registrar for alimony *pendente lite*, the wife is not entitled as a matter of course, under Divorce Court Rules, 1865, rr. 86, 191, to an order for cross-examination of her husband upon his answer, even though there may be a great discrepancy between the amount of his income as alleged by her in the petition & the amount as stated in his answer.

Whether the husband should be ordered to attend for cross-examination is a matter entirely for the discretion of the registrar, & the ct. will not interfere with the exercise of his discretion unless satisfied that he has either proceeded on a wrong principle or has exercised his discretion wrongly.

(2) Where there is no very great discrepancy between the two figures, it is not the practice of the ct. to order the attendance of the husband for cross-examination.

(3) Where a wife in her petition for alimony *pendente lite* put the income of her husband, a baronet, at £70,000 a year, while the husband in his answer put it at £16,600 only, supporting his statement by full & detailed particulars, the registrar, on the hearing of the petition, & the

PART XIII. SECT. 9, SUB-SECT. 1.—C.

4106 i. *Proportion of husband's income allowed.*]—The allowance & amount of *interim* alimony in divorce proceedings is in the discretion of the judge. It is not usual to give more than one-fifth of the husband's income.—HUTTON *v.* HUTTON (No. 2), [2 W. W. R. 993.—**CAN.**

d. —— *Ground for allowing more than usual proportion.*]—Where pltf. was supporting two children the ct.

judge on appeal from him, refused an application by the wife for an order on the husband to attend for cross-examination, allotted the wife £3,000 a year as alimony. On appeal:—*Held:* £3,000 a year was an adequate allowance for the wife *pendente lite*, & as the registrar had properly exercised his discretion in allotting that sum, the ct. would not interfere by ordering the husband to attend for cross-examination as to his means.

(4) On an appeal from an order of a registrar or master the ct. will only recognise a note of the registrar or master as evidence of what took place before him, an affidavit by either party being inadmissible.—SYKES *v.* SYKES, [1897] P. 306; 66 L. J. P. 162; 77 L. T. 150; 13 T. L. R. 579; 41 Sol. Jo. 713, C. A.

Annotations:—As to (3) **Consd.** Kettlewell *v.* Kettlewell, [1898] P. 138. **Expld. & Distd.** Dean *v.* Dean, [1923] P. 172.

4112. —— Dependent on nature of income.]—In allotting alimony *pendente lite* the reversionary interest of the husband may be pleaded. *Secus*, a mere expectancy.

The wife is at liberty to plead the income of the husband, & the sources from whence it is derived; with regard to his reversionary property, & by the word reversionary I mean such property as the husband is entitled to for a vested interest expectant on the death of some person, or on the happening of some other contingency, it is usual & proper that such property should be stated. With regard to permanent alimony the ct. will make a different allotment in a case where the income of the husband is derived from his sole personal labour or exertions, from what it will do when he has moreover a large reversionary property in expectancy (DR. LUSHINGTON).—STONE *v.* STONE (1843), 3 Curt. 341; 7 Jur. 380; 163 E. R. 750.

Annotation: **Refd.** Beavan *v.* Beavan (1862), 2 Sw. & Tr. 652.

4113. —— Grounds for allowing less than usual proportion—Liability to maintain issue of former marriage.]—The circumstance that the husband has to maintain several children, the issue of a former marriage, is no ground for allotting less than one-fifth of his income as alimony *pendente lite*.—HILL *v.* HILL (1864), 33 L. J. P. M. & A. 104.

See, also, No. 4115, *post*.

4114. —— No fixed proportion.]—LESLIE *v.* LESLIE, No. 5281, *post*.

4115. How husband's income calculated—What may be deducted—Cost of maintaining issue of former marriage.]—Under ordinary circumstances, the expense of educating & maintaining the children by a previous marriage do not form a legitimate deduction from the husband's income in allotting alimony *pendente lite*.—GRAFTON *v.* GRAFTON (1872), 27 L. T. 768; 21 W. R. 292.

See, also, No. 4113, *ante*.

——.]—*See, generally*, Sect. 22, sub-sect. 1, *post*.

4116. Proportion of joint income allowed.]—The wife has a separate income of £350 *per annum* for his life; if she had not had this property, I think the ct. below would have been called upon to grant her more than £100.

I know no such rule as that stated that the ct. usually grants one-sixth; the general proportion of alimony is much higher than has been stated (*per* CUR.).—REES *v.* REES (1821), 3 Phillim. 387; E. R. 1361.

4117. ——.]—Alimony *pendente lite* is usually about one-fifth of the annual income; but the proportion may vary according to the circumstances of the parties; *e.g.* the rank in life of the husband & the number of children for whose maintenance & education he must provide.—HAWKES *v.* HAWKES (1828), 1 Hag. Ecc. 526; 162 E. R. 666.

4118. How joint income calculated—Wife's earned income included.]—Not only the wife's income derived from separate property will be taken into account in allotting alimony *pendente lite*, but income of which she is in the actual enjoyment, though earned by herself.—GOODHEIM *v.* GOODHEIM & FRANKINSON (1861), 2 Sw. & Tr. 250; 30 L. J. P. M. & A. 162; 4 L. T. 449; 9 W. R. 853; 164 E. R. 991.

Annotation:—**Refd.** Madan *v.* Madan & De Thoren (1867), 37 L. J. P. & M. 10.

4119. Wife formerly in receipt of allowance under separation deed—Amount equal to allowance.]—WEBER *v.* WEBER & PYNE, No. 4093, *ante*.

4120. —— ——.]—WOOD *v.* WOOD (1887), 57 L. J. Ch. 1; 57 L. T. 746; 36 W. R. 33; 4 T. L. R. 39, C. A.

4121. Grounds for reducing amount—Conduct of wife—Extravagant debts incurred for necessaries.]—HAYWARD *v.* HAYWARD, No. 4109, *ante*.

4122. —— —— Vexatious suits brought by wife.]—HAKEWILL *v.* HAKEWILL, No. 4096, *ante*.

4123. —— —— Adultery.]—CRAMPTON *v.* CRAMPTON & ARMSTRONG, No. 4136, *post*.

D. Calculation of Husband's Income.

(a) In General.

See, now, Matrimonial Causes Rules, 1924, r. 61.

4124. Reference to registrar.]—When the accounts of the husband's income, in his answer to a petition for alimony, are complicated, the ct. may refer it to the registrar to ascertain what is the amount of income admitted by the answer.—SMITH *v.* SMITH (1860), 30 L. J. P. M. & A. 207.

4125. Calculated on previous year's income—Not on average.]—Alimony. The husband's income must be estimated at the amount of the previous year, & not by an average of years.—KELLY *v.* KELLY (1854), 1 Ecc. & Ad. 412; 164 E. R. 237.

4126. Major part of husband's income a terminable annuity.]—The wife applied for permanent alimony on a decree for judicial separation by reason of cruelty. The husband stated on affidavit that, since the petition for alimony *pendente lite* an answer had been filed, he had parted with his business, which was the principal source of income, for a yearly payment of £300 for seven years, & 5 per cent. on the value of warehouse, stock-in-trade, debts, etc.:—*Held:* in allotting alimony the £300 yearly must be taken as income, the ct. observing that, if the income really failed, the husband could apply for reduction of alimony.—MOORE *v.* MOORE (1864), 3 Sw. & Tr. 606; 34 L. J. P. M. & A. 146; 11 L. T. 459; 161 E. R. 1410.

4127. Husband temporarily unemployed—Average of three years' income.]—THOMPSON *v.* THOMPSON & JOHNSON, No. 4082, *ante*.

(b) What must be included.

4128. Voluntary allowance.]—MALO *v.* MALO,

awarded *interim* alimony in excess of an allowance based on the usual one-fifth rule.—COOK *v.* COOK, [1924] 1 W. W. R. 1162; 2 D. L. R. 112.—**CAN.**

4116 i. ***Proportion of joint income allowed.***]—*Interim* alimony fixed at one-fifth of the joint income.—DIEBERT *v.* DIEBERT (1908), 7 W. L. R. 458.—**CAN.**

Sect. 9.—Proceedings pending suit: Sub-sect. 1, D. z), (b) &

(1786), 2 Sw. & Tr. 657, n.; 32 L. J. P. M. & A. 67, n.; 7 L. T. 437, n.; 164 E. R. 1153.

Annotations:—**Consd.** Haviland *v.* Haviland (1863), 3 Sw. & Tr. 114. **Apld.** Martin *v.* Martin, [1919] P. 283.

4129. ——.]—The wife cannot include in her husband's income liable to alimony any purely voluntary allowance made to him; though possibly there might be circumstances under which the wife might be entitled to alimony out of income to which the husband might have no strict legal right.—HAVILAND *v.* HAVILAND (1863), 3 Sw. & Tr. 114; 1 New Rep. 377; 32 L. J. P. M. & A. 67; 7 L. T. 757; 9 Jur. N. S. 208; 11 W. R. 550; 164 E. R. 1216.

Annotations:—**Consd.** Bonsor *v.* Bonsor, [1897] P. 77. **Folld.** Martin *v.* Martin, [1919] P. 283. **Refd.** Dent *v.* Dent (1867), 36 L. J. P. & M. 61.

4130. ——.]—MOSS *v.* MOSS & BUSH, No. 4078, *ante.*

4131. ——.]—The ct. had made an order on resp. for payment of permanent alimony at the rate of £110 *per annum*, so long as he was in receipt of a rentcharge of £400 *per annum* (his only source of income), the trustees of which had a discretionary power to refuse payment, in which event it enured to the benefit of the tenant for life. Resp. had prior to the date of the order become a bkpt., but the trustees had nevertheless continued to pay to him the rentcharge, & he had failed to comply with the order of the ct. The ct. (resp. & trustees opposing) directed a sequestration in general terms to issue against the property, etc., of resp.—CLINTON *v.* CLINTON (1866), L. R. 1 P. & D. 215; 14 L. T. 257; 11 W. R. 545.

Annotations:—**Consd.** Bonsor *v.* Bonsor, [1897] P. 77. **Folld.** Martin *v.* Martin, [1919] P. 283. **Refd.** Dent *v.* Dent (1867), 36 L. J. P. & M. 61.

4132. ——-BRUERE *v.* BRUERE, No. 4077, *ante.*

4133. ——.]-BONSOR *v.* BONSOR, No. 5346, *post.*

4134. ——.]—MARTIN *v.* MARTIN, No. 5322, *post.*

4135. Property not producing income.]—HARRIS *v.* HARRIS (1828), 1 Hag. Ecc. 351; 162 E. R. 610.

4136. ——.]—(1) Where the answer to a petition for alimony alleges that property of which the husband is owner is mortgaged, it should state the date of the mtge. & the name of the mtgee. as well as the amount of the mtge. debt.

(2) All the valuable property of the husband will be taken into account in allotting alimony, although he may derive no income from it. Therefore the value of shares in a joint-stock co. although no dividend is payable upon them, & the annual value of houses occupied by the husband or by others rent free, should be stated in the answer.

(3) Payments made by the husband to the wife since the service of the citation will be deducted from the alimony *pendente lite.*

(4) The adultery of the wife is no ground for allotting less than the usual amount of alimony *pendente lite*, & the averment of such adultery in the answer is irrelevant.—CRAMPTON *v.* CRAMPTON & ARMSTRONG (1863), 32 L. J. P. M. & A. 142.

Annotation:—*Generally*, **Refd.** Maden *v.* Maden & De Thoren (1867), 37 L. J. P. & M. 10.

4137. ——**Cumulative investment.**]—Where, in a petition for alimony *pendente lite* a portion of the husband's property was invested upon terms that the profits accruing therefrom should not be at once paid, but should accumulate until they should amount to a certain fixed sum, & the investment was a flourishing one, the ct. included this portion of the property in calculating the alimony.—WILSON *v.* WILSON & HOWELL (1872), 26 L. T. 108; 20 W. R. 320.

4138. Estimated value of marketable securities.]—The estimated value of all marketable securities must be included in the calculation of the husband's income, in order to the allotment of alimony *pendente lite.*—HARRIS *v.* HARRIS (1828), 1 Hag. Ecc. 351; 162 E. R. 610.

4139. Contingent reversionary interest.]—STONE *v.* STONE, No. 4112, *ante.*

Where husband's sole property a contingent reversionary interest.]—*See* No. 4083, *ante.*

4140. Expectancy.]—STONE *v.* STONE, No. 4112, *ante.*

4141. Stock-in-trade, tools, etc.]—HICK *v.* HICK & KITCHIN (1863), 12 W. R. 444, n.

(c) *What may be deducted.*

4142. Life insurance premiums.]—HARRIS *v.* HARRIS (1828), 1 Hag. Ecc. 351; 162 E. R. 610.

4143. —— **Policy settled for benefit of wife & children.**]—The general rule in estimating the husband's income for the purposes of alimony is, that he is not entitled to deduct sums paid by way of premium to maintain a policy of insurance on his life; but where the policy was under settlement for the benefit of his wife & children after his death, & the premium was deducted & paid over to the office by his employers, the ct. allowed him to deduct the amount of such premium in estimating his income.—FORSTER *v.* FORSTER & THOMAS (1862), 2 Sw. & Tr. 553; 31 L. J. P. M. & A. 84; 6 L. T. 693; 10 W. R. 810; 164 E. R. 1111.

4144. Outgoings—Due to husband's extravagance.]—(1) After sentence of separation by reason of gross cruelty & adultery on the part of the husband, the real estate being £6,000 a year, subject, as alleged by the husband, to large incumbrances, the mother's jointure having been £1,000 & the wife's pin-money £500 a year, the ct. allotted £1,000 a year permanent alimony, allowing the husband to deduct from that sum any payment on account of pin-money above £200 a year, the sum agreed to be paid to the wife for the maintenance of the children.

(2) The court [would not] be disposed to allow the full deductions claimed on account of outgoings, occasioned by [the husband's] own extravagance & profligacy (SIR JOHN NICHOLL).—MYTTON *v.* MYTTON (1831), 3 Hag. Ecc. 657; 162 E. R. 1298.

4145. —— **Real property—Current repairs—Improvements.**]—HAYWARD *v.* HAYWARD, No. 4109, *ante.*

4146. Instalments to pay debt.]—Upon the allotment of alimony, if a husband has contracted to pay off a debt by annual instalments, the amount of each instalment may be deducted from

PART XIII. SECT. 9, SUB-SECT. 1.—D. (c).

e. *Change of husband's circumstances.*]—A petition by a wife—petitioner in the one & resp. in the other of two cross-suits for an increase of alimony was treated by consent on appeal as a petition for alimony. Resp. was in receipt of a salary from Govt. which was subject to deductions, on account of the pension & annuity funds, his circumstances were involved, & he had agreed with his creditors to discharge his liabilities by instalments; as part of such agreement he was keeping up a policy of insurance on his life, & he was maintaining & educating three children in England, but his salary had increased since the order first made for alimony:—*Held:* resp. was entitled as of right to have only the deductions on account of pension & annuity funds taken into consideration in the computation of his nett income. In this case, however, the ct., in the exercise of its discretion, took into consideration the

his annual income.—PATTERSON *v.* PATTERSON, CURTIS & DORE (1863), 33 L. J. P. M. & A. 36.

Maintenance of issue of former marriage—Calculation of alimony pendente lite.]—*See* Nos. 4113, 4115, *ante*, No. 5281, *post*.

E. Duration.

(*a*) *Commencement.*

4147. Ecclesiastical practice—Delay by wife—Return of inhibition.]—GRESSE *v.* GRESSE (1780), cited 1 Phillim. 208; 161 E. R. 962.

Annotation:—**Consd.** Loveden *v.* Loveden (1810), 1 Phillim. 208.

4148. —— —— Date of sentence.]—BRISCO *v.* BRISCO (1820), 3 Phillim. 206; 161 E. R. 1303.

Annotations:—**Refd.** Harmar *v.* Harmar (1857), Dea. & Sw. 282; Leslie *v.* Leslie, [1911] P. 203.

4149. Return of petition.]—Alimony *pendente lite* is to be computed from the return only & not from the issue of the citation, even though considerably prior to the return, unless, possibly under special circumstances.—BAIN *v.* BAIN (1824), 2 Add. 253; 162 E. R. 286.

4150. ——.]—HAYWARD *v.* HAYWARD, No. 4109, *ante*.

4151. Service of petition.]—Alimony *pendente lite* is payable from the date of the service, not of the return, of the citation.—NICHOLSON *v.* NICHOLSON & RATCLIFFE (1862), 31 L. J. P. M. & A. 165.

4152. Date of decree—Where payment on account made before decree.]—HAYWARD *v.* HAYWARD, No. 4109, *ante*.

4153. Respondent living with co-respondent—Cessation of cohabitation.]—HOLT *v.* HOLT & DAVIS, No. 4072, *ante*.

Whether ordered before husband's answer.]—*See* No. 4070, *ante*.

(*b*) *Suspension.*

4154. Adjournment of proceedings at request of wife.]—ROGERS *v.* ROGERS, No. 4303, *post*.

(*c*) *Termination.*

4155. In restitution suit—Obedience to decree.]—*Held:* she was entitled to alimony subsequently to the decree for restitution, & until the husband received her home; &, for the purpose of alimony, the cause was *pendente lite* until the husband obeyed the decree of the ct.—TAYLOR *v.* TAYLOR (1842), 6 Jur. 633, P. C.; *subsequent proceedings* (1843), 2 Notes of Cases, 174, P. C.

4156. —— Disobedience to decree.]—The jurisdiction of the ct. to provide alimony for a wife *pendente lite*, in the case of proceedings for restitution of conjugal rights by a wife, extends until the proved disobedience by the husband to a decree for restitution, after which the ct. has jurisdiction under Matrimonial Causes Act, 1884 (c. 68), to provide her with permanent maintenance. The wife's right to an order for alimony *pendente lite* is not affected by the fact that the order is not made until after the decree for restitution.—VER MEHR *v.* VER MEHR, [1921] P. 404; 90 L. J. P. 349; 126 L. T. 108; 66 Sol. Jo. (W. R.) 4.

4157. In dissolution suit—On decree nisi.]—LATHAM *v.* LATHAM & GETHIN, No. 4184, *post*.

4158. ·.]—Alimony *pendente lite* ceases when the wife's adultery is conclusively proved; that is, on the pronouncing of the decree *nisi* in cases heard before the ct. itself, or in cases tried before a jury, when the time has elapsed for moving for a new trial before the ct.; & if that is refused by the ct., when the further time for appealing from such refusal has elapsed.—WELLS *v.* WELLS & HUDSON (1864), 3 Sw. & Tr. 542; 4 New Rep. 446; 33 L. J. P. M. & A. 151; 10 L. T. 696; 10 Jur. N. S. 755; 164 E. R. 1386.

Annotations:—**Consd.** Dunn *v.* Dunn (1888), 13 P. D. 91. **Refd.** Whitmore *v.* Whitmore (1866), L. R. 1 P. & D. 96.

4159. —— —— Discretion of court to continue.]—Where alimony *pendente lite* has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the ct. may in its discretion make an order for the alimony to continue.—DUNN *v.* DUNN (1888), 13 P. D. 91; 57 L. J. P. 58; 59 L. T. 385; 36 W. R. 539; 4 T. L. R. 399, C. A.

4160. —— On lapse of time for appeal or application for new trial.]—WELLS *v.* WELLS & HUDSON, No. 4158, *ante*.

4161. —— ——.]—Where a decree *nisi* had been pronounced at the instance of the husband, & the time for moving for a new trial had been allowed to elapse without any such application, the ct. refused to enforce the payment of the wife's alimony *pendente lite* beyond the fortnight during which she might have moved for a new trial. The *lis* between the parties is terminated not by the decree absolute, but by the lapse of time allowed for questioning the verdict.—MADAN *v.* MADAN & DE THOREN (1868), 19 L. T. 612; 17 W. R. 265.

4162. In suit for judicial separation—Whether allowed pending appeal.]—JONES *v.* JONES, No. 2320, *ante*.

4163. In nullity suit—Whether on decree nisi or decree absolute.]—In a suit for nullity alimony continues payable after the decree *nisi* until the decree is made absolute.—S. (FALSELY CALLED B.) *v.* B. (1884), 9 P. D. 80; 53 L. J. P. 63; 32 W. R. 756.

4164. —— ——.]—The principle on which decrees of nullity of marriage have been ordered to be decrees *nisi* in the first instance is that the Queen's Proctor may have an opportunity of intervening wherever there is any doubt as to the facts of the case. Where, however, the status of the parties is definitely settled, as where it has been proved beyond question that the marriage which it is sought to set aside was bigamous, there is no reason why the ct. should not at once exercise its discretion & relieve petitioner from the obligation to pay alimony *pendente lite* between decree *nisi* & decree absolute.—CHILDERS *v.* CHILDERS (OTHERWISE BURFORD) (1899), 68 L. J. P. 90.

4165. Where King's Proctor intervenes—At date of proof of wife's adultery.]—WHITMORE *v.* WHITMORE, No. 4884, *post*.

4166. —— Wife proved guilty of collusion but not adultery—Decree nisi rescinded—Appeal by wife pending.]—On the trial of cross-petitions presented by husband & wife, the jury found that the husband had, but the wife had not committed adultery, & a decree *nisi* for dissolution of the

---

expenses resp. was put to in maintaining his children, & also the arrangement he had made for liquidating his debts.—R. *v.* R. (1890), I. L. R. 14 Mad. 88.—**IND.**

PART XIII. SECT. 9, SUB-SECT. 1.—E. (a).

4151 i. *Service of petition.*]—*Interim* alimony runs from the time of the service of the bill, if there has been no want of diligence on pltf.'s part in making the application.—HOWE *v.* HOWE (1871), 3 Ch. Ch. 494.—**CAN.**

f. Date of decree.]—Unless the statement of claim makes a demand for a specific sum by way of interim alimony, it should only be allowed from the date of the order, not from the commencement of the action.—MCARTHUR *v.* MCARTHUR (1905), 15 Man. L. R. 151.—**CAN.**

g. ——.]—PARISH *v.* PARISH (1912), 23 O. W. R. 79; 4 O. W. N. 105; 6 D. L. R. 491.—**CAN.**

Sect. 9.—*Proceedings pending suit: Sub-sect.* 1, *E.* (*c*), *& F., G., H. & I.* (*a*),

marriage was accordingly pronounced by the ct. The Queen's Proctor having intervened, a second trial took place, when the jury found that both parties had acted in collusion to suppress material facts, but they could not agree as to the charge of adultery, brought by the Queen's Proctor against the wife. The ct. rescinded the decree *nisi*. The wife appealed, & the husband had ceased to pay the alimony:—*Held:* a writ of *fi. fa.* to enforce the arrears of alimony could not be granted, but the order for payment of the alimony ought to be renewed until further notice.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM (1889), 15 P. D. 13; 59 L. J. P. 11.

4167. Disobedience by wife of order as to custody.]—HOPE *v.* HOPE, No. 5319, *post*.

4168. Charge of maintenance by prostitution—Charge denied by wife—Main issue in suit.]—The ct. refused to rescind an order for alimony *pendente lite* on an allegation, supported by affidavits, that the wife was maintaining herself by prostitution; the wife in her affidavit denying the truth of the allegation, & the charge of prostitution being the main question in the suit.—PATCH *v.* PATCH (1869), 38 L. J. P. & M. 27; 19 L. T. 662; 17 W. R. 265.

F. Increase or Reduction of Amount.

See Matrimonial Causes Rules, 1924, r. 63.

4169. Decrease—Whether allowed.]—An allotment of alimony *pendente lite* reduced, on the proof that the husband was no longer in a condition to aliment the wife *pendente lite*, at the rate originally assigned.—COX *v.* COX (1826), 3 Add. 276; 162 E. R. 480.

Annotation:—**Refd.** Shirley *v.* Wardrop (1858), 1 Sw. & Tr. 317.

4170. —— Sufficiency of particulars of grounds for application.]—In Apr. 1857, in a suit for nullity of marriage brought by the husband against the wife, alimony *pendente lite* was agreed upon at £300 *per annum*, & confirmed by order of ct. On application for reduction of such rate of alimony, on the husband's affidavit that his income in 1857 was £1,200, & now only £949, but not explaining how such reduction had been caused, nor stating when or how a certain sum of £10,000 had been spent, the ct. refused to interfere.—SHIRLEY *v.* WARDROP (FALSELY CALLED SHIRLEY) (1858), 1 Sw. & Tr. 317; 32 L. T. O. S. 198; 164 E. R. 746.

4171. Increase—Whether allowed—Husband's income not actually ascertained.]—On appeal by the wife in a suit of divorce by reason of adultery, application was made for an increase of alimony *pendente lite*. The alleged addition to the husband's income, the ground of the application, could not be actually ascertained until the end of the year, & the *præsertim* of the appeal in effect acknowledged the wife's guilt:—*Held:* the ct. could not decree an increase of alimony out of an income, not actually ascertained, & the sum allotted in the ct. below was sufficient in the circumstances.—STONE *v.* STONE (1845), 9 Jur. 381.

G. Payment.

4172. Allowance of payment on account.]—When alimony *pendente lite* is decreed to commence from the return of the citation all sums paid subsequent to that return are to be allowed as part payment.—HAMERTON *v.* HAMERTON (1827), 1 Hag. Ecc. 23; 162 E. R. 493.

Annotations:—**Refd.** Mackonochie *v.* Penzance (1881), 6 App. Cas. 424; Bailey *v.* Bailey (1884), 50 L. T. 722.

4173. Payment to solicitor—Husband's right to refuse.]—When alimony is by the terms of the order allotting it made payable to the wife, the husband is not bound, at her request, to pay it to her solr. The ct. allowed such an order to be amended by making the alimony payable to the wife's solr.; but refused to allow her the costs of the motion.—PARR *v.* PARR & WHITE (1863), 32 L. J. P. M. & A. 90; 11 W. R. 257.

4174. —— Necessity for authority by wife—Consent by affidavit—Wife in prison for felony.]—KELLY *v.* KELLY, No. 4230, *post*.

4175. —— —— Consent in writing.]—The ct. will not make an order for the payment of alimony *pendente lite* to the wife's attorney without a written consent from her.—BROWN *v.* BROWN (1865), 4 Sw. & Tr. 144; 34 L. J. P. M. & A. 102; 164 E. R. 1471.

4176. —— —— ——.]—(1) An order for the payment of alimony to the wife's solr. or proctor will not be made except upon the written application of the wife.

(2) When alimony is so paid, the solr. is not entitled to charge for receiving it.—MARGETSON *v.* MARGETSON (1865), 35 L. J. P. & M. 80.

4177. —— Right of solicitor to charge.]—MARGETSON *v.* MARGETSON, No. 4176, *ante*.

—— Whether subject to lien.]—*See* Nos. 4179, 4180, *post*.

4178. Death of wife before payment—Claim by executors to be joined as parties.]—SCHENCK *v.* SCHENCK, No. 4580, *post*.

Payment in arrear—Issue of bankruptcy notice against husband.]—*See* BANKRUPTCY, Vol. IV., p. 91, No. 819.

Deduction of income tax.]—*See* INCOME TAX.

Enforcement.]—*See* Sub-sect. 1, K., *post*.

H. Alienation.

4179. Payment to wife's solicitor—Whether subject to lien.]—The alimony allotted to the wife, petitioner, was, by the order of the ct., made payable to herself. Resp. paid the alimony to the wife's solr., who, from time to time, made payments on account to petitioner. Petitioner never authorised him, by nomination in writing, to receive the alimony, nor was it shown that she had acquiesced in his receiving it:—*Held:* the solr. had no lien for costs on the money which he had received as alimony.—LEETE *v.* LEETE (1879), 48 L. J. P. 61; 40 L. T. 788; 27 W. R. 921.

Annotation:—**Folld.** Cross *v.* Cross (1880), 43 L. T. 533.

4180. —— ——.]—A solr.'s lien does not extend to alimony *pendente lite* paid over to him as such, *i.e.* for the purpose of the wife's maintenance, unless he holds her direct written authority to him to receive it as her agent under r. 94.—CROSS *v.* CROSS (1880), 43 L. T. 533.

See, generally, SOLICITORS.

4181. Whether alienable—Equitable execution.]—A husband & wife were joint lessees of a dwelling-house. The lease was mortgaged. The husband paid the rent, rates, taxes, & interest on the mtge., which amounted together to £294. The wife with the children of the marriage lived in the lower part of the house. The upper part was let to a tenant at a rent of £200. The husband allowed the wife to receive this rent. The value of her occupation of the lower part was £100. The husband instituted proceedings for divorce. The registrar fixed the amount of alimony *pendente lite* for the wife & children at £836 a year. He treated her as already receiving £300, & an order was made that the husband should pay the wife alimony at the rate of £45 a month, £540 a year, for herself & the

children. Certain creditors of the wife recovered judgment against her & then obtained an order for the appointment of a receiver of the rents, profits, & moneys receivable in respect of her interest in the house :—*Held :* the order for a receiver must be discharged.—WALLS (J.) LTD. *v.* LEGGE, [1923] 2 K. B. 240 ; 92 L. J. K. B. 717 ; 129 L. T. 129, C. A.

I. Procedure.

(*a*) *Time for Application.*

See Matrimonial Causes Rules, 1924, r. 57.

4182. After evidence de bene esse—Though evidence proves guilt of wife.]—On the last day of the sittings the judge ordinary allowed petitioner's witnesses to be examined, though the case was not in the list for the day, on the understanding that, if the resp. & co-resp. intimated their intention to defend the suit, the case should be reheard. The evidence proved adultery. On a subsequent application for alimony *pendente lite*, the judge ordinary held that resp. could not be prejudiced by the evidence so taken ; notice meantime having been given that resp. & co-resp. intended to defend.—PHILLIPS *v.* PHILLIPS & MEDLYN (1865), 4 Sw. & Tr. 129 ; 34 L. J. P. M. & A. 107 ; 164 E. R. 1465.

4183. In dissolution suit—After decree nisi—On ground of wife's adultery.] — Alimony *pendente lite* was allotted after there had been a verdict of adultery against the wife, but before the case came on for a final decree before the full ct.—D'OYLEY *v.* D'OYLEY & BALDIE (1859), 4 Sw. & Tr. 226 ; 29 L. J. P. M. & A. 165 ; 23 J. P. 231 ; 164 E. R. 1503.

4184. ——.]—A decree *nisi* for dissolution of marriage, if not appealed from, puts an end to the *lis* between the parties. Alimony *pendente lite* will not therefore be due after the date of the decree *nisi ;* but where the husband moved to have the decree made absolute, he being resident in India, & it appeared that a sum of money was due to the wife on account of alimony *pendente lite*, the ct. refused to make the decree absolute.—LATHAM *v.* LATHAM & GETHIN (1861), 2 Sw. & Tr. 299 ; 30 L. J. P. M. & A. 163 ; 9 W. R. 680 ; 164 E. R. 1011.

Annotations :—**Dbtd.** Laxton *v.* Laxton (1861), 30 L. J. P. M. & A. 208. **Overd.** Ellis *v.* Ellis (1883), 8 P. D. 188. **Refd.** Wells *v.* Wells (1861), 3 Sw. & Tr. 542 ; Ousey *v.* Ousey (1875), 1 P. D. 56 ; Langworthy *v.* Langworthy (1886), 55 L. J. P. 33 ; Lewis *v.* Lewis, [1892] P. 212.

4185. ——.]—(1) The ct. has power to order alimony *pendente lite* notwithstanding a decree *nisi* has been made for dissolution of marriage. *Latham* v. *Latham*, No. 4184, *ante*, overd.

(2) Until the decree becomes absolute the parties are still husband & wife & the marriage is not severed (COTTON, L.J.).—ELLIS *v.* ELLIS (1883), 8 P. D. 188 ; 52 L. J. P. 99 ; 49 L. T. 223 ; 31 W. R. 942, C. A.

Annotations :—*As to* (1) **Distd.** Dunn *v.* Dunn (1888), 13 P. D. 91. **Refd.** Fox *v.* Fox, [1925] P. 157. *As to* (2) **Refd.** Stanhope *v.* Stanhope (1886), 11 P. D. 103.

4186. —— Effect of delay—Application shortly before husband's petition for leave to withdraw.]—TWISLETON *v.* TWISLETON & KELLY, No. 4611, *post*.

4187. .]—The ct. refused to make any order for alimony *pendente lite*, after a decree *nisi* had been obtained for a dissolution of marriage by reason of the wife's adultery, the wife having allowed some months to elapse after the commencement of the suit before she filed her petition for alimony.—NOBLETT *v.* NOBLETT & KERSHAW (1869), L. R. 1 P. & D. 651 ; 20 L. T. 716.

4188. In nullity suit—After decree nisi—Time for decree absolute passed.]—FODEN *v.* FODEN, No. 4101, *ante*.

4189. In restitution suit—After decree to resume cohabitation.]—VER MEHR *v.* VER MEHR, No. 4156, *ante*.

(*b*) *Service of Petitions and Orders.*

See Matrimonial Causes Rules, 1924, r. 57.

4190. Substituted service—Of petition—Where allowed—Substituted service of main petition allowed.]—On a motion for substituted service of a petition for alimony *pendente lite*, in a case where substituted service of the petition for divorce had previously been ordered by service upon resp.'s agents, the ct. granted the motion, & as it appeared that a copy of the petition for alimony, had already been sent in a registered letter to the agent's address, ordered that further service, should be dispensed with.—ODEVAINE *v.* ODEVAINE (1888), 58 L. T. 564 ; 52 J. P. 280.

4191. —— Of order—How served.] — Where orders had been made that the husband should pay the wife's costs & alimony *pendente lite*, & the husband had assigned his property, & could not be found, the ct. allowed substituted service of the orders by leaving them at the last known residence of the husband, at his attorney's office, & at the address given in the appearance book.—NUTTALL *v.* NUTTALL (1862), 31 L. J. P. M. & A. 164.

Service generally, *see* Sect. 8, sub-sect. 5, *ante*.

(*c*) *Pleadings.*

See, now, Matrimonial Causes Rules, 1924, rr. 57–60.

4192. Petition—Amendment after answer—Allegation of further income of husband—Denial of own income.]—Petitioner filed a petition for alimony in which she set forth certain property which she asserted she held to her separate use, & resp. answered the petition on oath. The ct. consequently permitted petitioner to amend her petition for alimony, by adding thereto allegations of further income of resp., & a denial of the greater part of the income she had attributed to herself in her petition.—HARKER *v.* HARKER (1868), 37 L. J. P. & M. 11.

4193. Answer—Husband's right to put in.]—BUTLER *v.* BUTLER (1752), 1 Lee, 38 ; 161 E. R. 16.

Annotation :—**Refd.** Synge *v.* Synge (1900), 64 J. P. 454.

4194. —— Jurisdiction of court to order.] — In a matrimonial suit the wife filed a petition for alimony, to which resp. did not answer. Under Rules & Regulations, 1866, r. 84, the ct. made a peremptory order upon resp. to file an answer to the petition for alimony within a week.—SNOWDON

PART XIII. SECT. 9, SUB-SECT. 1.—I. (a).

h. *Effect of delay.*]—Where a pltf. had neglected to proceed to a hearing at the first hearing term after issue joined, owing to a slip on the part of her solr. :—*Held :* this was no bar to her obtaining *interim* alimony.—PETERSON *v.* PETERSON (1874), 6 P. R. 150.—**CAN.**

k. ——.] — THOMPSON *v.* THOMPSON (1883), 9 P. R. 526.—**CAN.**

l. *After defence filed — Or expiration of time allowed for defence.*]—An application for *interim* alimony cannot be made until defence is filed or the time for filing it has expired.—PECK *v.* PECK (1882), 9 P. R. 299.—**CAN.**

m. —— ——.] — MCARTHUR *v.* MCARTHUR (1905), 15 Man. L. R. 151 ; 1 W. L. R. 1.—**CAN.**

PART XIII. SECT. 9, SUB-SECT. 1.—I.

n. *Answer—Offer to pay for necessaries — Cruelty alleged in petition.*] —It is not a sufficient answer to a motion for *interim* alimony where cruelty is alleged, that the husband has offered to allow the wife to get

Sect. 9.—*Proceedings pending suit: Sub-sect.* 1, *I.* (*c*) *&* (*d*) *i. & ii.*, (*e*), *J. & K.*]

v. SNOWDON (1871), L. R. 2 P. &. D. 200; 40 L. J. P. & M. 29; 24 L. T. 763; 19 W. R. 760.

4195. —— What particulars must be given.]—On a petition for alimony *pendente lite* by the wife, the husband is required by the ordinary practice of the ct. to furnish particulars of his income, but such rule or practice is not absolute. If the wife has a separate income sufficient to maintain her in the position to which she has been accustomed, the ct. will not be disposed to order the husband to furnish particulars of his income with a view to the allotment of alimony, more especially if the investigation into his circumstances would tend to the husband's detriment.—BLACKBORNE *v.* BLACKBORNE (1867), 36 L. J. P. & M. 88; 16 L. T. 435; 16 W. R. 29.

4196. —— —— Mortgage of property.]—CRAMPTON *v.* CRAMPTON & ARMSTRONG, No. 4136, *ante*.

4197. —— —— Whether gross or net annual value—Income from trade.]—It is not sufficient to specify the amount of net annual income derived from trade in an answer to a petition for alimony. The gross annual income, & the deductions, must be specified. It is also necessary to specify the gross rental of houses from which income is derived, & to give particulars of the charges & out-goings, in respect of which deduction is claimed.—NOKES *v.* NOKES (1863), 3 Sw. & Tr. 529; 3 New Rep. 215; 33 L. J. P. M. & A. 24; 12 W. R. 443; 164 E. R. 1381.

4198. —— —— —— Income from house property.]—NOKES *v.* NOKES, No. 4197, *ante*.

4199. —— —— Whether value of stock in trade, tools, etc.]—HICK *v.* HICK & KITCHIN (1863), 12 W. R. 444, n.

4200. —— When particulars of husband's income dispensed with.]—BLACKBORNE *v.* BLACKBORNE, No. 4195, *ante*.

4201. —— Income during previous three years—Whether average income sufficient.]—An answer to a petition for alimony, setting out the average income of the husband for several years, & not setting out his income during the three years previous to the commencement of the suit:—*Held:* to be insufficient.—WILLIAMS *v.* WILLIAMS (1867), L. R. 1 P. & D. 370; 36 L. J. P. & M. 39; 15 L. T. 249; 15 W. R. 288.

Annotations:—**Refd.** Powell *v.* Powell (1874), L. R. 3 P. & D. 186; Gandy *v.* Gandy (1882), 51 L. J. P. 41.

4202. What particulars may be given—Facts bearing on present income.]—WILLIAMS *v.* WILLIAMS, No. 4201, *ante*.

4203. —— Amendment—Jurisdiction of court to order—Answer ambiguous.]—(1) The ct. has no power to order that the husband should attend at the hearing of a petition for alimony *pendente lite*, that he may be cross-examined as to the statements in his answer as to the amount of his income.

(2) Where such an answer is ambiguous (*e.g.*), where it does not appear what are the deductions made by the husband from his gross income, the ct. will direct it to be reformed by inserting an explanation of the ambiguous statements.—HOPPER *v.* HOPPER (1858), 28 L. J. P. & M. 26.

4204. —— Further & fuller answer—When ordered—Instead of ordering husband's attendance.]—Where the answer of a husband to a petition for alimony is not sufficiently explicit, he will under r. 12 of Further Rules, be ordered to give a further & fuller answer, but he will not be ordered to attend the hearing that he may be examined in open ct., unless his answer is evasive.—CLARK *v.* CLARK (1860), 31 L. J. P. M. & A. 32.

Annotation:—**Folld.** Senior *v.* Senior (1866), 15 W. R. 91.

4205. —— —— —— ——.]—TONGE *v.* TONGE, ANDERSON & EYKYN, No. 4227, *post*.

4206. Proceedings after answer—Where husband alleges separate income of wife—Replication.]—Where, in his answer to a petition for alimony *pendente lite*, the husband alleges that the wife's income exceeds his—if the wife dispute this, the proper course for her to adopt is to deny the allegation by her replication on oath.—WATTS *v.* WATTS (1859), 28 L. J. P. & M. 125; 23 J. P. 280.

4207. —— —— Amendment of petition.]—HARKER *v.* HARKER, No. 4192, *ante*.

(*d*) *Evidence.*

i. *In General.*

See, now, Matrimonial Causes Rules, 1924, r. 61.

4208. Who may be called—Husband.]—A wife who has presented a petition for alimony has a right to subpœna her husband for the purpose of examining him as a witness in support of her petition.—ANDERSON *v.* ANDERSON (1868), L. R. 1 P. & D. 512; 37 L. J. P. & M. 64; 18 L. T. 371.

Power to call husband for cross-examination on his answer, *see* Sub-sect. 1, (*d*) ii., *post*.

4209. Witnesses—Right of wife to call & examine—Where husband has not filed an answer—Whether notice to husband necessary.]—ROBERTS *v.* ROBERTS (1859), 29 L. J. P. M. & A. 158; 23 J. P. 297.

4210. —— —— ——.]—A husband who has not filed an answer on oath to the petition for alimony *pendente lite* under r. 84, cannot cross-examine the witnesses produced in support of the petition, on the motion for an allotment, or contradict their evidence.—CONSTABLE *v.* CONSTABLE (1869), L. R. 2 P. & D. 17; 39 L. J. P. & M. 17; 21 L. T. 401.

4211. —— —— Where husband has not appeared to original petition.]—In a suit by a wife for judicial separation on the ground of desertion, the ct. having allowed substituted service of the petition, & petition for alimony *pendente lite*, & the husband not having appeared, the ct., under r. 89, allowed the wife to examine witnesses in support of her petition for alimony, without giving the usual four days' notice.—ROBINSON *v.* ROBINSON (1871), 41 L. J. P. & M. 40; 26 L. T. 108; 20 W. R. 260.

4212. —— Right of husband to cross-examine—Or contradict.]—CONSTABLE *v.* CONSTABLE, No. 4210, *ante*.

4213. —— Whether entitled to professional advice.]—A witness who has been subpœnaed to attend for examination before a registrar in divorce proceedings is not entitled as of right to have his solr. present to advise him.—ALLPORT *v.* ALLPORT (1909), 25 T. L. R. 588.

4214. Evidence by affidavit—When allowed.]—The ct. allowed the income of resp., who had not filed any answer to his wife's petition for alimony, to be proved by affidavits; but required that notice should be given to resp. of the filing of the affidavits, & of the wife's intention to apply for alimony upon the income proved therein.—MUMBY *v.* MUMBY (1869), L. R. 1 P. & D. 701; 38 L. J. P. & M. 72; 21 L. T. 155; 17 W. R. 1115.

4215. Cross-examination—Of wife—Grounds for

whatever is necessary for the house, in which both are living but not on friendly terms, & to pay for all such goods.—THEAKSTONE *v.* THEAKSTONE (1905), 10 O. L. R. 386; 6 O. W. R. 436.—**CAN.**

o. *Agreement by wife releasing husband—Subsequent adultery of husband.*]—MILLER *v.* MILLER (1914), 27 W. L. R. 607; 6 W. W. R. 168; 16 D. L. R. 557; 19 B. C. R. 563.—**CAN.**

refusing.]—The husband filed a petition for divorce on the ground of the wife's adultery. By her answer the wife denied the adultery & made a countercharge of cruelty. She then filed a petition for alimony *pendente lite*, which the husband answered by alleging that the wife was being maintained by the co-resp. The wife filed an affidavit denying this, & an order for alimony *pendente lite* was made by the registrar. On the application of the husband an order was made suspending the order for alimony & giving the husband leave to cross-examine the wife on her affidavit & to file further evidence. The wife appealed on the ground that to allow the cross-examination upon an interlocutory proceedings would prejudice the fair trial of the issue of adultery in the divorce suit.

The Ct. of Appeal varied the order by directing that the leave to cross-examine & file further evidence should be subject to the condition that no question should be put in cross-examination or affidavit filed or used which directly or indirectly went to the issue of adultery.—BASS *v.* BASS, [1915] P. 17; 84 L. J. P. 53; 112 L. T. 70; 31 T. L. R. 49, C. A.

Annotation :—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

4216. —— Of wife's witnesses—Whether allowed]—CONSTABLE *v.* CONSTABLE, No. 4210, *ante*.

ii. *Attendance of Husband for Cross-Examination.*

See, now, Matrimonial Causes Rules, 1924, r. 61.

4217. Jurisdiction of court to order.]—HOPPER *v.* HOPPER, No. 4203, *ante*.

4218. When ordered—Discretion of registrar.]—SYKES *v.* SYKES, No. 4111, *ante*.

4219. —— Answer evasive.]—CLARK *v.* CLARK, No. 4204, *ante*.

4220. Where the answer of a husband to a petition for alimony *pendente lite is* not merely insufficiently explicit, but clearly evasive, he will, under the Further Rules, r. 12, be ordered to attend the hearing, that he may be examined in open ct.—SENIOR *v.* SENIOR (1866), 15 W. R. 91.

4221. —— ——.]—The ct. will only permit a husband to be cross-examined on a petition for alimony, when his answer is evasive on the face of it.—PARKER *v.* PARKER (1871), 26 L. T. 108.

4222. —— Discrepancy between husband's & wife's allegations of his income.]—SYKES *v.* SYKES, No. 4111, *ante*.

4223. Costs of motion for attendance & examination.]—Costs of application for further time to answer, etc., on behalf of the wife, will, as a general rule, not be taxed against the husband. Nor costs of a motion for the husband to attend & be examined on the wife's petition for alimony, & his answer on oath thereto, where the result of his examination is to establish the truth of his answer on oath.—HARDING *v.* HARDING & LANCE (1862), 2 Sw. & Tr. 549; 31 L. J. P. M. & A. 76; 6 L. T. 692; 10 W. R. 811; 164 E. R. 1110.

(*e*) *Production and Inspection of Documents.*

See, now, Matrimonial Causes Rules, 1924, r. 61.

4224. Jurisdiction to order—Partnership books.]—In a wife's petition for dissolution of marriage she applied for alimony *pendente lite*. Resp. filed a balance-sheet, showing a loss on his whole business for the year, & the registrar made an order on him & his partner to produce their account-books. They produced a ledger for the last year, but refused to allow it to be inspected :—*Held :* the registrar had power under r. 191 to require an inspection of the ledger, & a writ of attachment issued to enforce the order.—CAREW *v.* CAREW, [1891] P. 360; 61 L. J. P. 24; 65 L. T. 167.

Annotation :—**Consd.** Tonge *v.* Tonge, [1892] P. 51.

4225. Whether ordered — Husband refusing further & fuller answers.]—On motion by a wife that her husband be ordered to give a further & fuller answer to her petition for alimony *pendente lite*, the husband stated his inability to do so.

The ct. ordered that the husband's books should be submitted for inspection to the wife & such other person as might be agreed upon between the parties or named by the registrar.—NEWTON *v.* NEWTON & ALLEN (1872), 27 L. T. 768; 21 W. R. 292.

4226. —— Objection to disclose partnership accounts.]—HIGGS *v.* HIGGS (1830), 3 Hag. Ecc. 472; 162 E. R. 1230.

4227. —— ——.]—In a petition by the husband for the dissolution of the marriage, the wife applied for an allotment of alimony pending suit. The husband in his answer admitted that his income from his business amounted to £3,000 a year, but objected to produce the books of the business before the registrar on the ground that they would disclose the accounts of the partnership :—*Held :* the husband's answer was incomplete, & he must file a fuller & further answer; but he ought not at then existing stage of the proceedings to be ordered to file accounts & to attend for the purpose of being cross-examined upon them.—TONGE *v.* TONGE, ANDERSON & EYKYN, [1892] P. 51; 61 L. J. P. 87; 67 L. T. 390.

Annotation :—**Refd.** Sykes *v.* Sykes, [1897] P. 306.

J. *Costs of Application.*

4228. Where petition refused—On ground of husband's absence of means.]—GAYNOR *v.* GAYNOR & DEGLIANTONI, No. 4075, *ante*.

4229. Amendment of order—Alimony made payable to wife's solicitor—Wife's costs refused.]—PARR *v.* PARR & WHITE, No. 4173, *ante*.

4230. —— —— ——.]—(1) A wife who is undergoing a sentence of imprisonment for felony is, nevertheless entitled to alimony *pendente lite*.

(2) An order that alimony *pendente lite* be paid to the wife will, on her application, be varied by making the alimony payable to the wife or to her solr., but she must bear the costs of the application.

(3) Where a wife was undergoing a sentence of imprisonment the ct. refused so to vary the order without an affidavit by her that she wished the alteration to be made.—KELLY *v.* KELLY (1863), 4 Sw. & Tr. 227; 32 L. J. P. M. & A. 181; 11 W. R. 958; 164 E. R. 1503.

Annotation :—*As to* (1) **Consd.** Leslie *v.* Leslie, [1908] P. 99.

K. *Enforcement of Order.*

4231. Whether court of equity will interfere.]—Husband & wife, who were separated, entered into

PART XIII. SECT. 9, SUB-SECT. 1.—I. (d) ii.

p. *When ordered.*]—On an application alleging means made by a wife for alimony *pendente lite*, resp. denied means. The ct. refused to refer the matter to the registrar to inquire & report, but ordered resp. to attend ct. for cross-examination as to his means.—STEVENSON *v.* STEVENSON (1899), I. L. R. 26 Calc. 764.—**IND.**

PART XIII. SECT. 9, SUB-SECT 1.—J.

q. *Resumption of cohabitation—During pendency of motion—Husband's liability for costs.*]—Pltf., during the pendency of a motion for *interim* alimony, returned to her husband :—*Held :* deft. must pay the costs as between solr. & client of pltf.'s solr.—LEONARD *v.* LEONARD (1883), 9 P. R. 450.—**CAN.**

Sect. 9.—Proceedings pending suit: Sub-sect. 1, K.; sub-sects. 2 & 3, A. (a), (b), (c) &

an agreement in writing, providing for their living together again, & stipulating that, in the event of a future separation for a particular cause, the wife should receive the income of her own fortune, which her husband was entitled to receive, & that her mother should indemnify him against her debts. They afterwards separated, for the cause referred to by the agreement, & the wife obtained a divorce in the Ecclesiastical Ct., & a sentence for permanent alimony to an amount exceeding the income of her fortune. That alimony was regularly paid by the husband, & he received the income of her fortune. The wife accepted a bill of exchange in favour of a creditor of her own. In a suit by that creditor, an injunction was granted to restrain the husband from paying to the wife the annual amount of the income of her fortune, as the validity of the agreement for future separation, under which she was entitled to such income, was not in dispute between the husband & wife.

Qu.: whether such an agreement would be held valid, if disputed. *Semble:* the ct. [of Equity] will not interfere, either to compel or to restrain the payment of alimony, as such, except so far as to grant a writ of *ne exeat* against the husband.—VANDERCUCHT *v.* DE BLAQUIERE (1839), 5 My. & Cr. 229; 3 Jur. 1116; 41 E. R. 358, L. C.

Annotations:—**Consd.** *Re* Meyrick's Settlmt., Meyrick *v.* Meyrick, [1921] 1 Ch. 311. **Refd.** Cartwright *v.* Cartwright (1853), 10 Hare, 630; *Exp.* Bremner (1866), L. R. 1 P. & D. 254; Anderson *v.* Hay (1890), 7 T. L. R. 113.

Modes of enforcement—Action in King's Bench.]—*See* No. 5989, *post.*

—— **Attachment & committal.**]—*See* Nos. 5911–5916, *post.*

—— **Injunction restraining husband from dealing with property.**]—*See* Nos. 6005, 6006, *post.*

—— **Sequestration.**]—*See* Nos. 5956, 5957, *post.*

—— **Writ ne exeat regno.**]—*See* Sect. 23, sub-sect. 3, I., *post.*

See, also, Sect. 22, sub-sect. 1, K., *post.*

SUB-SECT. 2.—DISPUTES AS TO PROPERTY.

See Part XII., Sect. 1, sub-sect. 2, D., *ante.*

SUB-SECT. 3.—CUSTODY AND MAINTENANCE OF, AND ACCESS TO CHILDREN.

A. Custody.

(a) In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193, & Matrimonial Causes Rules, 1924, r. 73.

4232. Discretion of court.]—In making an *interim* order under Matrimonial Causes Act, 1857 (c. 85), s. 35, as to the custody of the children, the ct. will adhere to, or depart from the common law rule according to its discretion.—SPRATT *v.* SPRATT (1858), 1 Sw. & Tr. 215; 31 L. T. O. S. 269; 6 W. R. 860; 164 E. R. 699.

Annotation:—**Refd.** Thomasset *v.* Thomasset, [1894] P. 295.

4233. Jurisdiction of court—Children over sixteen.]—RYDER *v.* RYDER, No. 4250, *post.*

4234. —— ——.]—The ct. has no power to make provision for the maintenance of children above the age of sixteen years.—BLANDFORD *v.* BLANDFORD, [1892] P. 148; 61 L. J. P. 97; 67 L. T. 392; 8 T. L. R. 381.

Annotations:—**Distd.** Midwinter *v.* Midwinter, [1893] P. 93. **Overd.** Thomasset *v.* Thomasset, [1894] P. 295.

4235. ——.]—THOMASSET *v.* THOMASSET, No. 5780, *post.*

4236. —— ·.]—Upon a summons by a father that the mother should be deprived of the custody of their eldest child, a girl over sixteen years of age, the judge in chambers refused the father's application, & directed that the mother should retain the custody of the child pending suit.—B. *v.* B. (1894), 72 L. T. 268.

4237. —— Children out of jurisdiction—Application under Custody of Infants Act, 1873 (c. 12).]—A married woman residing abroad, & having the *interim* custody of her children pending proceedings in England committed to her by the French tribunals, was ordered by the Lord Chancellor to concur with her husband in taking such steps as should be necessary according to the laws of France to obtain the delivering up the children to him. She having opposed an application by the husband to the French cts. for that purpose, on the ground of the pending of an appeal to the House of Lords against the order of the Lord Chancellor, the application was unsuccessful. An order was now made upon Mrs. H., within one week from service of the order, to deliver up the children to Mr. H., or otherwise concur with him in taking such steps as might be necessary, according to the laws of France, to authorise her to deliver them up.

The Ct. of Ch. has jurisdiction over infants who are natural-born English subjects, though born & resident abroad.—HOPE *v.* HOPE (1854), 4 De G. M. & G. 328; 23 L. J. Ch. 682; 24 L. T. O. S. 29; 2 W. R. 698; 43 E. R. 534, L. C.

Annotations:—**Consd.** *Re* Willoughby (1885), 30 Ch. D. 324. **Mentd.** Kendall *v.* Wilkinson (1855), 4 E. & B. 680; Cookney *v.* Anderson (1863), 1 De G. J. & Sm. 365; Drummond *v.* Drummond (1866), 2 Ch. App. 32; *Re* Slade, Slade *v.* Hulme (1881), 45 L. T. 276; Brown *v.* Collins (1883), 25 Ch. D. 56.

(b) To Whom Given.

4238. Intimate friend of petitioner.]—In Apr. 1858, the wife left her husband's house, with the view of instituting a suit for dissolution of marriage, by reason of cruelty & adultery, taking with her their boy, between seven & eight years of age, whom she placed in a school kept by an intimate friend of her own. On application for an *interim* order, to prevent the father removing him from such school:—*Held:* the wife's intimate friend could not be considered an indifferent person between the parties.

The ct. ordered the child to be given up to the husband's mother, who from the letters appeared to be on good terms with the daughter-in-law & attached to the boy.—BOYNTON *v.* BOYNTON (1858), 1 Sw. & Tr. 324; 32 L. T. O. S. 229; 7 W. R. 181; 164 E. R. 749.

4239. Mother of respondent.] — BOYNTON *v.* BOYNTON, No. 4238, *ante.*

4240. Father "or his agent"—Father abroad.]—The ct. decreed the custody of the children, in a suit for dissolution by the husband, who was in India, to "the father or his agent" with the view that, in the father's absence, the grandfather should have charge of them.—LING *v.* LING & PRIOR (1866), 13 L. T. 683.

Compare Sect. 17, sub-sect. 3; Sect. 22, sub-sect. 6, *post.*

(c) What Court will Consider.

4241. Religion of parent.]—GALLINI *v.* GALLINI (*circa* 1815), cited 2 Sim. at p. 37; 57 E. R. 704, L. C.

Annotation:—**Refd.** Ball *v.* Ball (1827), 2 Sim. 35.

4242. Conduct of parent—Father's mistress not

brought to his house.]—Where a person supposed to be improperly in custody is brought up on *habeas corpus*, the ct., if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, & will, if necessary, give him the protection of an officer in going. But, if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; &, if the mother has possessed herself of the child adversely to him, & he claims it, the ct. will oblige her to deliver it up. Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, & does not intend to so do. *Semble:* the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption.—R. *v.* GREENHILL (1836), 4 Ad. & El. 624; 6 Nev. & M. K. B. 244; 111 E. R. 922.

Annotations:—**Consd.** *Re* Hakewill (1852), 12 C. B. 223. **Refd.** *Ex p.* Pulbrook (1847), 11 J. P. Jo. 102; R. *v.* Smith (1853), 17 Jur. 24; R. *v.* Clarke (1857), 7 E. & B. 186; R. *v.* Howes (1860), 3 E. & E. 332; *Re* Andrews (1873), L. R. 8 Q. B. 153; *Re* Edwards (1873), 42 L. J. Q. B. 99; R. *v.* Prince (1875), L. R. 2 C. C. R. 154; *Re* Agar-Ellis, Agar-Ellis *v.* Lascelles (1883), 24 Ch. D. 317; Thomasset *v.* Thomasset, [1894] P. 295.

4243. —— Previous improper attempt to obtain custody.]—Pending a suit for divorce, the wife, in an improper manner, obtained possession of an infant child of the marriage, then living with the husband. On the husband again taking the child from her she endeavoured, by violence, to get it from him, but failing, applied to the ct. for an order that it might be restored to her. The ct. rejected the application, on account of the impropriety of her conduct, & condemned her in the costs of the motion.—ALLEN *v.* ALLEN & D'ARCY (1859), 29 L. J. P. M. & A. 166; 23 J. P. 247.

4244. Age of infant.]—The father has the common law right to the custody of an infant, however young, & in the case of an infant of seven months the ct. held that the mother must show more than the mere natural desire of a mother to induce the ct. to exercise its discretion under Matrimonial Causes Act, 1857 (c. 85), in her favour, & as it did not appear that either mother or child were suffering by the separation, refused to make any order.—CARTLIDGE *v.* CARTLIDGE (1862), 2 Sw. & Tr. 567; 31 L. J. P. M. & A. 85; 6 L. T. 397; 10 W. R. 672; 164 E. R. 1117.

Annotations:—**Distd.** Barnes *v.* Barnes (1867), L. R. 1 P. & D. 463. **Refd.** *Re* Andrews (1873), L. R. 8 Q. B. 153; *Re* Edwards (1873), 42 L. J. Q. B. 99.

4245. ——.]—HAMILTON *v.* HAMILTON (1887), 4 T. L. R. 27.

4246. ——.]—On an application for an order for access to children pending suit on behalf of the mother, the ct. will require to be satisfied that the motive is natural love & affection for the children, & that appct. has no indirect object in view; as to which, lapse of time in making the application may be material. The ct. will also consider the convenience of all parties in the circumstances, & how the children would probably be affected if the order were made.

Interlocutory appeals to the full ct. must be decided on the same materials that were before the judge ordinary.—CODRINGTON *v.* CODRINGTON & ANDERSON (1864), 3 Sw. & Tr. 496; 4 New Rep. 121; 10 L. T. 387; 164 E. R. 1367.

4247. Motives of application—Whether mere desire of mother sufficient.]—CARTLIDGE *v.* CARTLIDGE, No. 4244, *ante*.

4248. Effect of separation on mother's health.]—The ct. made an order, giving the custody of two infant children, the one being of the age of between three & four years, the other of eighteen months, to the mother, resp. in a suit for dissolution of marriage, on the ground that the mother's health was suffering from being deprived of their society, & that they were living with a stranger, & not with the father.—BARNES *v.* BARNES & BEAUMONT (1867), L. R. 1 P. & D. 463; 16 W. R. 283.

(*d*) *Practice and Procedure.*

See Matrimonial Causes Rules, 1924, rr. 34, 73.

4249. Adjournment—To enable wife to answer application—Granted on terms.]—Upon an application by a husband for the custody of a child *pendente lite*, the wife asked for time to answer the affidavit upon which the application was founded. The ct. granted time, upon an undertaking being given by the wife that the child should not be removed out of the jurisdiction of the ct. until further order.—CARTER *v.* CARTER (1860), 29 L. J. P. M. & A. 167.

4250. Evidence—Whether court bound by affidavits.]—(1) On a motion for an *interim* order for the custody of children, the ct. will consider all the existing circumstances at the time of the application, but will not follow affidavits to be read as to the truth or falsehood of charges brought by the parties against each other

(2) The court has, under Matrimonial Causes Act, 1857 (c. 85), s. 31, no jurisdiction to make any order as to custody of children upwards of sixteen years of age. (3) *Semble:* if necessary it might make an order as to their maintenance. —RYDER *v.* RYDER (1861), 2 Sw. & Tr. 225; 30 L. J. P. M. & A. 44; 3 L. T. 678; 9 W. R. 440; 164 E. R. 981.

Annotations:—*As to* (2) **Consd.** Thomasset *v.* Thomasset, [1894] P. 295. *As to* (3) **Refd.** Thomasset *v.* Thomasset, [1894] P. 295; Shaftesbury Union *v.* Brockway (1912), 82 L. J. K. B. 222.

4251. Interim order restraining removal—Whether granted.]—The ct., upon affidavit that petitioner believed her husband intended to remove the only child out of the jurisdiction of the ct., made an order, *ad interim*, upon petitioner's *ex p.* application, restraining resp. from removing the child.—HARRIS *v.* HARRIS (1890), 63 L. T. 262.

4252. Pleading—Paternity of child disputed—Must be specially pleaded.]—Where it is desired by a resp. to question the paternity of a child or children the custody of whom is claimed on a petition, the question of such paternity must be specifically raised in the answer, so that the other side may have due notice to be prepared to meet it, & unless the party opposing the prayer for custody so pleads, such party will not in future be allowed at the hearing to question the paternity of such child or children.—GORDON *v.* GORDON, [1903] P. 92; 72 L. J. P. 34; 88 L. T. 573.

Annotation:—**Consd.** Russell *v.* Russell, [1924] A. C. 687.

PART XIII. SECT. 9, SUB-SECT. 3.—A. (d).

r. *Interim order restraining removal—May be made ex parte.*]—An order that resp. in a suit for judicial separation, in whose custody the children are, do not remove them out of the colony until final decree, or until further order may be made on an *ex p.* application, if, in the opinion of the ct., the matter is so urgent as to require it.—ATKINSON *v.* ATKINSON (1890), 8 N. Z. L. R. 442.—**N.Z.**

s. *Two orders made—Irregularity in first order—Appearance on second—Waiver.*]—Where two *interim* orders as to custody of children have been made in the same suit, but the second does not assume the existence of the first, a party cannot treat an appearance on the making of the second as a waiver of an irregularity in the first.—ATKINSON *v.* ATKINSON (1890), 8 N. Z. L. R. 442.—**N.Z.**

Sect. 9.—*Proceedings pending suit: Sub-sect.* 3, *A.* (*e*) & (*f*), *B.* & *C.*; *sub-sect.* 4, *A.*, *B.*, *C.* & *D.*; *sub-sect.* 5, *A*

(*e*) *Costs of Application.*

4253. Application refused—For improper conduct of applicant—Applicant condemned in costs.]—ALLEN *v.* ALLEN & D'ARCY, No. 4243, *ante.*

(*f*) *Enforcement of Order.*

Peremptory order.]—*See* No. 4102, *post.*

Attachment & committal.]—*See* Nos. 5934–5936, *post.*

B. Maintenance.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193; Matrimonial Causes Rules, 1924, r. 73.

4254. Jurisdiction of court to order—Children over sixteen.]—RYDER *v.* RYDER, No. 4250, *ante.*

4255. —— ——.]—BLANDFORD *v.* BLANDFORD, No. 4234, *ante.*

4256. Whether ousted by separation agreement.]—A wife, having petitioned for the dissolution of her marriage, presented a petition for an allowance by way of alimony *pendente lite* & for the maintenance & education of the children of the marriage. In answer to this petition the husband alleged that prior to the divorce petition he & his wife had entered into an agreement for separation, by which he had agreed to make her an allowance of £600 a year. The wife denied the existence of the agreement:—*Held:* the agreement, if it existed, would not affect the jurisdiction of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 35, & Matrimonial Causes Act, 1859 (c. 61), s. 4, to make provision for the maintenance & education of the children, & the husband must make discovery of his means.—BARRY *v.* BARRY, [1901] P. 87; 70 L. J. P. 17; 84 L. T. 33; 49 W. R. 370; 45 Sol. Jo. 238, C. A.

4257. Whether granted—One child—Order for alimony pendente lite.]—Where alimony has been allotted to the wife & the only child of the marriage left in her custody, *pendente lite*, the ct. refused to order the husband to contribute to its maintenance.—CRANWELL *v.* CRANWELL (1868), 19 L. T. 611.

4258. Order for particulars of husband's income—Jurisdiction of court to order—Effect of prior separation agreement.]—BARRY *v.* BARRY, No. 4256, *ante.*

See, also, No. 4787, *post.*

C. Access.

See Matrimonial Causes Rules, 1924, rr. 34, 73

4259. Jurisdiction of court—Order for access only—No application or order for custody.]—(1) By Matrimonial Causes Act, 1857 (c. 85), s. 35, the ct. for divorce is authorised, during the pendency of a matrimonial suit, to make *interim* orders for the custody, etc., of the children, the marriage of whose parents is the subject of such suit:—*Held:* the ct. might entertain an application for access to the children, although it may not have made & may not have been applied to to make any order as to their custody.

(2) On appeal from an interlocutory matter, not touching the main issue in the cause, & resting in the judicial discretion of the ct. below, applt. must satisfy the Ct. of Appeal that the discretion of the ct. below was altogether wrongly exercised.—THOMPSON *v.* THOMPSON & STURMFELLS (1861), 2 Sw. & Tr. 402; 31 L. J. P. M. & A. 213; 5 L. T. 325; 7 Jur. N. S. 1207; 10 W. R. 96; 164 E. R. 1052.

Annotation:—*As to* (1) **Consd.** Codrington *v.* Codrington & Anderson (1864), 3 Sw. & Tr. 496.

4260. Discretion of court.]—HEATHCOAT *v.* HEATHCOAT (1864), 10 L. T. 389, n.

4261. What court will consider—Necessity for order—Suit for restitution pending.]—The father of infants, before a petition was presented by their mother for access to them, etc., under 2 & 3 Vict. c. 54, went with them to reside abroad. The ct. ordered substituted service of the petition, but, at the hearing, declined to make the order, although the father had filed affidavits & appeared by counsel, because the father & infants were resident abroad, & because a suit by the mother for restitution of conjugal rights was pending, which, if successful, would have the same effect as the order prayed.

The ct. will not make the order where the wife has left her husband without sufficient cause. *Semble:* the order may be made *ex p.* if the necessity of the case requires it.—*Re* TAYLOR (1840), 11 Sim. 178; 9 L. J. Ch. 399; 4 Jur. 983; 59 E. R. 842.

4262. —— Conduct of applicant—Desertion without cause.]—*Re* TAYLOR, No. 4261, *ante.*

4263. —— Motives of application.]—HEATHCOAT *v.* HEATHCOAT (1864), 10 L. T. 389, n.

4264. —— Welfare of children.]—HEATHCOAT *v.* HEATHCOAT (1864), 10 L. T. 389, n.

4265. —— ——.]—In exercising its discretion in the matter of access to children by their parents pending a suit, the ct. is mainly influenced by considerations for the interests of the children. Therefore, where it was satisfied that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused the mother an order for access pending the suit, though there was reason to apprehend that the separation of the mother from the child would exercise a prejudicial effect on the mother's health.—PHILIP *v.* PHILIP (1872), 41 L. J. P. & M. 89; 27 L. T. 592.

4266. Practice—Service of petition—Substituted service.]—*Re* TAYLOR, No. 4261, *ante.*

4267. —— Whether granted on ex parte application.]—*Re* TAYLOR, No. 4261, *ante.*

4268. Variation of order — After verdict — Whether before expiry of time of moving for new trial.]—After the verdict in a petition for dissolution the ct. refused to vary the order as to access to children & to prohibit the guilty wife from seeing her children, until the time for moving for a new trial had expired.

The controversy between the parties is not ended until the period in which a new trial can be moved is exhausted.—GODERICH *v.* GODERICH & LARA, FORDER & KELSEY (1868), 19 L. T. 611.

4269. Costs of application—Whether wife entitled—Application unsuccessful.]—(1) A wife, who unsuccessfully makes or opposes an interlocutory motion in a matrimonial suit, is not entitled to the costs. Accordingly, it was held that the costs of an unsuccessful motion by a wife for access to the children of the marriage, & of an unsuccessful opposition by her to a motion for further particulars of the charges made by her in her petition, should not be allowed.

(2) The fee of counsel for advising on the sufficiency of an answer, which is special, & not a mere traverse of the allegations in the wife's petition, will be allowed on the taxation of costs.—HEPWORTH *v.* HEPWORTH (1861), 30 L. J. P. M. & A. 253.

SUB-SECT. 4.—SECURITY FOR COSTS.

A. In General.

4270. Application of common law rules.]—BLACKETT *v.* BLACKETT & FRAIL, No. 4276, *post.*

B. Against Whom Ordered.

See Matrimonial Causes Rules, 1924, r. 97.

4271. Guardian instituting proceedings on behalf of infant husband.]—BEAVAN *v.* BEAVAN, No. 4083, *ante.*

4272. Wife petitioning for decree of nullity—Out of jurisdiction—Separate estate must be proved.]—The ct. held that it had power to order the wife, who was petitioner in a nullity suit, to give security for costs, but it declined to do so, in that particular instance, as it was not sufficiently proved that she had a separate income.—M. (FALSELY CALLED DE B.) *v.* DE B. (1875), 44 L. J. P. & M. 41 ; 33 L. T. 263.

4273. Intervener—Stranger to suit.]—A husband's petition for divorce was met by a cross-petition for divorce by the wife. The husband's petition being unsupported by evidence was dismissed, but a decree *nisi* was granted to the wife upon her petition. Before the decree was made absolute, upon the intervention of a stranger, an order was made for trial of an issue as to the wife's adultery, no terms as to costs being asked for or imposed upon the intervener. Upon a subsequent application by the wife that the intervener should give security for her costs of the intervention :—*Held:* there was no jurisdiction to make such an order.—GILROY *v.* GILROY, [1914] P. 122 ; 83 L. J. P. 49 ; 110 L. T. 601 ; 30 T. L. R. 365 ; 58 Sol. Jo. 378, C. A.

Husband—In respect of co-respondent's costs.]—*See* Sub-sect. 4, C., *post.*

—— **In respect of wife's costs.**]—*See* Sub-sect. 5, *post.*

C. Costs of Co-Respondent.

4274. When ordered—Only in cases of need.]—The ct., being satisfied that petitioner had, as a fact, assets in this country upon which, if defeated in his suit, execution for any costs ordered to be paid by him could be levied, refused the application of one of co-resps. that petitioner be ordered to give security for his costs. *Semble :* the ct., if well assured that there is real necessity for it, will make an order, upon a co-resp.'s *bonâ fide* application, that petitioner give security for the costs of such co-resp.—REDFERN *v.* REDFERN & HERBERT (1890), 63 L. T. 780.

4275. —— Petitioner husband a bankrupt—Claiming damages.]—In a petition for dissolution of marriage, the husband, who was an uncertificated bkpt. claimed damages. Upon application by the co-resp. :—*Held :* unless the claim for damages was withdrawn petitioner must give security for the costs of the action.—SMITH *v.* SMITH & PALK (1882), 7 P. D. 227 ; 47 L. T. 355 ; 31 W. R. 124.

Annotation :—**N.F.** Blackett *v.* Blackett & Frail, [1902] P. 170.

4276. —— —— ——.]—There is no settled practice in the Probate & Divorce Div. that petitioner, who is an undischarged bkpt. & who claims damages from the co-resp. must give security for costs unless he withdraws the claim for damages.

The same rules apply in the Probate, Divorce & Admlty. Div. as in other divisions of the High Ct., where damages are claimed under Matrimonial Causes Act, 1857 (c. 85).—BLACKETT *v.* BLACKETT & FRAIL, [1902] P. 170 ; 71 L. J. P. 69 ; 86 L. T. 669 ; 50 W. R. 516 ; 18 T. L. R. 567 ; 46 Sol. Jo. 482, C. A.

D. Wife's Costs.

See Sub-sect. 5, *post.*

SUB-SECT. 5.—WIFE'S COSTS.

A. In General.

See Matrimonial Rules, 1924, rr. 91–93.

4277. When payment or security ordered—Petitioner's solicitors not attending application—Costs already taxed.]—GOUGH *v.* GOUGH & BAYNTON, No. 5055, *post.*

4278. —— Discretion of court.]—(1) Registrar or judge has a discretion under r. 158 of the Divorce Rules to order a husband to pay or secure a sum to meet his wife's costs of a divorce suit

PART XIII. SECT. 9, SUB-SECT. 4.– A.

t. *Whether ordered in suit for alimony.*]—An order for security for costs will not be made in an alimony suit.—BENNETT *v.* BENNETT (1876), 7 P. R. 54.—**CAN.**

a. ——.]—KNOWLTON *v.* KNOWLTON (1880), 8 P. R. 400.—**CAN.**

b. —— *Whether husband entitled to order—Wife obtaining divorce decree elsewhere.*]—In an action for alimony the fact that the wife has obtained, of her own volition, a divorce in another jurisdiction is not a ground entitling the husband to security for costs.—ACKERMAN *v.* ACKERMAN, [1918] 2 W. W. R. 759.—**CAN.**

c. *Waiver by plaintiff — What amounts to—Taking steps in action.*]—When a petition by deft. to reduce the amount of alimony allowed in the suit, came on to be heard, pltf. procured an enlargement for two weeks to answer deft.'s affidavits & obtained a further enlargement for two weeks, but before the time expired she applied for an order for security for costs :—*Held :* pltf. had waived her right, if any, to such security.—KNOWLTON *v.* KNOWLTON (1880), 8 P. R. 400.—**CAN.**

d. *Witness & counsel fees.*]—Where pltf., in an alimony suit, is without means, she is not entitled as of course to have the witness fees necessary to enable her to bring the case on to a hearing paid in advance by deft. Such application must be made at the hearing.—HAFFEY *v.* HAFFEY (1877), 7 P. R. 137.—**CAN.**

e. ——.]—An order was made in an alimony suit for payment to pltf., before the trial, of $22.35 on account of her disbursements for witness fees, & of $40 on account of counsel fee :—*Qu. :*—whether the counsel fee should be paid in advance if pltf.'s solr. acts as counsel.—INGRAM *v.* INGRAM (1883), 10 P. R. 569.—**CAN.**

f. ——.]—Rule 1144 does not warrant the making of an order for payment by deft. to pltf.'s solrs. in an alimony action, of a sum to cover counsel fees, unless it is shown that the fees are to be paid to counsel who is not solr. for pltf. or the partner of the solr.—GALLAGHER *v.* GALLAGHER (1897), 17 P. R. 575.—**CAN.**

g. ——.]—FRAZIER *v.* FRAZIER [1921] 1 W. W. R. 1116 ; 65 D. L. R. 774.—**CAN.**

PART XIII. SECT. 9, SUB-SECT. 5.—A.

h. *When payment or security ordered —Action for alimony—Undertaking by solicitor to account.*]—Notwithstanding the language of Rule 1144, an order may be made in an action for alimony for payment by deft. to pltf.'s solicitor of a sum to cover prospective witness fees, upon the undertaking of the solr. to account for all sums not actually & properly disbursed.—STEVENSON *v.* STEVENSON (1899), 19 C. L. T. 392 ; 19 P. R. 48.—**CAN.**

k. —— *Wife's suit for judicial separation.*]—A wife, petitioner for judicial separation, is entitled to an order that the husband do give security for her costs under Divorce Rule 42 (Man.)—ONEFREYCHUCK *v.* ONEFREYCHUCK, [1923] 2 W. W. R. 991.—**CAN.**

l. —— —— *Husband's suit for divorce.*]—On an application by the wife for her costs during the pendency of her suit for judicial separation & her husband's suit for divorce :—*Held :* a wife, whose property is retained by her husband, is entitled to her costs.—GEORGUCOPULAS *v.* GEORGUCOPULAS (1902), I. L. R. 29 Calc. 619.—**IND.**

m. —— *Wife's suit for divorce.*]—In a suit for divorce by a wife having no separate estate, & for whom a solr. has taken up her case *bonâ fide*, an order will be made for security for, or payment into ct. of her taxed assessed costs by deft., unless exceptional reasons can be shown against making such order.—COUCH *v.* COUCH, [1924] 3 D. L. R. 358.—**CAN.**

n. —— *Wife petitioner or respondent.*]—Divorce & Matrimonial

Sect. 9.—Proceedings pending suit: Sub-sect. 5, A., B., C., D., E., F. & G.]

notwithstanding that the wife has separate property.

(2) For the purpose of exercising such discretion in a case where alimony has been ordered the registrar or judge may properly take into consideration the comparative income of husband & wife, as otherwise the basis upon which the alimony was estimated might be disturbed.—ALLEN *v.* ALLEN, ALLEN *v.* ALLEN & BELL, [1894] P. 134; 63 L. J. P. 78; 70 L. T. 326; 42 W. R. 230; 10 T. L. R. 161; 38 Sol. Jo. 128; 6 R. 585, C. A.

4279. —— In husband's suit for dissolution—Only where wife has bonâ fide defence.]—KERSHAW *v.* KERSHAW & BERRY, No. 4915, *post*.

4280. —— —— —— Evidence required.]—FRANKLIN *v.* FRANKLIN & MINSHALL, No. 4305, *post*.

4281. —— Jurisdiction disputed by husband—Whether ground for refusing.]—SMITH *v.* SMITH, No. 3955, *ante*.

B. Costs of Particular Proceedings.

Commission to take evidence abroad.] — *See* Sect. 13, sub-sect. 10, *post*.

4282. Appeal by wife to House of Lords.]—YELVERTON *v.* LONGWORTH (OR YELVERTON) (1864), Halsbury's Laws of England, Vol. XVI., p. 562.

4283. Intervention of Queen's Proctor—After decree nisi granted to wife.]—(1) A wife who has obtained a decree *nisi* with costs is entitled to enforce payment of those costs from the husband, notwithstanding the intervention of the Queen's Proctor before the decree is made absolute.

(2) After a wife had obtained a decree *nisi* the Queen's Proctor intervened & charged her with collusion, with the suppression of material facts, & with adultery, & those charges were denied by her. The ct. declined to order the husband to deposit in the registry or to find security for the wife's costs of trying the issues raised by the Queen's Proctor's intervention.—GLADSTONE *v.* GLADSTONE (1875), L. R. 3 P. & D. 260; 44 L. J. P. & M. 46; 32 L. T. 404.

Annotations:—As to (1) **Distd.** Butler *v.* Butler (1890), 15 P. D. 126. *Generally*, **Mentd.** Robinson *v.* Robinson (1877), 25 W. R. 376; Crawford *v.* Crawford (1886), 11 P. D. 150.

4284. —— ——.]—Where there were cross-petitions, & a decree *nisi* for dissolution had been pronounced on the wife's petition, & subsequently the Queen's Proctor intervened, & the decree *nisi* was thereupon rescinded, &, the wife having appealed, the decision of the ct. below was confirmed by the Ct. of Appeal, the ct. refused either to order a sum of £90, which had been paid into the registry by the husband, under an order of the ct., to secure the wife's costs, to be paid out to the wife's solrs., or to order the husband to pay the costs incurred by the wife in consequence of the Queen's Proctor's intervention. *Semble:* it is not the practice of the Probate Div., in matters relating to divorce, to order a husband to give security for his wife's costs of & incidental to the Queen's Proctor's intervention.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM (1890), 15 P. D. 32; 59 L. J. P. 30; *on appeal* (1890), 15 P. D. 126, C. A.

Annotation:—**Apld.** Russell *v.* Russell, [1892] P. 152.

4285. Inquiry as to wife's property.] — MIDWINTER *v.* MIDWINTER, No. 5542, *post*.

4286. Motion for new trial.]—The Ct. of Appeal will not order security to be given for the costs of a motion for a new trial of a divorce petition, it not having been the practice to require security to be given in such a case before Jud. Act, 1890 (c. 44).—RICKABY *v.* RICKABY & SWIFT, [1901] P. 134; 70 L. J. P. 24; 84 L. T. 182; 45 Sol. Jo. 326, C. A.

C. Where Husband has No Means.

4287. Whether payment or security ordered—Wife with separate estate.]—DAVIS *v.* DAVIS (1789), 2 Hag. Con. 204, n.; 161 E. R. 716.

Annotations:—**Folld.** Fyler *v.* Fyler (1856), Dea. & Sw. 175. **Refd.** Wilson *v.* Wilson (1797), 2 Hag. Con. 203; Beevor *v.* Beevor (1809), 3 Phillim. 261; Belcher *v.* Belcher (1836), 1 Curt. 444.

4288. ——.]—The ct. will make an order for

Causes Act, 1867, Rule 156, providing for security to be given by the husband for the wife's costs, applies where the wife is petitioner as well as where she is resp.—SHIRLEY *v.* SHIRLEY (1896), 15 N. Z. L. R. 227.—**N.Z.**

o. *In husband's suit for dissolution—Only where wife has bonâ fide defence.*]—The wife of a petitioner in a suit for dissolution of marriage on the ground of adultery pleaded that she was never married to petitioner, but did not deny cohabitation with co-resp.:—*Held:* resp. was not entitled to security for her costs.—MATIU *v.* REWETI (1906), 26 N. Z. L. R. 287.—**N.Z.**

p. —— *Whether affidavit of wife necessary.*]—In applying for an order under Divorce Rule 42, Man., for security for the wife's costs in a petition by a husband for divorce, an affidavit of merits on the part of the wife is not essential.

While the possession of separate property by the wife & the want of means in the husband may be an answer to an application for security, the Judge's discretion in making the order under the circumstances in question will not be interfered with on appeal unless he has improperly exercised such discretion.—PARSONS *v.* PARSONS & CHALMERS, [1924] 1 W. W. R. 167; 1 D. L. R. 643; 34 Man. L. R. 84.—**CAN.**

q. ——.] — Where in a petition for dissolution of marriage upon the ground of adultery filed by her husband, the wife denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full & satisfactory defence.—GARLINGE *v.* GARLINGE (1922), I. L. R. 44 All. 745.—**IND.**

r. *Whether court has jurisdiction to order security.*]—In British Columbia, there is no jurisdiction in the ct. to order a husband to put up security for his wife's costs in a suit for divorce when the wife is petitioner, even though it be shown that the wife has no separate estate & that the husband has means to comply with the order if made.—DAVY *v.* DAVY (No. 2), [1922] 1 W. W. R. 360; 63 D. L. R. 341; 30 B. C. R. 365.—**CAN.**

PART XIII. SECT. 9, SUB-SECT. 5.—B.

s. *Application by husband for custody of children—Unsuccessful resistance by wife.*]—Where a wife leaves her husband without justification she is not entitled against him to her costs of unsuccessfully resisting his appln. by *habeas corpus* for the custody of the children of the marriage.—*Re* MCPHALEN (1903), 10 B. C. R. 40.—**CAN.**

t. *Application by wife for alimony—Jurisdiction of taxing master.*]—A solr., acting for a wife, instituted on her behalf against her husband a suit for restitution of conjugal rights in which a decree was made in favour of the wife. In the course of the proceedings applications were made for alimony *pendente lite* & for permanent alimony, for an order charging the alimony on the husband's property, & for an order restraining the husband from selling his property. The husband having died before the applications came before the ct., the solr. rendered his bill of costs in respect of those applications to the husband's exor., & an order was made for its taxation. The taxing officer disallowed all the costs other than out-of-pocket expenses:—*Held:* the taxing officer had power to determine whether the applications were necessaries.—FEALY *v.* PUBLIC TRUSTEE (N. S. W.) (1919), 26 C. L. R. 407.—**AUS.**

PART XIII. SECT. 9, SUB-SECT. 5.—C.

4288 i. *Whether payment or security ordered.*]—In a wife's petition for divorce, resp. had failed to pay petitioner's costs incurred before trial & had not provided security to cover petitioner's costs at the trial. Resp. alleged want of means:—*Held:* petitioner was entitled to the order for resp. to pay the taxed costs & provide security, & if the order is not complied with resp. could not be precluded from appearing at the trial. No order for attachment was made.—BATGER *v.* BATGER (1899), 17 N. Z. L. R. 572.—**N.Z.**

a. *Inability of husband to pay sum ordered—Whether stay of proceedings granted.*]—In a suit brought

the taxation & payment of the wife's costs in a matrimonial suit against the husband, notwithstanding his apparent inability to pay them.

Semble: it will not grant an attachment for disobedience to such order, if satisfied of the husband's inability, through poverty, to comply with it.

The ct. refused to allow an attachment to issue against a common workman, dependent upon his weekly earnings of 24*s.* a week, & whose sole property consisted of furniture of the value of £4, for non-payment of £2 4*s.* arrears of alimony *pendente lite*, but gave the wife leave to sue out a *fi. fa.* for the sum due.—WARD *v.* WARD (1859), 1 Sw. & Tr. 484; 29 L. J. P. & M. 17; 23 J. P. 297; 164 E. R. 824.

4289. —— Husband petitioning as "poor person."]—(1) Subject to the discretion of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 51, it is the practice in the Probate Div. to allow a husband suing *in formâ pauperis* for dissolution of marriage only his or his solr.'s costs out of pocket, including those of the certificate, & in the latter case a reasonable sum for office expenses, against co-resp. *Semble:* (2) resp. & co-resp. may, if successful, obtain an order for full costs against such pauper petitioner; (3) there is no clear rule of practice as to whether resp. should obtain an order for security for costs against such pauper petitioner, but each case must be dealt with on its own merits.—RICHARDSON *v.* RICHARDSON & PLOWMAN, [1895] P. 276; 64 L. J. P. 93; 11 T. L. R. 469; *affd.*, [1895] P. 346, C. A.

Annotations:—As to (2) **Folld.** White *v.* White, [1898] P. 124. *As to* (3) **Refd.** Smith *v.* Smith & Rutherford, [1920] P. 206. *Generally*, **Mentd.** *Re* Raphael, *Ex p.* Salomon, [1899] 1 Ch. 853.

4290. —— ——.]—Where a husband is petitioning for a divorce as a "poor person" within the meaning of the Rules of the Supreme Ct. (Poor Persons), 1914, the registrar may, nevertheless, consider an application by the wife, resp., for security for costs & may also make an allotment of alimony *pendente lite*.

The Rules of the Supreme Ct. (Poor Persons), 1914, do not preclude the old practice of the Divorce Ct. being followed in regard to applications by a wife, resp., for security for costs & for alimony *pendente lite*.—GRINHAM *v.* GRINHAM & PASCOE, [1916] P. 1; 85 L. J. P. 20; 113 L. T. 1216; 60 Sol. Jo. 176.

Annotation:—**Refd.** Smith *v.* Smith & Rutherford, [1920] P. 206.

4291. —— ——.]—The fact that a husband petitioner for divorce has obtained leave to sue as a poor person does not relieve him from the obligation to give security for his wife's costs. The costs for which security is ordered may in a proper case be limited to such costs as the wife would incur if she had obtained leave to defend as a poor person; but each case must be decided on its own merits.—SMITH *v.* SMITH & RUTHERFORD, [1920] P. 206; 89 L. J. P. 175; 123 L. T. 174; 36 T. L. R. 480.

4292. For what amount security ordered.]—SMITH *v.* SMITH & RUTHERFORD, No. 4291, *ante*.

D. Where Wife has Separate Estate.

See Matrimonial Causes Rules, 1924, r. 91.

4293. When payment or security ordered—Discretion of court.]—ALLEN *v.* ALLEN, ALLEN *v.* ALLEN & BELL, No. 4278, *ante*.

4294. Wife with adequate income—Incomes of parties substantially equal.]—Costs of the wife, having a sufficient independent income, not allowed to be taxed, against the husband, during the proceedings.—WILSON *v.* WILSON (1797), 2 Hag. Con. 203; 161 E. R. 716.

Annotations:—**Refd.** Beevor *v.* Beevor (1800), 3 Phillim. 261; Belcher *v.* Belcher (1836), 1 Curt. 444; Fyler *v.* Fyler (1856), Dea. & Sw. 175; Barrow *v.* Barrow (1863), 17 Jur. 240; Gilroy *v.* Gilroy (1914), 58 Sol. Jo. 378.

—— Where husband without means.]—*See* No. 4287, *ante*.

4295. What is separate estate—Trust fund under separation deed—Repayable on death of child before twenty-one.]—By a deed of separation a husband covenanted & did actually invest in the hands of trustees a sum of £250 to be applied to the separate maintenance of his wife & her child. But it was also covenanted that in the event of the child dying before attaining the age of twenty-one, the sum was to be repaid to him by the trustees. The wife instituted a suit for restitution of conjugal rights, in which cruelty was pleaded on both sides. The ct. held that the deed made no independent provision for the wife, & that the husband therefore should provide her with the means of trying the issue between them, & the costs not being paid by the husband in pursuance of the order, it directed an attachment to be issued against him, but allowed it to lie for three weeks in the registry, to give him an opportunity of finding the money.—WILLIAMS *v.* WILLIAMS (1869), 20 L. T. 332.

E. After Judicial Separation or Separation Order.

4296. Prior judicial separation—On ground of wife's adultery.] — In a suit for dissolution of marriage instituted by the husband, who has previously obtained a divorce *a mensâ et thoro* in an Ecclesiastical Ct. on the ground of his wife's adultery, the wife is not entitled to alimony *pendente lite*. She is, however, entitled to costs *de die in diem*.—HOLT *v.* HOLT & FLEEMING (1858), 28 L. J. P. & M. 12.

Annotations:—**Consd.** Otway *v.* Otway (1888), 13 P. D. 141; Earnshaw *v.* Earnshaw, [1896] P. 160.

4297. Separation order by justices.]—Notwithstanding the words of sect. 26 of Matrimonial Causes Act, 1857 (c. 85), & the construction placed thereon by the decision of the Ct. of Appeal in the case of *In re Wingfield & Blew*, No. 5354, *post*, the Divorce Ct. has power to direct a husband, whose wife has obtained a separation order against him, to find security for such costs of the wife as may be considered necessary to enable her to bring a suit for dissolution of marriage.—SHEPPARD *v.* SHEPPARD, [1905] P. 185; 74 L. J. P. 102; 93 L. T. 443; 53 W. R. 608; 21 T. L. R. 526.

4298. ——.]—GILLET *v.* GILLET, No. 4306, *post*.

F. In Nullity Suits.

4299. Allegation of fraud by wife in procuring marriage.]—PORTSMOUTH (COUNTESS) *v.* PORTSMOUTH (EARL), No. 4102, *ante*.

4300. Suit instituted by father of husband.]—WELLS *v.* WELLS & COTTAM, No. 4865, *post*.

G. Delay in Application.

Delay in application by wife.]—*See* Nos. 5055, 5056, *post*.

Delay in application by wife's solicitors.]—*See* No. 5065, *post*.

for dissolution of a marriage, resp., being possessed of no separate property of her own, obtained an order directing her husband to deposit in ct. a sum certified by the registrar as sufficient to cover her probable costs of suit. The husband, being a man of next to no means, failed to pay the sum into ct.:—*Held:* it would be unreasonable to stay proceedings on account of the husband being unable to pay into ct. that which he did not possess.—THOMSON *v.* THOMSON (1887), I. L. R. 14 Calc. 580.—**IND.**

Sect. 9.—*Proceedings pending suit: Sub-sect.* 5, *H. Sect.* 10: *Sub-sect.* 1, *A., B., & C.*]

H. Practice and Procedure.

See Matrimonial Causes Rules, 1924, rr. 91–92.

4301. Husband out of jurisdiction—Deposit in lieu of security.]—Where petitioner is out of the jurisdiction, he may deposit a sum in lieu of giving security for costs, but the undertaking of his solr. is insufficient.—*Re* NORMAN (1849), 11 Beav. 401; 50 E. R. 872.

4302. —— Undertaking by solicitor.]—*Re* NORMAN, No. 4301, *ante*.

4303. Wife's suit—Mala fides—Payment of costs into registry.]—(1) In a suit by the wife for judicial separation, an application was made in chambers for the usual order for the payment by resp. of petitioner's taxed costs, incurred previous to the hearing, to her attorney. Affidavits were filed showing that petitioner had been living in open adultery for several years before the petition was filed, & up to the date of the petition. The ct., having reason to believe that the suit was not instituted *bonâ fide*, but for the purpose of obtaining costs from the husband, refused to make the usual order for the payment of costs to petitioner's attorney, but directed that they should be paid into the registry to abide the event of the hearing.

(2) The trial of a suit by the wife for judicial separation being postponed at her instance, the ct. directed the payment of the alimony *pendente lite* which had been allotted to her to be suspended from the date of the postponement until the cause was tried.—ROGERS *v.* ROGERS (1865), 4 Sw. & Tr. 82; 34 L. J. P. M. & A. 87; 12 L. T. 236; 13 W. R. 546; 164 E. R. 1446.

4304. Application to increase security.]—Where the sum allowed in the registry for the wife's costs of trial is inadequate for the purpose, the proper course is to apply on summons to the judge ordinary at chambers, that the registrar be directed to make a further estimate, & not to move the ct. for the allotment of a specific sum.—MADAN *v.* MADAN & DE THOREN (1868), 18 L. T. 337; 16 W. R. 712.

4305. Order for security—Time for compliance—Effect of decree nisi before time fixed for registrar.]—(1) The fact that a decree *nisi* is made before the time fixed by the registrar's order for the husband giving security has expired does not prevent that order being effectual. (2) It is the established principle of the ct. that a wife cannot in any interlocutory proceedings be asked to deny on oath the adultery with which she is charged; & this principle applies as well to proceedings to make the husband pay or give security for costs as to other proceedings. (3) An affidavit by the wife that she is advised she has a good defence on the merits is a sufficient compliance with the memorandum on Divorce Rule 158 issued in 1902, directing the registrars to require an affidavit of the merits from the wife & her solr. on her application against the husband for payment of taxed costs & security for costs of hearing. The practice as to asking a wife resp. for the address of co-resp. discussed.—FRANKLIN *v.* FRANKLIN & MINSHALL, [1921] P. 407; 90 L. J. P. 306; 126 L. T. 110; 37 T. L. R. 894.

Annotation:—Generally, **Mentd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903.

4306. —— Enforcement of order—Injunction restraining husband from receiving legacy.]—In a petition by the wife for dissolution of the marriage it appeared that before the petition, the husband having been convicted of an aggravated assault on his wife, a magistrate made an order under Matrimonial Causes Act, 1878 (c. 19), s. 4, that the wife be not bound to cohabit with her husband, & that he should pay to her the sum of £1 weekly. In the suit in this ct. orders had been made on resp. to pay £16 & secure a further sum of £45 to defray the wife's costs. The husband was entitled to the sum of £1,400 under the will of a deceased testatrix, & the wife had obtained an *ex p.* injunction restraining the husband from receiving any part of the legacy. On an application for the continuation of the injunction & the appointment of a receiver, the ct. continued the injunction in regard to the costs until the trial or payment of them, but declined to make any order for the enforcement of the magistrate's order for an allowance.—GILLET *v.* GILLET (1889), 14 P. D. 158; 58 L. J. P. 84; 61 L. T. 401; 38 W. R. 144.

Annotations:—**Folld.** Brewis *v.* Brewis, [1893] W. N. 6. **Refd.** Bullus *v.* Bullus (1910), 102 L. T. 399.

——.]—*See, generally*, Sects. 23 & 24, *post*.

4307. Enforcing security—Wife not allowed costs.]—(1) In a petition by the wife for judicial separation, her solr. has no greater right than his client to recover costs from the opposite party. Where, therefore, a petition by the wife for judicial separation had been dismissed with costs: —*Held:* the solr. of petitioner could not enforce against resp. the bond executed by resp. under Divorce Ct. Rules, r. 158, as security for petitioner's costs of the trial.

(2) Under Matrimonial Causes Act, 1857 (c. 85), s. 51, the costs of any suit or proceeding under the Act are in the discretion of the ct. Where, therefore, the ct. has, in the exercise of its discretion, refused an application under Divorce Ct. Rules, r. 199, to allow the bond given by the husband to the wife's solr. under r. 158, to be enforced, the Ct. of Appeal is precluded by Judicature Act, 1873 (c. 66), s. 49, & Appellate Jurisdiction Act, 1876 (c. 59), s. 20, from reviewing such decision.—RUSSELL *v.* RUSSELL, [1892] P. 152; 61 L. J. P. 45; 66 L. T. 436; 8 T. L. R. 442; 36 Sol. Jo. 346, C. A.

Annotations:—As to (1) **Refd.** Betton-Bright *v.* Betton-Bright, [1920] P. 338; Durnford *v.* Baker, [1924] 2 K. B. 587. *As to* (2) **Refd.** Young *v.* Thomas (1892), 40 W. R. 468. *Generally*, **Mentd.** Allen *v.* Allen, [1894] P. 134; Pead *v.* Price (1903), 19 T. L. R. 563.

SECT. 10.—PREPARATIONS FOR TRIAL.

SUB-SECT. 1.—DISCOVERY, INSPECTION, INTERROGATORIES, ETC.

A. Discovery.

See Matrimonial Causes Rules, 1924, r. 35 (D); *& generally*, DISCOVERY, Vol. XVIII., pp. 52, 53, Nos. 98–104.

PART XIII. SECT. 9, SUB-SECT. 5.—H.

b. *Wife's suit—Right to apply de die in diem.*]—In an action for judicial separation by a wife against her husband she is entitled to apply for her costs as against him *de die in diem*, but the fact that she has omitted to do so should not deprive her thereof.—HOWES *v.* HOWES, [1923] 3 W. W. R. 33.—**CAN.**

PART XIII. SECT. 10, SUB-SECT. 1.—A.

c. *Whether court will order—In action for criminal conversation—Examination of wife.*]—In an action of crim. con. there is no power to order the examination of the wife for discovery as to the alleged acts of adultery.—MURRAY *v.* BROWN (1894), 16 P. R. 125.—**CAN.**

Examination of defendant.]—In an action for crim. con. with pltf.'s wife, deft. cannot be compelled to submit to examination for discovery.—MULHOLLAND *v.* MISENER (1895), 17 P. R. 132.—**CAN.**

e. —— —— ——.]—In an action for crim. con. deft. cannot be compelled to submit to examination for discovery. But where in the

4308. Against whom order made—Infant litigant.]—REDFERN *v.* REDFERN, No. 2317, *ante*.

4309. —— Not King's Proctor—After intervention.]—Where the King's Proctor has intervened in a suit, the ct. will not make an order upon him to give petitioner discovery of documents.—D. *v.* D. (1909), 25 T. L. R. 411; 53 Sol. Jo. 359.

4310. —— Guardian ad litem—Litigant of unsound mind.]—An order for discovery can be made against a guardian *ad litem* of a person of unsound mind, though not so found by inquisition, who is a party to a matrimonial suit.—PASPATI *v.* PASPATI, [1914] P. 110; 83 L. J. P. 56; 110 L. T. 751; 30 T. L. R. 390; 58 Sol. Jo. 400.

4311. Whether court will order—To prove adultery.]—REDFERN *v.* REDFERN, No. 2317, *ante*.

4312. —— ——.]—Where, in a suit for dissolution of marriage, the only issue is that of adultery, the ct. will not make an order for discovery.—THOMAS *v.* THOMAS & HEGNAUR (1918), 34 T. L. R. 434; 62 Sol. Jo. 637.

4313. —— ——.]—In a wife's petition for divorce on the ground of adultery petitioner served resp. with a *subpœna duces tecum* requiring him to produce his pass book & cheques for a given period; his correspondence with two women with whom adultery was charged; & his diaries. The only issue in the action was that of adultery:—*Held:* the *subpœna* must be discharged on the ground that an order for discovery cannot be made against a party to divorce proceedings when it is sought for no other purpose than to prove that party guilty of adultery.—CAVENDISH *v.* CAVENDISH, [1926] P. 10; 42 T. L. R. 134.

4314. —— —— Order limited to countercharges other than adultery.]—In a complex suit, the judge ordered the wife to file an affidavit & to give discovery of documents, limited to her countercharges other than that of adultery.—SCHOOLCRAFT *v.* SCHOOLCRAFT & RUHMOOR (1891), 65 L. T. 794.

4315. —— Assessment of damages against co-respondent—Letters from respondent to petitioner.]—P. petitioned for dissolution of marriage & for assessment of damages. The judge, on summons, at the instance of co-resp., ordered petitioner to bring into the registry letters written by resp. to him, or to file an affidavit that he had no such letters, or that they contained no such matters as suggested by the affidavits in support of the summons.—POLLARD *v.* POLLARD & HEMMING (1864), 3 Sw. & Tr. 613; 11 L. T. 749; 164 E. R. 1413.

Annotation:—**Refd.** Redfern *v.* Redfern, [1891] P. 139.

B. Production and Inspection.

See, generally, DISCOVERY, Vol. XVIII., p. 95, Nos. 469 *et seq.*

4316. Production—Power to order—Documents material to conduct of petition—Taken by respondent from petitioner.]—SHAW *v.* SHAW, No. 4513, *post*.

4317. —— —— Notes of medical practitioner—Not party to suit.]—Where a husband, resp. in a divorce suit, asked for discovery of notes made by a medical man who had attended the wife, petitioner, the ct. refused to make an order.—D. *v.* D. (1911), 55 Sol. Jo. 331.

——.]—*See, generally*, DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

4318. Inspection—Liberty to take copies.]—SHAW *v.* SHAW, No. 4513, *post*.

4319. —— Power of court to order—Letters brought into registry in pursuance of order.]—WINSCOM *v.* WINSCOM & PLOWDEN (1864), 3 Sw. & Tr. 383, n.; 164 E. R. 1323.

Annotation:—**Refd.** Redfern *v.* Redfern, [1891] P. 139.

4320. —— Records of Divorce Division.]—CROPLEY (OTHERWISE INGERSOLL) *v.* CROPLEY (1920), 150 L. T. Jo. 281.

——.]—*See, generally*, DISCOVERY, Vol. XVIII., pp. 171 *et seq.*

C. Interrogatories.

See Matrimonial Causes Rules, 1924, rr. 35 (A)—(C); &, *generally*, DISCOVERY, Vol. XVIII., p. 178, Nos. 1314 *et seq.*

4321. Power of court to order—In nullity suits.]—In a suit for nullity of marriage the ct. has power to order interrogatories.—EUSTON *v.* SMITH (FALSELY CALLED EUSTON) (1884), 9 P. D. 57; 32 W. R. 596.

Annotations:—**Apprvd.** Harvey *v.* Lovekin (otherwise Harvey) (1884), 10 P. D. 122. **Refd.** Redfern *v.* Redfern, [1891] P. 139.

4322. —— ——.]—In a suit for nullity of marriage, the ct. has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the ecclesiastical cts., which had power to allow interrogatories to be administered between the parties, & now all the jurisdiction of the ecclesiastical cts. as to suits for nullity of marriage, including matters of practice & procedure, is vested in the Probate, Divorce, & Admlty. Div. Further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, & Admlty. Div. by the Supreme Court of Judicature Act, 1873 (c. 66); for at the time of passing that statute the superior cts. of common law & the Ct. of Ch. had power to allow interrogatories to be administered between the parties to a suit; & by sect. 16, all the jurisdiction of those cts., including the ministerial powers & authorities incident thereto, was transferred to & vested in the High Ct. of Justice, & by sect. 23 the jurisdiction transferred to the High Ct. may, so far as regards

---

action damages are also claimed for the alienation of the affections & loss of the society of pltf.'s wife, deft. can be examined upon that branch of the case.—TAYLOR *v.* NEIL (1896), 17 134.—**CAN.**

f. .]—An action for crim. con. & for alienating the affections of pltf.'s wife is an action instituted in consequence of adultery, & a deft. in such an action cannot be compelled to submit to examination for discovery.—FLEURY *v.* CAMPBELL (1898), 18 P. R. 110.—**CAN.**

g. ——.]—In an action for crim. con., which is an action instituted in consequences of adultery, deft. cannot be compelled to be examined for discovery, although R. 398 of the King's Bench Act makes no exception to the right of examination for discovery there generally given; the particular enactment in the Imperial Act, 32 & 33 Vict. c. 68, has not been repealed by necessary implication & is still in force.—WARMBEIN *v.* ULRICH, [1919] 3 W. W. R. 959.—**CAN.**

h. —— *To prove matters other than misconduct.*]—In a petition for dissolution of marriage, resp. applied for an affidavit of documents:—*Held:* on resp. filing an affidavit showing that discovery was not sought for the purpose of proving the adultery of petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of petitioner, the discovery ought to be ordered.—LEVY *v.* LEVY (1906), 12 B. C. R. 60; 3 W. L. R. 514.—**CAN.**

PART XIII. SECT. 10, SUB-SECT. 1.—B.

k. *Production — Documents tending to criminate.*]—Pursuer called upon the alleged paramour, as a haver, to produce any documents or correspondence, between him & defender, or any other person concerned in any way, directly or indirectly, with the matters at issue between the parties. The compearer objected to the production of these papers on the ground of their tendency to criminate him. The objection was repelled.—DON *v.* DON (1848), 10 Dunl. (Ct. of Sess.) 1046; 20 Sc. Jur. 387.—**SCOT.**

Sect. 10.—*Preparations for trial: Sub-sect.* 1, *C. & D ; sub-sect.* 2, *A.*]

procedure & practice, be exercised in the same manner, as it might have been exercised by any of the cts. whose jurisdiction has been transferred.—HARVEY *v.* LOVEKIN (OTHERWISE HARVEY) (1884), 10 P. D. 122; 54 L. J. P. 1; 33 W. R. 188; 1 T. L. R. 136, C. A.

Annotations:—**Consd.** Redfern *v.* Redfern, [1891] P. 139. **Mentd.** Martin *v.* Treacher (1886), 55 L. J. Q. B. 209.

4323. Right to refuse answer—Tendency to criminate.]—A party is not bound to answer, when his answer would criminate himself, nor (*semble*) when it would tend to degrade him.—SWIFT *v.* SWIFT (OTHERWISE KELLY) (1832), 4 Hag. Ecc. 139; 162 E. R. 1399.

Annotations:—**Refd.** Dysart *v.* Dysart (1843), 3 Curt. 543; Redfern *v.* Redfern, [1891] P. 139. **Mentd** H—— (falsely called C——) *v.* C—— (1860), 1 Sw. & Tr. 605.

4324. Furnishing evidence for other side.]—In a cause of divorce by reason of adultery, resp. will be protected against answering any of the articles of the libel, not only having a direct tendency to criminate him, but which may form one step towards it.—KING *v.* KING (1850), 2 Rob. Eccl. 153; 7 Notes of Cases, 396; 14 Jur. 276; 163 E. R. 1275.

Annotations:—**Refd.** Redfern *v.* Redfern, [1891] P. 139; Cavendish *v.* Cavendish (1925), 42 T. L. R. 134.

—— ——.]—*See, generally,* DISCOVERY, Vol. XVIII., p. 238, Nos. 1813 *et seq.*

4325. What interrogatories allowed—Relating to charge of adultery—Evidence Further Amendment Act, 1869 (c. 68), s. 3.]—REDFERN *v.* REDFERN, No. 2317, *ante.*

4326. —— —— —— Charges of cruelty & adultery.]—A wife in her petition for divorce on the ground of her husband's cruelty & adultery alleged in paragraph 4, as an act of cruelty, the wilful communication to her of a venereal disease & in paragraph 7 she alleged an act of adultery with a woman unknown at the same date whereby he had contracted the disease. The wife proposed to interrogate resp. as to whether he was not suffering from venereal disease at the time in question, & whether a doctor did not attend him for it, contending that the interrogatories went solely to the charge of cruelty alleged in paragraph 4:—*Held:* the interrogatories were not admissible.—E. *v.* E. (1907), 24 T. L. R. 78.

—*See, generally,* DISCOVERY, Vol. XVIII., p. 191, Nos. 1398 *et seq.*

4327. Statements in—Amounting to admissions—Corroborative evidence where witness partly discredited.]—DAVIDSON *v.* DAVIDSON, No. 2739, *ante.*

D. Inspection of the Person.

4328. When ordered—Only when absolutely necessary—Feelings to be spared if possible.]—ANON. (1857), No. 3565, *ante.*

4329. —— Charge against husband of communicating venereal disease.]—ANON. (1857), No. 3565, *ante.*

4330. —— No evidence of incurable malformation.]—As a general rule, a decree of nullity of marriage on the ground of malformation will not be granted unless the existence of incurable malformation is proved by a medical man who has examined the person of resp.

In a suit of nullity on the ground of the malformation of the woman, resp., who was abroad, & who, in consequence of her address being unknown, had not been personally served, had not been examined by the medical inspectors or other medical men. The ct. suspended its decree, in order that petitioner might have an opportunity of procuring such an examination, if resp. should come to England.—T. *v.* M. (FALSELY CALLED T.) (1865), L. R. 1 P. & D. 31; 35 L. J. P. & M. 10; 13 L. T. 644.

Annotation:—**Refd.** Dickinson *v.* Dickinson, [1913] P. 198.

4331. —— Triennial cohabitation.]—ALESON *v.* ALESON, No. 2387, *ante.*

4332. Notice to attend for inspection—Service on respondent—Proof of.]—In nullity suits strict proof is required of service upon resp. of notice to attend before the medical inspectors, & of the appointment itself.—B. (OTHERWISE W.) *v.* B. (1909), 25 T. L. R. 713.

4333. —— —— ——.]—In a nullity suit at the instance of the husband an order was made directing resp. to attend before the medical inspectors. An affidavit was filed on behalf of petitioner that this order had been served upon resp., that she had received notice of the appointment before the inspectors, & that she had failed to keep the appointment:—*Held:* further evidence of those facts was unnecessary.—P. *v.* P. (OTHERWISE A.) (1909), 25 T. L. R. 530; 53 Sol. Jo. 486.

4334. Whether inspection of both parties essential.]—(1) Where, in a suit for dissolution by husband against wife, the wife pleaded that the marriage was null on account of the husband's impotency, the ct. held that, there being substantially a traverse of the marriage, the petitioner had the right to begin.

(2) Upon the question of incapacity, although no application had been made for a monition or order for a personal inspection of either of the parties, the ct. received medical evidence of an examination.

There is no precedent . . . of a woman seeking for a decree of nullity of marriage when she was no longer *virgo intacta.* Suppose a case of a person who had wilfully destroyed the primary evidence, as, for instance, if he had burned a deed, & he afterwards sought to put it in evidence in his favour, could he give secondary evidence of it . . . The lady here has destroyed the primary evidence; can she ask me to receive this secondary evidence until she has accounted for the absence of primary evidence? . . . I am not aware of any rule of Westminster Hall which excludes this evidence. . . I shall receive it. (CRESSWELL, J. O.).—SERRELL *v.* SERRELL & BAMFORD (1862), 2 Sw. & Tr. 422; 31 L. J. P. M. & A. 55; 5 L. T. 691; 164 E. R. 1060.

4335. ——.]—S—— (FALSELY CALLED E——) *v.* E—— (1863), No. 2351, *ante.*

4336. Refusal to obey order—Effect of—Presumption of impotence.]—(1) Sentence of nullity of marriage, *causa impotentiæ,* pronounced on confession of non-consummation, & refusal to undergo inspection.

To satisfy Canon 105 . . . proof by inspection is said to be essential. Their Lordships give no opinion on this construction of the Canon; for if adminicular proof is requisite, they think that the circumstance of applt.'s having taken a legal

PART XIII. SECT. 10, SUB-SECT. 1. D.

4336 i. *Refusal to obey order—Effect of—Presumption of impotence.*]—In an action to annul a marriage on the ground of impotence, if the proof is otherwise incomplete, deft. may be compelled to submit to a surgical examination, or, in default of so doing, the grounds of action may be taken *pro confessis.*—DORION *v.* LAURENT (1843), 17 L. C. J. 324.—**CAN.**

4336 ii. —— —— ——.]—After a cohabitation lasting six weeks a wife petitioned for a decree of nullity of marriage on the ground of her husband's impotence. A medical examination ordered by the ct. showed

opinion on the validity of the marriage . . . coupled with the confession of non-consummation, this refusal in the first instance to undergo inspection, is sufficient extrinsic proof (*per* CUR.).

(2) A medical certificate of the competency of the party in a suit *impotentia causa*, not in evidence in the ct. below, refused to be admitted on appeal.—HARRISON *v.* HARRISON (1842), 4 Moo. P. C. C. 96; 1 Notes of Cases, 294; 6 Jur. 899; 13 E. R. 238, P. C.; *affg.* S. C. *sub nom.* SPARROW (FALSELY CALLED HARRISON) *v.* HARRISON (1841), 3 Curt. 16.

Annotations:—*As to* (1) **Refd.** N——r (falsely called M——e) *v.* M——e (1853), 2 Rob. Eccl. 625. *Generally*, **Mentd.** Handley *v.* Edwards (1844), 4 Moo. P. C. C. 407; A. (falsely called B.) *v.* B. (1853), 1 Ecc. & Ad. 112; Hall *v.* Wright (1859), E. B. & E. 765; M. (otherwise D.) *v.* D. (1885), 10 P. D. 75.

4337. ——— —.]—B—— *v.* B—— (1901), No. 2377, *ante*.

4338. —.]—S. *v.* B. (FALSELY CALLED S.) (1905), No. 2378, *ante*.

See, generally, Sect. 3, sub-sect. 2, D., *ante*.

4339. —— Enforcement—Attachment.]—In a suit of nullity, by reason of the malformation of the woman, the ct. made the usual order for the inspection of her person. This order was personally served upon her, but she refused to submit to such inspection. The ct. directed that a motion for an attachment against her should stand over until after the hearing of the petition.—B. *v.* L. (FALSELY CALLED B.) (1869), L. R. 1 P. & D. 639; 38 L. J. P. & M. 35; 20 L. T. 280.

4340. Medical inspectors—By whom appointed—By court—Or parties with consent of court.]—(1) When a question of impotence is raised in a suit, the appointment of two medical inspectors rests with the ct.; but it will allow the parties to select them, & should they not agree, each will be allowed to nominate one.

(2) Resp., in answer to a suit for restitution of conjugal rights pleaded the impotency of petitioner. The ct., upon the application of petitioner, ordered the cause to be tried by a jury, notwithstanding resp.'s objection to that mode of trial.—C—— *v.* C—— (1862), 32 L. J. P. M. & A. 12.

4341. ——— Where parties disagree—One by each party.]—C—— *v.* C—— (1862), No. 4340, *ante*.

4342. —— —— Two by each party.]—In a suit of nullity of marriage on the ground of physical incapacity, each party has a right to nominate two medical inspectors to examine him or her. It is not necessary that both parties should be examined by the same inspectors. In a suit of nullity by a woman, the ct., with the consent of resp., allowed petitioner's evidence to be given on affidavit.—B—— (FALSELY CALLED C——) *v.* C—— (1863), 32 L. J. P. M. & A. 135.

4343. —— Who may be—Private adviser of one of the parties.]—G. (OTHERWISE R.) *v.* G. (1920), 149 L. T. Jo. 234.

4344. Procedure at inspection—Examination of both parties by same inspectors—Not essential.]—B—— (FALSELY CALLED C——) *v.* C—— (1863), No. 4342, *ante*.

4345. —— Identification of parties inspected.]—In an undefended suit for nullity on the ground of impotence, although the identity of both parties is proved in the registry at the time of the medical examination, the identity of the party not appearing must be proved again in open ct.—H. (OTHERWISE G.) *v.* G. (1900), 69 L. J. P. 120.

4346. Report of medical inspectors—Not in evidence in court below—Not admitted on appeal.]—HARRISON *v.* HARRISON, No. 4336, *ante*.

4347. —— Whether conclusive as to impotency—Admissibility of evidence to explain or vary.]—(1) On a petition for a decree of nullity by reason of malformation of the woman, neither the ct. nor the parties are concluded by the terms of the report of medical inspectors, but the inspectors themselves & other medical men may be examined. There is no rule as to any particular age constituting a bar to such petitions. (2) Where the result of the medical evidence is that the malformation might possibly, but at great risk to life, & with a doubtful success as to the end desired, be removed, petitioner need not call upon resp. to submit to an operation, & such a state of things is equivalent to a permanent & irremovable malformation.

(3) Although the ct., when the parties have reached an advanced period of life may refuse to inquire into a question of malformation, it would seem no limit as to age has been fixed at which the legal right to complain ceases.—W—— *v.* H—— (FALSELY CALLED W——) (1861), 2 Sw. & Tr. 240; 30 L. J. P. M. & A. 73; 4 L. T. 89; 9 W. R. 619; 164 E. R. 987; *sub nom.* WILLIAMS *v.* HOMFRAY (FALSELY CALLED WILLIAMS), 7 Jur. N. S. 315.

SUB-SECT. 2.—ARRANGEMENTS FOR HEARING.

A. Setting down Causes.

See Matrimonial Causes Rules, 1924, rr. 30-32.

4348. Who may set down—Delay by petitioner—Leave to respondent.]—Where five months had elapsed since the ct. had directed that a cause should be tried without a jury, & petitioner had not set down the cause for trial, the ct., on the application of resp., gave him leave to set it down for trial if petitioner should not do so within a fortnight.—HARE *v.* HARE (1862), 3 Sw. & Tr. 218; 1 New Rep. 34; 32 L. J. P. M. & A. 7; 8 L. T. 703; 164 E. R. 1257.

Annotation:—**Refd.** Stuart *v.* Stuart (1862), 32 L. J. P. M. & A. 110.

4349. Time for setting down—After amended answer.]—HITCHCOCK *v.* HITCHCOCK, No. 3684, *ante*.

4350. Notice of setting down—Form of—Letter to respondent's solicitor.]—FLUISTER *v.* FLUISTER & HUTTON, No. 5242, *post*.

4351. Entry in list—When petition amended—Re-entry in usual course.]—Where a petition has been set down for hearing & is afterwards amended & re-served, it must be re-entered in the usual course & cannot be restored to the place the original suit occupied in the list of causes.—MILNER *v.* MILNER (1861), 30 L. J. P. M. & A. 103.

4352. —— Cause must be correctly described—Duty of petitioner's solicitor—Effect of omission of co-respondents' names.]—(1) It is the duty of petitioner's solr. to see that the cause is correctly described in the official term list & in the daily cause list, & the ct. refused to allow the case to proceed where the names of the co-resps. were omitted; but the case being undefended, allowed

---

petitioner to be normal but resp. did not submit himself to examination & did not enter an appearance:—*Held*: petitioner was entitled to a decree.—A. (——) B.

PART XIII. SECT. 10, SUB-SECT. 2.—A.

1. *Time for setting down.*]—It is sufficient to serve deft. with notice of trial at the time of the service of the citation.—MCCORQUINDALE *v.* MCCORQUINDALE (1890), 30 N. B. R. 1.—CAN.

m. ——.]—Divorce Rule 31 (Manitoba) which provides that the day appointed for trial shall not be less than ten days after the day on which

Sect. 10.—*Preparations for trial: Sub-sect.* 2, *A., B., C., D., E & F. Sect.* 11: *Sub-sects.* 1 & 2.]

it to proceed on the following day, the correct description of the case being given in the list for that day.

(2) The ct. refused to pronounce a decree where it appeared that a former petition of the same petitioner, which had been struck out some time previously, still remained on the files of the ct.—ONSLOW *v.* ONSLOW, JONES & CAMPBELL (1889), 60 L. T. 680.

4353. —— As from date of completion of pleadings—Where certificate of completion refused.]—Where a registrar had refused a certificate owing to a petition not setting out the addresses where the parties thereto had cohabited, & had thereby caused the case to be too late for insertion in the next term's list, the ct., while refraining from laying down any rule, ordered the case to be entered as on the date when the certificate was refused.—*Re* LAWTON'S PETITION FOR DISSOLUTION OF MARRIAGE (1912), 107 L. T. 591; 57 Sol. Jo. 61.

4354. Undefended suits—Notice of facts to Queen's Proctor.]—The President, upon a summons for directions in a nullity suit by a husband, the case being undefended, directed the solrs. for petitioner to give information of the facts of the case to the Queen's Proctor, before setting the case down for hearing, under Matrimonial Causes Act, 1860 (c. 144), s. 7, as amended by Matrimonial Causes Act, 1873 (c. 31). Upon receipt by petitioner's solrs. of an intimation from the Queen's Proctor that he did not intend to intervene at this stage of the proceedings, the president allowed the case to be set down forthwith, & to be added to the supplemental list of undefended causes just published.—M. *v.* M. (OTHERWISE A.) (1897), 76 L. T. 172.

4355. Cases only defended as to damages—Insertion in general undefended list undesirable.]—CLEGG *v.* CLEGG & BISHOP, [1919] W. N. 36.

B. Application for Directions.

See Matrimonial Causes Rules, 1924, rr. 30–32.

4356. Time for making application—After lapse of time allowed for pleadings.]—LING *v.* LING & CROKER, No. 4484, *post.*

4357. —— —— Particulars not delivered.]—When the pleadings are complete the ct. will, upon the application of petitioner, direct the mode of trial, although he may not have complied with an order to furnish particulars of a charge in the petition.—GOUGH *v.* GOUGH & BAYNTON (1863), 32 L. J. P. M. & A. 128.

4358. —— —— Expiration of time to reply.]—In a suit by a husband for dissolution of marriage, resp. & co-resp. traversed the adultery, & resp. further countercharged adultery & cruelty. Petitioner having allowed the time for filing a replication to resp.'s answer to expire without replying or obtaining further time, resp. moved the ct. to order the trial of this cause:—*Held:* the pleadings being incomplete, the ct. could not order the mode of trial.—BROADWOOD *v.* BROADWOOD & ST. ALBANS (1864), 34 L. J. P. M. & A. 10.

4359. When service of petition dispensed with—Necessity to file affidavit of search for appearance by respondent.]—Before petitioner applies to the ct. to direct the mode of hearing, an affidavit should be filed that search has been made for an appearance by resp., although service of a citation & copy of a petition upon him may have been dispensed with.—COOKE *v.* COOKE & LUCY (1859), 28 L. J. P. & M. 56.

4360. —— Order dispensing with service—Must be brought into court.]—ELSLEY *v.* ELSLEY, BEACHAM & BAGSHAW, No. 3916, *ante.*

As to service of petition, *see* Sect. 8, sub-sect. 5, *ante.*

C. Trial by Jury.

See Sect. 16, sub-sect. 1, *post.*

D. Trial of Issues.

See Matrimonial Causes Rules, 1924, r. 40.

4361. Parties to issue—Co-respondent—Not where no answer filed.]—(1) On a petition for dissolution of marriage, when a record is drawn up in order that the case may be tried before a jury, only the issues stated on the record are to be proved at the trial before jury by either party.

(2) Co-resp., if he has put in no answer to the petition, is no party to the issue to be tried by the jury.

(3) Co-resp. having put in no answer, is not entitled to be heard on the question of costs.

Co-resp. condemned in the costs of the suit.—TOURLE *v.* TOURLE & RENSHAW (1858), 1 Sw. & Tr. 176; 31 L. T. O. S. 155; 6 W. R. 674; 164 E. R. 681.

4362. Separation of issues for trial—Jurisdiction of court to order—How jurisdiction exercised.]—MYERS *v.* MYERS, CARPENDALE, RADFORD & THOM, No. 2319, *ante.*

4363. —— Who may apply for—Any party to suit.]—MYERS *v.* MYERS, CARPENDALE, RADFORD & THOM, No. 2319, *ante.*

4364. —— When ordered—Charges of adultery against two co-respondents.]—A petition alleged adultery between resp. & co-resp. A. A. appeared to the citation served upon him, but did not file any answer. The petition was subsequently amended by alleging adultery with co-resp. B. B. appeared & denied the charge. The questions at issue were directed to be tried before the ct. & a special jury. On the application of B., & on the condition that he should pay any extra costs to which petitioner might be put by the order, the ct. ordered that the questions at issue against B. should be tried separately from & before those against A.—COX *v.* COX, READE & TOBIN (1871), L. R. 2 P. & D. 201; 40 L. J. P. & M. 23; 21 L. T. 237; 19 W. R. 512.

Annotation:—**Apld.** Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260.

4365. —— —— Cases against respondent & co-respondent.]—MILLER *v.* MILLER & FOWLER (1905), *Times*, Mar. 9, 10, & 11.

E. Consolidation of Cross-Suits.

4366. Nature & effect of consolidation order—Arrangement for convenience of trying two suits together—Not analogous to consolidation at common law.]—FORBES-SMITH *v.* FORBES-SMITH & CHADWICK, No. 4985, *post.*

4367. Wife's suit for restitution—Cross issues of adultery in husband's petition for dissolution—Judgment in restitution suit stayed.]—BURROUGHS *v.* BURROUGHS, No. 4664, *post.*

4368. Same issues raised in cross-suits—Stay of one without reference to position in cause list.]—Where the same issues are raised in cross-suits, made necessary by the imperfect powers granted

the cause has been set down, save with the consent of the parties, applies, not to defended causes alone, but also to undefended causes, &, where the date fixed for the hearing of an undefended is less than ten days after setting down decree will be refused.—UPTON *v.* UPTON, [1924] 2 W. W. R. 1092; 3 D. L. R. 975; 34 Man. L. R. 333.—**CAN.**

by the legislature to the ct., the ct. will, as a general rule, stay one, & that without reference to their relative positions in the cause list. Where the same issues are raised in cross-suits, & an order is made for a commission to examine witnesses, it will be drawn up in such a form that the evidence will be admissible in both suits.—OSBORNE *v.* OSBORNE, OSBORNE *v.* OSBORNE & MARTELLI (1863), 3 Sw. & Tr. 327; 33 L. J. P. M. & A. 38; 9 L. T. 456; 10 Jur. N. S. 80; 164 E. R. 1301.

F. Postponement of Trial.

See Sect. 16, sub-sect. 3, *post*.

SECT. 11.—EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

4369. Vivâ voce evidence—General rule.]—In a suit for divorce by reason of adultery, promoted by the husband, the proof of the guilt of the wife was conclusive & she had also in terms admitted it. An application on her behalf to stay the proceedings, to enable her to examine witnesses resident in India & Australia, to prove condonation on the part of the husband, was rejected, & sentence of separation pronounced.

As a general rule the ct. will always accede to an application to examine witnesses *vivâ voce*; & where such application is intended for the whole cause, the pleadings must be concluded before any of the witnesses are examined. Condonation, or the renewal of conjugal intercourse requires strict proof. In matrimonial causes there are few reasons for delay.—CAMPBELL *v.* CAMPBELL (1857), Dea. & Sw. 285; 29 L. T. O. S. 150; 3 Jur. N. S. 845; 5 W. R. 519; 164 E. R. 578.

Annotations:—**Mentd.** Keats *v.* Keats & Montezuma (1859), 1 Sw. & Tr. 331; Hall *v.* Hall (1891), 60 L. J. P. 73; Cramp *v.* Cramp & Freeman, [1920] P. 158; Crocker *v.* Crocker, [1921] P. 25.

4370. Court bound by rules of evidence—As observed at common law.]—(1) The affidavit of petitioner required by Matrimonial Causes Act, 1857 (c. 85), s. 41, will not be taken as evidence at the hearing, but the parties must produce sufficient evidence to prove the petition independently of such affidavit.

(2) The ct. is bound by the rules of evidence observed at common law.

(3) *Semble:* the fact of an appearance having been given to the citation, no further steps in the suit having been taken by deft., will not be considered at the hearing as any proof of identity.—DEANE *v.* DEANE (1858), 1 Sw. & Tr. 90; 28 L. J. P. & M. 23; 31 L. T. O. S. 25; 22 J. P. 180; 4 Jur. N. S. 268; 164 E. R. 642.

Annotations:—*As to* (2) **Refd.** Redfern *v.* Redfern, [1891] P. 139. *Generally,* **Mentd.** Tomkins *v.* Tomkins (1858), 1 Sw. & Tr. 163.

4371. Evidence of petitioner—May be dispensed with.]—The ct. pronounced a decree *nisi* for divorce upon a husband's petition, without requiring his evidence.—NICOLSON *v.* NICOLSON & FAIRLEY (1892), 68 L. T. 28; 1 R. 498.

4372. Police constables—Employment to obtain evidence.]—Persons actually in the police force ought not to be employed in getting up divorce cases. It is a practice that ought to be discouraged (SIR FRANCIS JEUNE, P.).—STEPHENSON *v.* STEPHENSON & JACKSON (1897), 61 J. P. 729.

SUB-SECT. 2.—PROOF OF MARRIAGE.

How marriages proved, *see* Part II., Sect. 12, *ante*.

4373. Whether formal proof essential—Suit for nullity.]—NOKES *v.* MILWARD (FALSELY CALLING HERSELF NOKES), No. 3644, *ante*.

4374. —— ——.]—The ct. pronounced the articles in a suit for incest against a man for marrying his niece, to be proved, & declared the marriage null & void, but dispensed with penance. Oral evidence alone in this case sufficient, without proof of the entries in the marriage register.—WOODS *v.* WOODS (1840), 2 Curt. 516; 163 E. R. 493.

Annotation:—**Consd.** Parkes *v.* Parkes (1852), 2 Rob. Eccl. 518.

4375. On ground of impotence.]—G. *v.* G. (FALSELY CALLED K.) (1908), No. 2360, *ante*.

4376. —— **Suit for dissolution.**]—PLAYFAIR *v.* PLAYFAIR & AFFLECK-GRAVES (1908), *Times*, Mar. 18.

Annotation:—**Folld.** Eden *v.* Eden & Batterick (1908), 52 Sol. Jo. 483.

4377. —— —— **Proof in previous restitution suit.**]—Petitioner obtained a decree of restitution of conjugal rights. In that suit she gave formal proof of her marriage to resp. in Scotland:—*Held:* in a suit for divorce following on the suit for restitution of conjugal rights, it was unnecessary for petitioner to prove again the marriage in Scotland.—FREER *v.* FREER (1910), 27 T. L. R. 13; 54 Sol. Jo. 874.

4378. —— —— ——.]—The proof of a marriage appearance had been entered by resp. or co-resp. Petitioner was a poor man who could not afford to bring witnesses from other parts of the country:—*Held:* a decree *nisi* should be granted on the evidence of petitioner alone.—DUNSTALL *v.* DUNSTALL & WILLIAMSON (1912), 32 N. Z. L. R. 669.—**N.Z.**

t. *Action for alimony—Wife's evidence necessary.*]—It may not be an absolute condition precedent to the right to recover that the wife should personally testify at the trial of an action for alimony, but it is the policy of the cts. to refuse alimony unless she does.—BATT *v.* BATT & HUGHES (1916), 33 W. L. R. 550; 9 W. W. R. 1040; 27 D. L. R. 718.—**CAN.**

PART XIII. SECT. 11, SUB-SECT. 1.

n. *General rule.*]—The rule as to the sufficiency of the evidence usually relied on in an action for divorce to establish adultery is closely akin to that followed in criminal cases where the prosecution relies upon circumstantial evidence, & where it is laid down that in order to find the accused guilty the jury must be satisfied not only that the circumstances are consistent with the commission of the offence by him, but that they are such as to be inconsistent with any other rational conclusion.—L. *v.* L. & K. (1922), 62 D. L. R. 581; [1922] 1 W. W. R. 224.—**CAN.**

o. *Evidence of petitioner—Cannot be dispensed with.*]—In all divorce cases petitioner must come into the witness-box, he must be sworn, & he must prove his case, because, amongst other things, the judge has to satisfy himself whether there is any collusion between the parties, & he has further to satisfy himself as to the complete honesty & truth of the petition.—HOWARD *v.* HOWARD (1922), I. L. R. 44 All. 728.—**IND.**

p. —— *Necessity for corroboration.*]—CAMPBELL *v.* CAMPBELL (1875), 22 Gr. 322.—**CAN.**

q. —— ——.]—STACK *v.* STACK (1905), 25 N. Z. L. R. 209.—**N.Z.**

r. —— ——.]—A divorce cannot be granted on the sworn testimony of petitioner alone, & where a wife petitioner produced as corroboration a letter which she stated was in her husband's handwriting:—*Held:* she must bring some further proof of her husband's handwriting & that the letter produced was his letter.—OWEN *v.* OWEN (1905), 25 N. Z. L. R. 64.—**N.Z.**

s. —— ——.]—In a suit for dissolution of marriage on the ground of adultery the only evidence tendered in support of the petition was that of petitioner, supported by a letter produced by him which he declared was in the handwriting of resp. No

PART XIII. SECT. 11, SUB-SECT. 2.

a. *When evidence conflicting.*]—Where the evidence as to the fact of marriage was conflicting, the ct. offered pltf. an opportunity of obtaining better evidence of an issue to

Sect. 11.—*Evidence: Sub-sects.* 2 & 3, *A.* & *B.* (*a*), (*b*) & (*c*).]

in a suit for restitution of conjugal rights is sufficient, without further proof, in a subsequent divorce suit between same parties, unless the validity of the marriage is put in issue.—COWLEY *v.* COWLEY, [1913] P. 154; 82 L. J. P. 120; 109 L. T. 48; 29 T. L. R. 690.

Annotation:—**Mentd.** Perrin *v.* Perrin, Powell *v.* Powell (1914), 30 T. L. R. 497.

In suits for restitution of conjugal rights.]—*See* Sect. 5, sub-sect. 1, C., *ante.*

In actions against husband for ante-nuptial obligations of wife.]—*See* Part VII., Sect. 1, sub-sect. 3, *ante.*

SUB-SECT. 3.—IN "PROCEEDINGS INSTITUTED IN CONSEQUENCE OF ADULTERY."

A. Competency of Witnesses.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

4379. Alleged adulterer.] — Testimony of the alleged paramour, negativing the charge against the wife. Such a person is a competent witness, but his evidence must be received with very great caution.—FRASER *v.* FRASER (1846), 5 Notes of Cases, 11.

Annotations:—**Refd.** Ling *v.* Ling (1857), 29 L. T. O. S. 348. **Mentd.** Jenkyn *v.* Jenkyn (1856), Dea. & Sw. 268.

4380. Respondent.] — Under the matrimonial Causes Acts resp. is not bound to go into the witness box & deny the adultery (BUTT, J.).—CHAMBERS *v.* CHAMBERS (1889), 60 L. T. 514.

4381. Parties to proceedings & husbands & wives of parties.]—COWLEY *v.* COWLEY (1897), *Times*, Feb. 3.

4382. ——.]—RUSSELL *v.* RUSSELL, No. 2743, *ante.*

Admissibility of evidence to rebut presumption of legitimacy, *see* BASTARDY, Vol. III., p. 364, Nos. 54 *et seq.*

B. Protection of Witnesses.

(*a*) *In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

4383. Necessity to claim protection—Effect of omission—Evidence admissible.]—A witness who is called to prove adultery with one of the parties to a suit may claim the protection of the proviso in Evidence Further Amendment Act, 1869 (c. 68), s. 3, & the judge will not allow such witness to be interrogated on the subject of his or her adultery; but unless the protection of the proviso is claimed by the witness, the evidence is admissible, & it is not competent to counsel for either party to exclude it.—HEBBLETHWAITE *v.* HEBBLETHWAITE (1869), L. R. 2 P. & D. 29; 39 L. J. P. & M. 15; 21 L. T. 732.

Annotations:—**Consd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814. **Refd.** Allen *v.* Allen, [1894] P. 248; Evans *v.* Evans & Blyth (1904), 73 L. J. P. 114.

(*b*) *In What Proceedings.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

4384. "Proceeding instituted in consequence of adultery"—Suit for nullity—Cross-suit for dissolution on ground of adultery.]—A suit had been instituted for nullity of marriage by reason of impotence, & a cross-suit for dissolution of marriage by reason of adultery:—*Held:* in the first suit, petitioner in that suit might be cross-examined as to her improper intimacy with the co-resp. in the cross-suit.

Mr. Justice Stephen in his book on Evidence, p. 111, considers that the word "such" has been omitted by accident from the section of 32 & 33 Vict. c. 68, & as I incline to the opinion that the intention of the section is to limit the inadmissibility to suits instituted in consequence of adultery, the safer course will be to allow the questions to be put (HANNEN, P.).—M. (OTHERWISE D.) *v.* D. (1885), 10 P. D. 175; 34 W. R. 48.

Annotations:—**N.F.** S. *v.* S., [1907] P. 224. **Refd.** Evans *v.* Evans & Blyth (1904), 73 L. J. P. 114; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

4385. —— —— ——.]—S. (OTHERWISE G.) *v.* S. (1907), No. 3569, *ante.*

4386. —— Suit for variation of settlements after final decree—Legitimacy of issue.] — Upon the hearing of an issue [in a suit for variation of settlements after a decree for dissolution of marriage], which had been directed for the purpose of determining the status of a child born of resp. during wedlock, co-resp. in the former proceedings was called as a witness by petitioner, & a question was put to him as to adultery between him & resp.:—*Held:* he was bound to answer the question.—EVANS *v.* EVANS & BLYTH, [1904] P. 378; 73 L. J. P. 114; 91 L. T. 600; 20 T. L. R. 612.

Annotation:—**Consd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

4387. —— Adultery in issue.] — Evidence Further Amendment Act, 1869 (c. 68), s. 3, provides that "the parties to any proceeding

---

try the question, & if refused directed the bill to be dismissed.—BAKER *v.* WILSON (1858), 6 Gr. 603.—**CAN.**

b. *Reputation.*]—The testimony of a woman of the ceremony having been performed, & evidence of respectable witnesses of general reputation:—*Held:* sufficient, without proof that the clergyman who performed the ceremony was duly authorised; & that evidence of reputation alone was sufficient.—BAKER *v.* WILSON (1860), 8 Gr. 376.—**CAN.**

PART XIII. SECT. 11, SUB-SECT. 3.—A.

4379 i. *Alleged adulterer.*]—In an action of divorce for adultery, at the instance of a husband against his wife, the husband called as a witness the alleged paramour, who objected to his being examined on the ground that as the only acts of adultery libelled were those alleged to have been committed with him, no question could be put to him which would not tend to inculpate himself. Objection repelled, reserving the privilege of the witness to decline answering any question, tending to criminate him, when put.—DON *v.* DON (1848), 10 Dunl. (Ct. of Sess.) 1046; 20 Sc. Jur. 387.—**SCOT.**

4381 i. *Parties to proceedings & husbands & wives of parties.*]—In an action for enticing pltf.'s wife to desert him, & for wrongfully harbouring her, & for wrongfully & carnally knowing her, against her will, the trial judge rejected the evidence of pltf.'s wife, which was tendered in support of the allegation that deft. had committed a rape upon her:—*Held:* the wife's evidence was properly rejected, she not being a competent witness in such case.—CORKUM *v.* CORKUM (1902), 40 N. S. R. 488.—**CAN.**

4381 ii. ——.]—On a petition for dissolution of marriage where there is a charge of adultery, neither resp., co-resp. nor petitioner, even where there is a countercharge, is bound to answer any questions tending to prove him or her guilty of adultery.—ROGERS *v.* ROGERS (1919), 25 B. C. R. 439.—**CAN.**

c. *Wife of alleged adulterer.*]—In an action of divorce on the ground of adultery, at the instance of a husband against his wife, pursuer proposed to adduce as a witness the wife of a man with whom defender was alleged to have committed adultery, & who had been himself examined as a witness for pursuer. It was objected for defender that it was incompetent to adduce a wife as a witness to prove facts inferring a criminal charge against her husband. Objection repelled.—AULD *v.* AULD (1874), 1 R. (Ct. of Sess.) 1015.—**SCOT.**

d. *Child.*]—In a proof in an action of divorce on the ground of adultery:—*Held:* the evidence of a boy nearly seven years of age could not be received on account of his tender years & the nature of the case.—ROBERTSON *v.* ROBERTSON (1888), 15 R. (Ct. of Sess.) 1001; 25 Sc. L. R. 708.—**SCOT.**

instituted in consequence of adultery, & the husbands & wives of such parties, shall be competent to give evidence in such proceeding. Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery" :—*Held :* the provisions of this sect. are confined to the adultery in issue in the proceedings.—HALL *v.* HALL (1909), 25 T. L. R. 524.

Annotations :—**Consd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814. **N.F.** Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403. **Refd.** Brown *v.* Brown (1915), 113 L. T. 190.

4388. Effect of consolidation of cross-suits —Judicial separation with dissolution.]—LEWIS *v.* LEWIS, LEWIS *v.* LEWIS & NEILLY, No. 4396, *post.*

4389. —— —— Dissolution with nullity.]—Matrimonial Causes Act, 1857 (c. 85), & Evidence Further Amendment Act, 1869 (c. 68), must be read together, & where the husband's suit for divorce on the ground of his wife's adultery with co-resp. & the wife's suit for nullity on the ground of the alleged impotence of her husband, had been consolidated, a question in cross-examination of the wife as to whether she had been guilty of adultery was held to be inadmissible.—TAYLOR *v.* TAYLOR & KING, TAYLOR (OTHERWISE WOODHEAD) *v.* TAYLOR (1923), 128 L. T. 797 ; 39 T. L. R. 173 ; 67 Sol. Jo. 246.

4390. —— Interlocutory proceedings—Security for costs.]—FRANKLIN *v.* FRANKLIN & MINSHALL, No. 4305, *ante.*

4391. —— Intervention by King's Proctor—Condonation after decree nisi—Common law protection.]—An intervention by the King's Proctor on the ground that since the decree *nisi* petitioner has resumed marital intercourse with resp. & has thereby condoned the adultery on which the decree *nisi* was founded, is not, within Evidence Further Amendment Act, 1869 (c. 68), s. 3, a "proceeding instituted in consequence of adultery," & therefore the sect. does not prohibit a witness on the hearing of such an intervention from being asked any question tending to show that he or she has committed adultery. But in such a case the common law protection which authorises a witness to refuse to answer questions which criminate him or her does apply.—SNEYD *v.* SNEYD & BURGESS (1925), 42 T. L. R. 106.

(c) *In What Circumstances.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 198.

4392. When no evidence given in disproof—Whether witness protected from cross-examination —Adultery not question in issue.]—A witness cannot be cross-examined as to any act of adultery respecting which he or she has not been examined in chief, although such adultery may not be a question in issue in the cause.—BABBAGE *v.* BABBAGE (1870), L. R. 2 P. & D. 222.

Annotations :—**Folld.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814; Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403. **Refd.** Brown *v.* Brown (1915), 84 L. J. P. 153.

4393. —— —— ——.]—HALL *v.* HALL, No. 4387, *ante.*

4394. — Whether acts of adultery pleaded or not.]—A party to a divorce suit who has not denied adultery in evidence cannot be asked or compelled to answer any question as to any act of adultery, whether pleaded or not.—BETTS *v.* BETTS & BRODRICK, BETTS *v.* BETTS (1917), 33 T. L. R. 200.

Annotation :—**Consd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

4395. —— —— Acts of adultery not alleged in pleadings—Claim for damages.]—Although by claiming damages petitioner puts his whole character & conduct as a husband in issue, & his being protected from cross-examination as to his own adultery is much to be regretted, the words of Evidence Further Amendment Act, 1869 (c. 68), s. 3, were too strong, & obliged the ct. to refuse to allow cross-examination in respect of adultery which had not been alleged in the pleadings, or denied by petitioner in his evidence in chief.—HENSLEY *v.* HENSLEY & NEVIN (1920), 122 L. T. 814 ; 36 T. L. R. 288.

Annotations :—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407 ; Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403. **Mentd.** Ewer *v.* Ewer & Charlton (1920), 123 L. T. 240.

4396. —— —— Suit for judicial separation on ground of cruelty—Consolidated with cross-suit for divorce on ground of adultery.]—(1) Where, in a suit for a judicial separation brought by a wife on the ground of her husband's cruelty, two of the charges were that he had made false accusations of adultery against her with a man named, with whom, in the answer, he charged her with adultery, & who was now cited as co-resp. in the husband's cross-petition, & the suits had been in due course consolidated :—*Held :* the wife, after giving evidence in support of her charges of cruelty, might be cross-examined as to the allegations of adultery in her husband's answer & cross-petition, although she had not, in examination-in-chief, been asked to deny the adultery.

(2) *Semble :* the consolidation for purposes of hearing of a suit for judicial separation with a cross-suit for dissolution of marriage on the ground of adultery does not have the effect of making the consolidated suits a "proceeding instituted in consequence of adultery" within Evidence Further Amendment Act, 1869 (c. 68), s. 3.—LEWIS *v.* LEWIS, LEWIS *v.* LEWIS & NEILLY, [1912] P. 19 ; 81 L. J. P. 24 ; 106 L. T. 191 ; 28 T. L. R. 174 ; 56 Sol. Jo. 189.

Annotations :—*As to* (1) **Refd.** Brown *v.* Brown (1915), 113 L. T. 190 ; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814.

4397. — Plea of conduct conducing—Cross-examination only as to circumstances of acquaintance with co-respondent.]—Where, in a divorce suit, resp. wife pleaded conduct conducing to her adultery, but in her examination-in-chief did not admit or deny that she had committed adultery, the ct. allowed her to be cross-examined, as to the circumstances in which she became acquainted with co-resp., so far as they did not tend to show that she had committed adultery.—CRASTON *v.* CRASTON & SEAMAN (1917), 34 T. L. R. 165 ; 62 Sol. Jo. 213.

4398. Where evidence given in disproof of charges —Denial of truth of some charges—Whether liable to cross-examination on all charges.]—A party to a cause who is produced as a witness on his own behalf, & in his examination-in-chief denies the truth of some of the charges of adultery contained in the pleadings, & is asked no questions as to others, is liable to be asked, & is bound to answer, questions in cross-examination respecting all the charges contained in the pleadings.—BROWN *v.* BROWN & PAGET (1874), L. R. 3 P. & D. 198 ; 43 L. J. P. & M. 33 ; 30 L. T. 767 ; 22 W. R. 759.

Annotations :—**Consd.** Brown *v.* Brown, [1915] P. 83. **Refd.** Allen *v.* Allen, [1894] P. 248 ; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814 ; Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403.

Sect. 11.—*Evidence: Sub-sect.* 3, *B.* (*c*); *sub-sects.* 4, 5, 6 & 7.]

4399. Whether witness protected from cross-examination—Adultery added in amended petition.]—COWLEY *v.* COWLEY (1897), *Times*, Feb. 3.

4400. —— —— Acts of adultery not charged in pleadings.]—It is contrary to the spirit of Evidence Further Amendment Act, 1869 (c. 68), s. 3, that a witness, called to give evidence in any proceeding instituted in consequence of adultery & having given evidence in the same proceeding in disproof of his or her alleged adultery, should be questioned as to an act or acts of adultery not alleged in the pleadings.

Resp. in a divorce suit, having denied upon oath the charges alleged in the petition, was asked whether he had not committed adultery on an earlier occasion, not charged in the petition; but, objecting to answer, he was not compelled to do so, & the question was disallowed.—BROWN *v.* BROWN, [1915] P. 83; 84 L. J. P. 153; 113 L. T. 190; 31 T. L. R. 280; 59 Sol. Jo. 442.

Annotations:—**Consd.** Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814. **Refd.** Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403.

4401. —— —— —— Witnesses cross-examined if charges relevant to issue.]—A husband who has denied on oath charges of adultery made against him by his second wife cannot be cross-examined as to an act of adultery alleged to have been committed by him during his marriage with his first wife, & not charged in the pleadings; but if proof of the commission by the husband of such an act of adultery is relevant to the issues raised on the pleadings, witnesses called on his behalf may be asked in cross-examination whether they have knowledge of such an act of adultery.—MOURILYAN *v.* MOURILYAN, MOURILYAN *v.* MOURILYAN & FAZIL (1922), 127 L. T. 403; 38 T. L. R. 482.

4402. Respondent giving evidence of own adultery—In support of pleas connivance & conduct conducing—Liable to cross-examination.]—Where, in a suit for dissolution of marriage brought by a husband, the wife goes into the witness box & gives evidence of her own adultery in support of pleas of connivance & conduct conducing to adultery raised by her answer, she may be asked questions in cross-examination relating to the time & circumstances of such adultery.—RUCK *v.* RUCK & CROFT, [1911] P. 90; 80 L. J. P. 17; 104 L. T. 462; 27 T. L. R. 191.

Annotation:—**Refd.** Brown *v.* Brown (1915), 113 L. T. 190.

4403. Respondent pleading connivance—Liable to be cross-examined as to own adultery—Although no previous denial on oath.]—Where a wife in answer to a petition for divorce brought by her husband, had filed a plea of connivance:—*Held:* she might be cross-examined as to her own adultery notwithstanding that she had not previously denied it on oath.—DENNYS *v.* DENNYS & CROSSMAN (1912), 107 L. T. 591; 57 Sol. Jo. 61.

SUB-SECT. 4.—PRIVILEGE OF WITNESSES.

See EVIDENCE, Vol. XXII., p. 392, Nos. 4011 *et seq.*

SUB-SECT. 5.—ADMISSIBILITY OF EVIDENCE.

Proceedings instituted in consequence of adultery, *see* Sub-sect. 3, *ante.*

Evidence of cruelty.]—*See* Sect. 5, sub-sect. 2, D., *ante.*

Proof of adultery.]—*See* Sect. 5, sub-sect. 3, B., *ante.*

Proof of impotence.]—*See* Sect. 3, sub-sect. 2, F., *ante.*

Proof of non-access—Birth of illegitimate child.]—*See* Sect. 5, sub-sect. 3, B. (*c*), *ante.*

Admissibility of evidence taken on commission.]—*See* Sect. 13, sub-sect. 9, *post.*

4404. Evidence of one party—Whether evidence against other—Opportunity of cross-examination.]—ALLEN *v.* ALLEN & BELL, No. 5257, *post.*

4405. Documents—Evidence of contents without notice to produce.]—Where a letter is pleaded to be in the possession of the adverse party, the contents may be set forth at length, leaving the other party, if she pleases, to produce the letter.—CROFT *v.* CROFT (1830), 3 Hag. Ecc. 310; 162 E. R. 1169.

Annotation:—**Mentd.** Latham & Dee *v.* Woolbert (1858), 7. & Tr. 1.

PART XIII. SECT. 11, SUB-SECT. 5.

e. *Evidence of one party—Whether evidence against other—Necessity for corroboration.]*—A suit for divorce by husband against wife on the ground of her adultery with co-resp. was defended by co-resp. alone:—*Held:* evidence given by the wife of adulterous relations between her & co-resp. was admissible as against co-resp. to show that their relations on a subsequent occasion, the adulterous nature of which would otherwise be improbable, were adulterous. Such evidence of the wife need not be corroborated.—MCCONVILLE *v.* BAYLEY (1914), 17 C. L. R. 509.—**AUS.**

f. *Documents—Letter from respondent admitting adultery.]*—On petition for divorce petitioner submitted in evidence a letter she had received from resp. in England, in which he admitted he had committed adultery on various occasions & that he intended to remain in England:—*Held:* if the ct. is satisfied as to the *bona fides* of the letter, the evidence is sufficient proof of adultery, & there should be an order absolute.—SHAW *v.* SHAW (1910), 27 B. C. R. 532.—**CAN.**

g. —— *Letter from wife to alleged adulterer not received by him.]*—A letter was written by the alleged adulteress after her husband's suspicions of her guilt were awakened, & addressed & sent to defender, but was never received by him. It was alleged to contain instructions to him as to the story which he ought to tell the husband regarding their conduct at certain interviews, which they were proved to have recently had:—*Held:* inadmissible against defender, in respect that he never received it.—BELL *v.* MURRAY (1833), 12 Sh. (Ct. of Sess.) 554.—**SCOT.**

h. *Stolen from post office by husband.]*—In a husband's action for divorce for alleged adultery he founded upon a letter written by defender to co-defender, & posted by her. He obtained it from the post office by the offence of stealing a post letter:—*Held:* the letter was competent evidence in his favour.—RATTRAY *v.* RATTRAY (1897), 25 R. (Ct. of Sess.) 315; 35 Sc. L. R. 294; 5 S. L. T. 245.—**SCOT.**

k. —— *Statement dictated by petitioner.]*—In an action of divorce on the ground of adultery, pursuer tendered as evidence a statement by his wife's sister, written, as he averred, with reference to a previously contemplated proceeding, for obtaining a separation from his wife on the ground of intemperate habits. The witness stated that this document was written by her from pursuer's dictation, & that its statements were very much exaggerated:—*Held:* the document was not admissible in evidence.—HOOK *v.* HOOK (1852), 14 Dunl. (Ct. of Sess.) 544; 1 Stuart, 518.—**SCOT.**

l. *As to matters not pleaded—Misconduct since action commenced.]*—During the trial of an action for alimony deft.'s counsel sought to introduce evidence of alleged misconduct on the part of pltf. since the action was commenced:—*Held:* such evidence was rightly disallowed as the matter had not been pleaded & pltf. might be taken by surprise & not be prepared to meet it.—KEWELUK *v.* KEWELUK, [1923] 2 W. W. R. 78; 2 D. L. R. 979.—**CAN.**

m. —— ——.]—Evidence tending to show that the parties charged with the adultery have, since the commencement of the suit, intentionally met in a distant place is relevant in support of that charge.—ATKINSON *v.* ATKINSON (No. 2) (1891), 10 N. Z. L. R. 374.—**N.Z.**

n. —— *Adultery with person other than co-respondent.]*—On trial of an action for judicial separation & alimony on the ground of adultery, evidence was admitted of an attempt by deft. years ago to commit adultery with a person other than the one connected with the charge made by

4406. No appearance by other party.]—CASE *v.* CASE, No. 4436, *post*.

Affidavits in support of petitions—Whether admissible as evidence.]—*See* No. 4370, *ante*, No. 4473, *post*.

4407. Statements to third parties—Affecting validity of marriage—Nullity suit.]—Nullity of marriage, by reason of undue publication of banns, on evidence of knowledge of both parties, pronounced for.

I think grave doubts may be entertained whether . . . subsequent declarations . . . made long after the marriage are admissible as evidence; because, in these cases, one party or the other might by admissions affect the status of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children & to the public. The declaration of the wife may by possibility be evidence against the husband, & *vice versâ*; but where it affects the children, I doubt whether such declarations could be received (DR. LUSHINGTON).—BREALY (FALSELY CALLED REED) *v.* REED (1841), 2 Curt. 833; 1 Notes of Cases, 121; 163 E. R. 601.

4408. Evidence that co-respondent guilty of adultery—Where co-respondent does not appear.]—(1) On an issue of adultery raised between husband & wife, to be tried by a jury, who have also to assess damages against a co-resp. who has not appeared, no evidence which is not admissible against resp. can be given to show that co-resp. has been guilty of adultery; but evidence in aggravation of damages is admissible.

(2) The question whether resp. is proved to have been guilty of adultery with co-resp. & the assessment of damages against co-resp. with reference to the adultery with which he was charged but on which no issue was raised . . . are distinct & must be kept distinct as if they were two separate causes tried by two separate juries (*per* CUR.).—STONE *v.* STONE & APPLETON (1864), 3 Sw. & Tr. 608; 11 L. T. 515; 164 E. R. 1411.

Annotations:—*As to* (1) **Reld.** R. *v.* Manning (1883), 12 Q. B. D. 241. *As to* (2) **Refd.** Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260. *Generally*, **Mentd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4409. Divorce bill—Death of witness—Certified copy of notes of evidence.]—A certified copy of the judge's notes of the evidence of a witness called by petitioner at the hearing of a petition for divorce *a mensâ et thoro* cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by petitioner.—GRIFFIN'S DIVORCE BILL, [1896] A. C. 133, H. L.

See, generally, EVIDENCE, Vol. XXII., p. 331, Nos. 3292 *et seq*.

SUB-SECT. 6.—EXAMINATION IN CHIEF.

See, generally, EVIDENCE, Vol. XXII., p. 457, Nos. 4783 *et seq*.

4410. Examination of respondent's witnesses by co-respondent—Adoption as own witnesses.]—GLENNIE *v.* GLENNIE & BOWLES, No. 3087, *ante*.

4411. General question as to truth of contents of petition—Consent of parties—Judicial separation.]—BROADFOOT *v.* BROADFOOT (1902), 46 Sol. Jo.

4412. Leading questions—As to residence of petitioner.]—LODGE *v.* LODGE & DICK (1921), 152 L. T. Jo. 39.

SUB-SECT. 7.—CROSS-EXAMINATION.

See, generally, EVIDENCE, Vol. XXII., p. 459, Nos. 4803 *et seq*.

Cross-examination of petitioner—Examined under Matrimonial Causes Act, 1857 (c. 85), s. 43.]—*See* Sub-sect. 8, A., *post*.

4413. Right of petitioner to cross-examine—After examination of adverse witness by court.]—LLOYD *v.* LLOYD & CHICHESTER (1859), 1 Sw. & Tr. 567; Sea. & Sm. 39; 30 L. J. P. M. & A. 97; 1 L. T. 335; 164 E. R. 863.

Annotations:—**Mentd.** Plumer *v.* Plumer & Bygrave (1859), 4 Sw. & Tr. 257; Todd *v.* Todd (1866), L. R. 1 P. & D. 121; Churchward *v.* Churchward, [1895] P. 7.

4414. —— As to matters not denied on the record.]—The petition came before the full ct. in proof of facts not in issue, when the ct. refused to allow resp.'s counsel to cross-examine petitioner's witnesses or to contest facts admitted on the pleas, but permitted him, after the proof of the facts of the petition, to argue, *rebus sic stantibus*, against the decree of dissolution & under the circumstances to examine petitioner. The ct. made a decree dissolving petitioner's marriage, but

pltf.—WILSON *v.* WILSON (1920), 3 W. W. R. 535.—**CAN.**

o. ——.]—Counsel for petitioner in a suit for dissolution sought to put a question to a witness tending to show that resp. had committed adultery with some person other than co-resp. There was no such charge in the petition, nor was there a general charge of prostitution:—*Held*: the question should be disallowed in the absence of a specific or general charge in the petition or of notice of intention to adduce evidence supporting such a charge or charges at the trial.—EVANS *v.* EVANS (1910), 30 N. Z. L. R. 290.—**N.Z.**

p. ——.]—The ct. will permit a resp. to adduce evidence of petitioner's adultery, although it has not been pleaded, where the admitted facts raise strong suspicion & there is no possibility of surprise.—CRAIG *v.* CRAIG (1881), 3 N. Z. L. R. 26 (S. C.).—**N.Z.**

q. *Evidence given at former trial.*]—In divorce proceedings the evidence of a witness who cannot be found given at a former trial proving misconduct, may be read over to petitioner at the trial & verified by her as a correct note of the evidence as given by the witness & used as proof of misconduct.—CUNLIFFE *v.* CUNLIFFE (1901), 8 B. C. R. 18.—**CAN.**

r. ——.]—At the trial of an action for the alienation of the affections of, & crim. con. with pltf.'s wife, pltf. answered questions in such a way as to disclose the financial circumstances of deft., without alleging or endeavouring to prove that deft. had used his fortune as a means of debauching pltf.'s wife:—*Held*: the questions were properly asked for the purpose of eliciting an explanation of pltf.'s motive in the prior litigation.—MAGUIRE *v.* MAGUIRE (1921), 64 D. L. R. 564; 50 O. L. R. 579.—**CAN.**

s. *Former proceedings.*]—A marriage was contracted in England between a domiciled Scotsman & an Englishwoman. After several years cohabitation in Scotland the wife abandoned her husband & went to reside in England. The husband raised a suit in the Ct. of Arches, for restitution, which was met by a "responsive allegation" by the wife, praying for a divorce *a mensâ et thoro* on the ground of cruelty & adultery, committed in Scotland. She obtained sentence of divorce:—*Held*: the proceedings in the previous case in England were admissible as evidence in the case.—GEILS *v.* GEILS (1855), 17 Dunl. (Ct. of Sess.) 397; 27 Sc. Jur. 162.—**SCOT.**

t. *Evidence of repute—As to paternity of respondent's illegitimate children.*]—In an action for divorce on the ground of adultery:—*Held*: evidence of repute or understanding in the family or among the neighbours of the alleged paramour, as to the paternity of illegitimate children borne by her, was incompetent & inadmissible, but with a view to test evidence given by the alleged paramour, it was competent to ask a witness whether at the time of the birth of a child she heard her say who was the father.—A. *v.* B. (1858), 20 Dunl. (Ct. of Sess.) 407; 30 Sc. Jur. 204.—**SCOT.**

a. *Evidence to co-respondent's misconduct—With woman other than respondent.*]—Pursuer of an action of divorce against his wife cannot lead evidence of misconduct of co-defender with another woman nine years previously.—JOHNSTON *v.* JOHNSTON (1903), 5 F. (Ct. of Sess.) 659; 40 Sc. L. R. 499; 10 S. L. T. 740.—**SCOT.**

Sect. 11.—*Evidence: Sub-sects.* 7 & 8, *A. & B.; sub-sects.* 9, 10 & 11.]

refused to make any order for payment of wife's costs.—TOLLEMACHE *v.* TOLLEMACHE (1859), 1 Sw. & Tr. 557; Sea. & Sm. 149, n.; 30 L. J. P. M. & A. 113; 2 L. T. 87; 23 J. P. 679; 164 E. R. 858.

Annotations:—**Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Niboyet *v.* Niboyet (1878), 4 P. D. 1; Green *v.* Green, [1893] P. 89; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Rickard *v.* Rickard & Bond (1921), 37 T. L. R. 511.

4415. —— ——.]—BACON *v.* BACON & BACON, No. 4673, *post.*

4416. Right of respondent to cross-examine—Co-respondent's witnesses—Where called before respondent's case opened.]—ROBINSON *v.* ROBINSON & LANE, No. 2777, *ante.*

4417. —— **Petitioner, as to general conduct—Where cruelty denied—Matters not in issue.**]—(1) A resp. who, in his answer, simply denies the cruelty charged in a petition, may cross-examine petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted.

(2) Resp., charged with desertion, traversed the charge. On his examination he admitted that he had insisted that his wife should leave his house, but said that he did so for a good cause, which he stated:—*Held:* he was guilty of desertion.—BAKER *v.* BAKER (1863), 3 Sw. & Tr. 213; 32 L. J. P. M. & A. 145; 9 L. T. 117; 11 W. R. 502; 164 E. R. 1255.

4418. —— **Petitioner as to adultery—In suit for nullity.**]—S. (OTHERWISE G.) *v.* S. (1907), No. 3569, *ante.*

4419. Whether co-respondent entitled to cross-examine—Petitioner's witnesses—Where no answer filed.]—LYNE *v.* LYNE & BLACKNEY, No. 3937, *ante.*

4420. —— **Respondent—Evidence tending to criminate.**]—ALLEN *v.* ALLEN & BELL, No. 5257, *post.*

4421. Cross-examination of respondent wife—By party named in confession by wife—Such party not party to suit.]—EDWARDS *v.* EDWARDS & WILSON (1899), *Times*, June 17.

SUB-SECT. 8.—EXAMINATION OF WITNESSES BY ORDER OF COURT.

A. Examination of Petitioner.

See Matrimonial Causes Rules, 1924, r. 38.

4422. Under Matrimonial Causes Act, 1857 (c. 85), s. 43—Power of court to order—In suits for judicial separation by reason of adultery.]—The ct. has power under above sect. to order petitioner, in a suit for judicial separation by reason of adultery, to attend at the hearing of the petition.—ROSS *v.* ROSS (1869), L. R. 1 P. & D. 629; 38 L. J. P. & M. 33; 20 L. T. 232; 17 W. R. 577.

4423. —— **When court will order—To support petition.**]—EVANS *v.* EVANS (1859), Sea. & Sm. 35.

4424. —— —— —— ——.]—In certain circumstances, the ct. will exercise the power given it by above sect., by calling petitioner & examining him on oath as to some of the facts necessary to establish his petition.

In a suit by a husband for dissolution of marriage, the only evidence of the wife's adultery was a confession by her & proof of some slight familiarities between her & co-resp. The ct. deemed this evidence insufficient, & under above sect. examined petitioner, who was the sole witness of an act of impropriety conclusively proving adultery, & upon his evidence pronounced a decree *nisi*, but refused to condemn co-resp., who had not been personally served, in costs.—TATHAM *v.* TATHAM & NUTT (1864), 3 Sw. & Tr. 511; 33 L. J. P. M. & A. 140; 10 L. T. 725; 164 E. R. 1374.

Annotations:—**Refd.** Sanderson *v.* Sanderson & Gibson (1866), 14 W. R. 972; Blackborne *v.* Blackborne (1868), L. R. 1 P. & D. 563.

4425. —— —— ——.]—HARDING *v.* HARDING & LANCE, No. 5157, *post.*

4426. ——.]—The ct. will, in some circumstances, allow petitioner in a suit for dissolution of marriage to be called to give evidence, under a discretion given by above sect. notwithstanding the Act which provides that neither of the parties in such a suit is allowed or compellable to give evidence.—SANDERSON *v.* SANDERSON & GIBSON (1866), 14 W. R. 972.

4427. —— —— **Queen's Proctor's intervention.**]—When, after a decree *nisi*, the Queen's Proctor intervened & pleaded collusion & condonation, & petitioner took issue thereon, & the case was ready to be heard before the ct., a motion on behalf of the Queen's Proctor was made to order the attendance of petitioner at the hearing under above sect. The ct. refused to make such order, but ordered the proceedings to be stayed till he should attend.—POLLACK *v.* POLLACK & DEANE & MACNAMARA (1862), 2 Sw. & Tr. 648; 1 New Rep. 35; 32 L. J. P. M. & A. 28; 7 L. T. 395; 8 Jur. N. S. 1230; 164 E. R. 1149.

4428. —— —— **Indentification of petitioner by respondent's witnesses.**]—LLOYD *v.* LLOYD, No. 4441, *post.*

4429. —— —— **Not to explain petitioner's conduct—When respondent able to give evidence.**]—BAYLIS *v.* BAYLIS, TEEVAN & COOPER, No. 3132, *ante.*

4430. —— **When petitioner examined—Re-examination.**]—HASWELL *v.* HASWELL & SANDERSON, No. 3609, *ante.*

4431. —— **Where respondent allowed to call petitioner—No right to cross-examine.**]—STUDDY *v.* STUDDY, No. 4473, *post.*

4432. —— —— ——.]—Where, at the hearing of a suit for dissolution of marriage, petitioner, in pursuance of an order under above sect. is present, if the ct. allows the counsel of resp. to call him, he must be treated as the witness of resp. He cannot be cross-examined by resp.; & before he is sworn resp.'s case must be opened.—GILES *v.* GILES & QUARTLEY (1863), 32 L. J. P. M. & A. 209; 12 W. R. 20.

B. Other Witnesses.

See Matrimonial Causes Rules, 1924, r. 38.

4433. Examination of respondent—Where evidence against respondent unsatisfactory—Cross-examination.]—LONG *v.* LONG & JOHNSON, No. 2704, *ante.*

4434. Examination of third parties—As to whereabouts of children.]—A husband having obtained a decree *nisi* for a divorce against his wife, she was ordered to deliver up the children of the marriage to him. She knew of the order, but evaded service of it & disobeyed it. Three relations of the wife were ordered to attend to be examined before the ct. as to their knowledge of the whereabouts of the children:—*Held:* the ct. had no jurisdiction to order third parties to attend for examination.—HYDE *v.* HYDE (1888), 13 P. D. 166; 57 L. J. P. 89; 59 L. T. 529; 36 W. R. 708; 4 T. L. R. 586, C. A.

Annotations:—**Mentd.** Cox *v.* Bennett, [1891] 1 Ch. 617;

Michell *v.* Michell, [1891] P. 208 ; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559 ; *Re* Lumley, *Ex p.* Hood Barrs, [1894] 3 Ch. 135 ; Pillers & Pershouse *v.* Edwards (1894), 71 L. T. 788 ; Favard *v.* Favard (1896), 75 L. T. 664 ; Bolitho *v.* Gidley, [1905] A. C. 98 ; Kistler *v.* Tettmar, [1905] 1 K. B. 39 ; *Re* Tuck, Murch *v.* Loosemore, [1906] 1 Ch. 692 ; *Re* Saurez, Saurez *v.* Suarez, [1918] 1 Ch. 176.

SUB-SECT. 9.—IMPEACHING CREDIT OF WITNESSES.

See EVIDENCE, Vol. XXII., p. 482, Nos. 5077 *et seq.*

4435. By reference to statements made to solicitor —Inconsistent with present testimony.]—A witness called by petitioner to support the charge of adultery swore that she had never seen or stated that she had seen any act of familiarity between resp. & co-resp. Counsel for petitioner then tendered evidence that she had stated to petitioner's attorney that she had seen acts of familiarity & impropriety :—*Held :* it was inadmissible.—RYBERG *v.* RYBERG & SMITH (1863), 32 L. J. P. M. A. 112 ; 11 W. R. 502.

SUB-SECT. 10.—PRODUCTION OF DOCUMENTS AT TRIAL.

See, generally, EVIDENCE, Vol. XXII., pp. 427 *et seq.*

4436. Notice to produce—When essential—Respondent accessible.]—In support of an allegation of desertion, petitioner gave evidence that she had written letters to resp., asking him to provide a home for her. The husband did not appear, & no notice to produce the letters had been served upon him. The ct., without pronouncing a final opinion upon the point, declined to act upon this evidence, but dissolved the marriage upon other evidence, intimating that although a notice to produce might not be necessary, when resp. was not easily accessible, it ought to be served when the service could be effected without difficulty.—CASE *v.* CASE (1860), 2 Sw. & Tr. 65 ; 29 L. J. P. M. & A. 127 ; 2 L. T. 391 ; 8 W. R. 532 ; 164 E. R. 916.

——.]—*See, generally,* EVIDENCE, Vol. XXII., pp. 427 *et seq.*

4437. Power to order—Letters to medical practitioner—Relative to his examination as witness.]—A witness [a surgeon], upon cross examination, is compellable, if required by the ministrant, to produce all written communications addressed to him, the witness, by the solr. or other agent of the producent relative to his examination as a witness in the cause.—ATKINSON *v.* ATKINSON (1825), 2 Add. 484 ; 164 E. R. 372.

Annotation :—**Refd.** Davidson *v.* Davidson (1856), Dea. & Sw. 132.

4438. —— Documents material to conduct of petition—Letter admitting misconduct.]—NOVERRE *v.* NOVERRE, No. 2783, *ante.*

SUB-SECT. 11.—PROOF OF IDENTITY OF PARTIES.

4439. Confrontation—Power of court to order.]—The ct. has no power to decree confrontation in a suit for dissolution of marriage, for the purpose of identification.—HOOKE *v.* HOOKE (1858), 4 Sw. & Tr. 236 ; 28 L. J. P. & M. 29 ; 164 E. R. 1506.

4440. —— ——.]—The Divorce Ct. will follow the practice of the Ecclesiastical Ct. in making a decree of confrontation in fit cases.—ENTICKNAP *v.* RICE (FALSELY CALLED ENTICKNAP) (1865), 4 Sw. & Tr. 136 ; 34 L. J. P. M. & A. 110 ; 13 L. T. 211 ; 164 E. R. 1468.

4441. —— ——.]—Where it was necessary for the witnesses of a husband to be confronted with the wife, petitioner, to enable him to establish his defence, & the husband was unable to ascertain her address, the ct. ordered the wife to supply to him her address within three days, or to attend at the hearing.—LLOYD *v.* LLOYD (1866), L. R. 1 P. & D. 222 ; 15 W. R. 287.

4442. —— ——.]—(1) Co-resp., who pleaded a counter-charge of adultery against petitioner, & whose case depended on petitioner's identification, applied that he might be ordered to attend at the trial. Petitioner asked that, as a condition of the order, co-resp. might also be ordered to attend. The ct. ordered that both petitioner & co-resp. should attend at the trial.

(2) A claim for damages having been formally withdrawn, the ct. refused to allow it to be reinstated in the petition, petitioner having failed to show that it was withdrawn in error, or that an altered state of circumstances had arisen which would justify its reinsertion.— SYKES *v.* SYKES & SMITH (1868), 38 L. J. P. & M. 12 ; 19 L. T. 611 ; 17 W. R. 265.

4443. Witness seeing party once only.]—DILLON *v.* DILLON, No. 2712, *ante.*

4444. By circumstantial evidence.]—Identity proved by circumstantial evidence.—ROOKER *v.* ROOKER & NEWTON (1863), 3 Sw. & Tr. 526 ; 33 L. J. P. M. & A. 42 ; 9 Jur. N. S. 1329 ; 12 W. R. 807 ; 164 E. R. 1379.

4445. By photographs only.]—Circumstances in which the ct. acted upon identification by a photograph only.— DAWSON *v.* DAWSON & REILLY (1907), 23 T. L. R. 716.

4446. ——.]—Circumstances in which the ct. is justified in acting on a photograph of a party to a divorce suit as evidence of identification.—HILLS *v.* HILLS & EASTON (1915), 31 T. L. R. 541.

4447. —— Special circumstances.]—In matrimonial cases, except in very special circumstances, the ct. will not act upon identification by a photograph only.—FRITH *v.* FRITH & PAICE, [1896] P. 74 ; 65 L. J. P. 53.

4448. Power to order witness to stand up for identification—Not if witness in court on subpœna.]—FARULLI *v.* FARULLI & PEDERZOLI, No. 3132, *ante.*

4449. Necessity for proof of identity.]—In all cases where a dissolution of marriage is the object

PART XIII. SECT. 11, SUB-SECT. 10.

b. *Production at hearing of appeal—Letters written after appeal filed.*]—At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage on the ground of her husband's incestuous adultery with her sister M. & cruelty, applt. produced certain letters written by resp. & M. to each other which showed that a criminal intimacy existed between them. These letters were not written until after applt. had filed the appeal :—*Held :* such letters were admissible & should be produced.—MORGAN *v.* MORGAN (1882), I. L. R. 4 All. 306.—**IND.**

PART XIII. SECT. 11, SUB-SECT. 11.

4445 i. *By photographs only.*]—Evidence of identity of defender in an action for divorce, with a person deponed to by certain witnesses by means of a photographic portrait not admitted, without, in the first place, ordaining defender to appear personally, for exhibition to the witnesses. —FORBES *v.* FORBES (1861), 24 Dunl. (Ct. of Sess.) 145.—**SCOT.**

4445 ii. ——.]—Where defender in an action of divorce has been cited to appear for identification at the proof, & has not appeared, it is competent for pursuer to show a photograph of defender to witnesses for the purpose of identification.—L. *v.* L. (1890), 17 R. (Ct. of Sess.) 751.—**SCOT.**

Sect. 11.—*Evidence: Sub-sects.* 11 & 12. *Sect.* 12: *Sub-sects.* 1 & 2, *A.*]

of the suit, it is the especial duty of the ct. to guard against imposition. Where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion; & should only be brought into question upon the most undisputed proofs, although those proofs may be only circumstantial. A married person may afterwards wish the marriage avoided; for this purpose a former marriage might be propounded by the one party & admitted by the other; but the ct. could not rely on declarations thus made, & that too not on oath, in furtherance of the common purpose. They might go further; by substituting false parties, who might admit themselves to be parties in the cause, when they were not, & various impositions of this nature might be resorted to, to destroy the rights of the real parties (SIR WILLIAM SCOTT).—SEARLE *v.* PRICE (FALSELY CALLED SEARLE) (1816), 2 Hag. Con. 187; 161 E. R. 710.

Annotations:—**Consd.** Deane *v.* Deane (1847), 12 Jur. 63. **Refd.** Dillon *v.* Dillon (1842), 1 Notes of Cases, 115.

4450. —— Undefended suit—Service on respondent.]—In a suit for dissolution of marriage, if resp. does not appear, proof must be given at the hearing of the identity of resp. & the person served with the citation.—GOLDSMITH *v.* GOLDSMITH, DALRYMPLE, NICOLLS & WOOLEY (1862), 31 L. J. P. M. & A. 163.

4451. —— —— Identification not proved in affidavit of service.]—SPENDLEY *v.* SPENDLEY & GOARD, HOBBS *v.* HOBBS, No. 3920, *ante.*

4452. —— —— Service on co-respondent.]—In undefended divorce actions co-resp. must at the trial be proved to be the person served with the citation, unless an order has been obtained for leave to proceed without making a co-resp.—DUFF *v.* DUFF & LINDSAY (OTHERWISE TRACY) (1888), 58 L. T. 389; 52 J. P. 232.

Service generally, *see* Sect. 8, sub-sect. 5, *ante.*

4453. Sufficiency of proof of identity—Appearance to citation—No further steps.]—DEANE *v.* DEANE, No. 4370, *ante.*

4454. Corroboration of evidence of petitioner.]—The ct. will not act upon the evidence of petitioner as to the identity of resp. without some corroboration.—HARRIS *v.* HARRIS & MILTON (1870), L. R. 2 P. & D. 77; 39 L. J. P. & M. 86.

4455. Nullity suit—Necessity for proof in open court—Of identity of party not appearing—Though identity of both parties proved at medical examination.]—H. (OTHERWISE G.) *v.* G. (1900), No. 4345, *ante.*

SUB-SECT. 12.—PETITIONS FOR DAMAGES ONLY.

4456. Proof of marriage—Necessity for.]—In actions for crim. con. there must be proof of a marriage in fact.—MORRIS *v.* MILLER (1767), 1 Wm. Bl. 632; 4 Burr. 2057; Bull. N. P. 27 b; 96 E. R. 366.

Annotations:—**Folld.** Catherwood *v.* Caslon (1844), 13 M. & W. 261. **Refd.** Birt *v.* Barlow (1779), 1 Doug. K. B. 171; Read *v.* Passer (1791), 1 Esp. 213; R. *v.* Hassall (1826), 2 C. & P. 434.

4457. —— By person present—Proof of reading of service not essential.]—In an action of crim. con., evidence of a marriage *de facto* & cohabitation, followed by proof of a criminal intercourse between deft. & a woman who passed for pltf.'s wife, is sufficient to go to a jury, without absolute proof of the identity of the former woman & the latter. *Semble:* evidence of a marriage, by a person present, is sufficient, without proving expressly the reading of the service.—HEMMINGS *v.* SMITH (1784), 4 Doug. K. B. 33; 99 E. R. 753.

4458. Whether absolute proof of identity of wife essential—Evidence of marriage de facto—Followed by intercourse between respondent & woman passing as wife.]—HEMMINGS *v.* SMITH, No. 4457, *ante.*

4459. What evidence admissible—In mitigation of damages—Adultery by wife with others.]—DONERAILE *v.* DONERAILE (1734), as reported in Bull. N. P. 296, H. L.

Annotations:—**Refd.** Wheeler *v.* Trotter (1736), 1 Hov. Supp. 281. **Mentd.** Clarke *v.* Periam (1742), 2 Atk. 333.

4460. —— —— —— Subsequent to adultery by defendant.]—In an action for crim. con. evidence of misconduct in the woman subsequent to her connection with deft., is not admissible. A letter written by the woman previous to her connection with deft., is admissible in mitigation of damages.—ELSAM *v.* FAUCETT (1797), 2 Esp. 562, N. P.

Annotation:—**Consd.** Webb *v.* Fisher (1857), 30 L. T. O. S. 123.

4461. —— —— Wife's letters before meeting defendant.]—ELSAM *v.* FAUCETT, No. 4460, *ante.*

4462. —— Relations between spouses—Wife's letters to husband during separation.]—Where the husband & wife necessarily, from their situation in life, live separate, & the wife commits adultery, letters written by her during their separation, but before any suspicion of misconduct in the wife, are admissible evidence to show that the husband & wife lived in a state of connubial affection previous to the adultery; but the time when the letters were written must be shown.—EDWARDS *v.* CROCK (1801), 4 Esp. 39, N. P.

Annotations:—**Apld.** Willis *v.* Bernard (1832), 8 Bing. 376. **Refd.** Scholey *v.* Goodman (1823), 8 Moore, C. P. 350; Potez *v.* Glossop (1818), 2 Exch. 191.

4463. —— —— ——.]—TRELAWNEY *v.* COLEMAN, No. 4466, *post.*

4464. —— —— —— .]—In an action for crim. con., the letters of the wife to her husband & others are admissible in evidence to show the state of the wife's feelings, although they may also state a fact which would not strictly be evidence.—WILLIS *v.* BERNARD (1832), 8 Bing. 376; 5 C. & P. 342; 1 Moo. & S. 584; 1 L. J. C. P. 118; 131 E. R. 439.

4465. —— —— Letters written to third parties.]—WILLIS *v.* BERNARD, No. 4464, *ante.*

4466. —— —— Conduct of wife during separation.]—(1) In an action for crim. con., proof that a letter produced corresponds, as to its contents, with a letter which the wife wrote to her husband, whilst she was absent from him, before the criminal intercourse, upon a visit at the house of a friend, & which she read over to the witness, is sufficient to warrant the reception of the letter in evidence, although no explanation is given of the cause of their living apart, there being no ground to suspect collusion.

(2) The judgment which a witness forms from the conduct & expressions of the wife to her husband whilst she lives apart from him, as to her affection for him, is evidence.—TRELAWNEY *v.* COLEMAN (1817), 1 B. & Ald. 90; 2 Stark. 191; 106 E. R. 33.

Annotations:—*As to* (1) **Apld.** Willis *v.* Bernard (1832), 8

PART XIII. SECT. 11, SUB-SECT. 12.

4456 i. *Proof of marriage—Necessity for.*]—In an action for *crim. con.* the marriage in question must be strictly proved. -MONALUK *v.* ELASCHUK, [1917] 2 W. W. R. 994.— **CAN.**

Bing. 376. **Refd.** Scholey *v.* Goodman (1823), 8 Moore, C. P. 350.

4467. —— Conduct of wife.]—In an action for crim. con. where the adultery was committed on board a ship during a voyage, a witness may be asked, on the part of pltf., whether the wife did not keep a journal, & whether she stated for what purpose she kept it.—JONES *v.* THOMPSON (1834), 6 C. & P. 415, N. P.

SECT. 12.—PROOF BY AFFIDAVITS.

SUB-SECT. 1.—IN GENERAL.

See Matrimonial Causes Rules, 1921, rr. 36, 37.

Evidence by affidavit generally, *see* EVIDENCE, Vol. XXII., p. 516, No. 5484 *et seq.*

4468. Power of court to order—Consent of both parties.]—I have . . . power to direct how the evidence shall be taken; & if both parties consent I will make an order under sect. 46 [Matrimonial Causes Act, 1857 (c. 85)] that the case be proved by affidavit, subject to the right of each party to cross-examine the witnesses on the other side in open ct. (*per* CUR.).—BARNETT *v.* BARNETT (1859), Sea. & Sm. 20; 29 L. J. P. & M. 28.

Annotations:—**Refd.** H. (falsely called C.) *v.* C. (1859), 29 L. J. P. & M. 29; Scott *v.* Scott, [1913] A. C. 417.

4469. Title of affidavits—Strictly as cause.]—Affidavits in a cause must be entitled strictly as the cause itself is entitled.—SUTHERLAND (FALSELY CALLED CROMIE) *v.* CROMIE (1863), 3 Sw. & Tr. 210; 32 L. J. P. M. & A. 125; 9 L. T. 23; 164 E. R. 1251.

4470. Filing of affidavit—Grant of further time.]—In a suit for dissolution of marriage, triable upon affidavits, in which there was no appearance, a motion for further time to file affidavits was granted notwithstanding rule 35, which directs that, in cases to be tried upon affidavit, petitioner & resp. shall file their affidavits within eight days from the filing of the last proceeding.—DAVIS *v.* DAVIS (1864), 33 L. J. P. M. & A. 139.

Affidavits on showing cause against decree nisi.]—*See* Sect. 20, *post.*

4471. Filing of order for proof by affidavit—With other papers before hearing.]—When leave is granted to prove a petition by affidavits, the order granting such leave must be drawn up before the hearing, & should be filed with the other papers.—WEBB *v.* WEBB (1862), 32 L. J. P. M. & A. 63; 11 W. R. 112.

4472. Affidavit in support of pleadings—Whether admissible as evidence.]—DEANE *v.* DEANE, No. 4370, *ante.*

4473. —— ——.]—Upon a separation between husband & wife an agreement was entered into by them, which, after certain pecuniary arrangements, contained the following clause:—"Major S. to allow Mrs. S. to reside where she pleases & with whom she pleases, & not to compel her to live with him again, or to go near her or molest her in any way; & Mrs. S. promises that if she does not fulfil her part of the agreement Major S. shall have the full power of a husband over her, whatever his way of living may be":—*Held:* (1) the concluding words of the agreement did not give Major S. leave & licence to commit adultery; (2) resp. cannot, in the first instance, & without the permission of the ct., cross-examine petitioner who is in attendance at the hearing, in pursuance of an order made on the application of resp., under Matrimonial Causes Act, 1857 (c. 85), s. 43, but must treat petitioner, as his witness, unless the ct. thinks fit to allow him to cross-examine.

(3) The affidavits filed with the petition & answer cannot, at the hearing, be referred to as evidence by either party.—STUDDY *v.* STUDDY (1859), 1 Sw. & Tr. 321, 324; 28 L. J. P. & M. 105; 164 E. R. 747.

Annotation:—*As to* (1) **Refd.** Higgins *v.* Higgins (1921), 41 T. L. R. 25.

4474. Affidavits taken in Chancery—Inadmissible in suit for nullity—On ground of bigamy.]—In a suit for nullity on the ground of bigamy:—*Held:* the ct. had no power to permit the facts to be proved by reading affidavits taken in a suit in Chancery.—LUMLEY *v.* VICTOR (FALSELY CALLED LUMLEY (1871), 26 L. T. 141.

4475. Affidavit of deceased person—Admitted by court—Where order could have been applied for before hearing.]—Upon an undefended divorce petition by the husband, making general charges against the wife of acting as a common prostitute & also containing specific charges of acts of adultery with men unknown, upon proof at the hearing of the death of one of the deponents whose affidavit was before the ct. on the motion dispensing with co-resps., the ct. allowed the affidavit of deceased deponent to be read.—WILLIAMS *v.* WILLIAMS, [1916] 1 P. 130; 85 L. J. P. 137; 114 L. T. 1183; 32 T. L. R. 485; 60 Sol. Jo. 528.

4476. Power to supplement evidence by affidavit—By oral evidence—Notwithstanding agreement to dispense with oral evidence—No appeal against registrar's report.]—The ct. has power to supplement evidence by affidavit by oral evidence, notwithstanding an agreement of the parties before the registrar to dispense with oral evidence, & although the report of the registrar is not being appealed against.—B. *v.* B. (1907), 51 Sol. Jo. 430.

SUB-SECT. 2.—WHAT MAY BE PROVED BY AFFIDAVIT.

A. Adultery.

See Matrimonial Causes Rules, 1924, rr. 36, 37.

4477. Only in special circumstances.]—(1) At the hearing of a wife's petition for divorce on the ground of her husband's desertion & adultery, the desertion was proved, & also the fact that the resp. had gone through the ceremony of marriage with another woman in America, but there was no evidence of any subsequent cohabitation between the parties to the bigamous marriage:—*Held:* the mere proof that the ceremony of marriage had been gone through was insufficient to satisfy the words "bigamy with adultery" used in Matrimonial Causes Act, 1857 (c. 85), s. 27, & there must be substantive evidence of the adultery.

(2) Proof of the adultery was allowed to be completed by affidavit in the special circumstances of the case.—ELLAM *v.* ELLAM (1889), 58 L. J. P. 56; 61 L. T. 338.

Annotation:—*As to* (2) **Consd.** Gayer *v.* Gayer, [1917] P. 64.

PART XIII. SECT. 12, SUB-SECT. 1.

c. *Power of court to order.*]—On an application for an order for directions in a divorce action, petitioner asked for an order allowing proof of the facts by affidavit at the trial, owing to the remoteness of witnesses & the financial disability of petitioner:—*Held:* the trial must be held on oral evidence, but a saving clause giving the trial judge power to allow proof by affidavit of such facts as may deem proper may be inserted in the order.—JENSEN *v.* JENSEN (1919), 25 B. C. R. 513.—**CAN.**

Sect. 12.—*Proof by affidavits: Sub-sect.* 2, *A. & B.; sub-sect.* 3. *Sect.* 13: *Sub-sects.* 1, 2, 3 & 4.]

4478. —— Undefended suits—Commission to take evidence preferable.]—GAYER *v.* GAYER, No. 4500, *post.*

4479. —— Affidavits admitted as sole proof.]—There is no rule of practice that an affidavit, made in pursuance of leave to give evidence by affidavit, must not contain allegations of adultery. Affidavit evidence cannot without special leave be admitted as sole proof of adultery, though leave to use it even for that purpose may be given in very special circumstances. But a petitioner to whom leave has been given to give his evidence by affidavit should state in his affidavit all the facts in his knowledge which bear upon the case whether they prove adultery or not.—GOODMAN *v.* GOODMAN & PINFIELD, [1920] P. 67; 89 L. J. P. 94; 122 L. T. 748; 36 T. L. R. 208; 64 Sol. Jo. 242.

4480. When parties abroad—Petitioner unable to afford commission.]—Where the witnesses in a divorce suit were all resident in America & the expenses of a commission would be beyond petitioner's means, the ct., upon motion by petitioner, made an order that the bigamous marriage, the subsequent adultery, & the identity might be proved by affidavit.—BURSLEM *v.* BURSLEM (1892), 67 L. T. 719; 1 R. 497.

Annotation:—**Consd.** Gayer *v.* Gayer, [1917] P. 61.

Commissions to take evidence, *see* Sect. 13, *post.*

4481. ——.]—BAILEY *v.* BAILEY & HODGSON (1909), *Times*, Jan. 14.

Annotation:—**Consd.** Gayer *v.* Gayer, [1917] P. 61.

4482. Where damages recovered against co-respondent—Nominal damages.]—Where petitioner for a dissolution of marriage, on the ground of the wife's adultery, had obtained a divorce *a mensâ et thoro*, & also a verdict in an action against co-resp. for crim. con., but for nominal damages only, the judge ordinary refused to allow the petition to be heard on affidavits, but required oral evidence.—POTTS *v.* POTTS (1858), 1 Sw. & Tr. 181; 27 L. J. P. & M. 59: 31 L. T. O. S. 269; 6 W. R. 860; 164 E. R. 683.

Annotation:—**Consd.** Gayer *v.* Gayer, [1917] P. 61.

4483. —— ——.]—WALTON *v.* WALTON & HIBBERT (1858), 28 L. J. P. & M. 31, n.

Annotation:—**Consd.** Gayer *v.* Gayer, [1917] P. 64.

4484. —— Substantial damages.]—(1) Petitioner for dissolution of marriage, on the ground of the wife's adultery, having recovered substantial damages in a defended action against co-resp. for crim. con., which, with the costs of the action, had been paid, & having also obtained a sentence of divorce *a mensâ et thoro*, the judge ordinary, on the application of petitioner, the other parties to the suit consenting, directed that the cause should be heard on affidavits.

(2) No application for directions as to mode of trial can be made, even with consent of parties, till after the time allowed for answer, or other pleadings, by the rule, etc., has elapsed.—LING *v.* LING & CROKER (1858), 1 Sw. & Tr. 180; 27 L. J. P. & M. 58; 31 L. T. O. S. 186; 6 W. R. 674; 164 E. R. 683.

Annotations:—*As to* (1) **Consd.** Walton *v.* Walton & Hibbert (1858), 28 L. J. P. & M. 31, n.; Gayer *v.* Gayer, [1917] P. 64.

4485. Contents of affidavit made in pursuance of leave—Evidence of non-access—Birth of illegitimate child.]—BOULTON *v.* BOULTON, No. 2751, *ante.*

4486. —— All relevant facts in knowledge of petitioner—Allegations of adultery.]—GOODMAN *v.* GOODMAN & PINFIELD, No. 4479, *ante.*

B. Other Matters.

See Matrimonial Causes Rules, 1924, rr. 36, 37.

4487. Nullity suit by wife—Petitioner's evidence—With consent of respondent.]—B—— (FALSELY CALLED C——) *v.* C—— (1863), No. 4342, *ante.*

4488. Identification of respondent.]—Where the evidence of adultery was complete but there was no evidence to identify resp. as the man who had committed adultery the ct. allowed evidence of the identity to be given on affidavit.—CARTER *v.* CARTER (1919), 36 T. L. R. 121; 64 Sol. Jo. 148.

Marriage—Whether leave granted on ground that witnesses resident abroad.]—*See* No. 4488, *ante*, Nos. 4489–4491, *post.*

—— **Suit for restitution—When no answer filed.**]
See No. 4499, *post.*

SUB-SECT. 3.—GROUNDS FOR GRANTING OR REFUSING LEAVE.

See Matrimonial Causes Rules, 1924, rr. 36–37.

Proof of adultery by affidavit, *see* Sub-sect. 2, A, *ante.*

4489. Witnesses resident abroad.]—DECK *v.* DECK (1858), 28 L. J. P. & M. 30, n.

4490. ——.]—MILLS *v.* MILLS (1858), 28 L. J. P. & M. 31, n.

4491. ——.]—In a suit for the dissolution of a marriage which had been celebrated in Scotland, where the parties who could prove it resided, the ct. made an order that petitioner should be allowed to prove it at the hearing by affidavit. No appearance had been entered by resp. or co-resp.—M'KECHNIE *v.* M'KECHNIE (1859), 1 Sw. & Tr. 550; 28 L. J. P. & M. 31; 164 E. R. 855.

Annotations:—**Consd.** Scott *v.* Scott, [1912] P. 241. **Refd.** Gayer *v.* Gayer, [1917] P. 64.

4492. ——.]—BURSLEM *v.* BURSLEM, No. 4480, *ante.*

4493. Witnesses resident at distance.]—RYLANCE *v.* RYLANCE & JONES (1858), 28 L. J. P. & M. 31, n.

4494. ——.]—A husband was convicted of bigamy in 1852. The wife petitioned for a dissolution of their marriage on the ground of his bigamy & adultery. The witnesses to the facts to be proved were resident at Oldham or Huddersfield. The judge ordinary directed that the petition might be proved by affidavit.—MARCH *v.* MARCH (1858), 2 Sw. & Tr. 49; 28 L. J. P. & M. 30; 164 E. R. 910.

Annotations:—**Folld.** Macartney *v.* Macartney (1866), 15

PART XIII. SECT. 12, SUB-SECT. 2.—B.

d. *Nullity suit by wife.*]—Pltf., a girl under 19 years of age, brought this action, by her next friend, against a man with whom she went through a ceremony of marriage when only 15, to obtain a declaration that a valid marriage was not effected or entered into. Deft. did not appear or defend, & pltf. moved for judgment upon the statement of claim, supported by affidavits of herself, her mother, & deft. Deft. stated that he procured a marriage licence without obtaining the consent of either of pltf.'s parents; & the return of the marriage contained the information that pltf. was then 18 years of age:—*Held:* in the circumstances, the motion for judgment was properly refused, & the pltf. left to proceed to trial in the ordinary way.—MENZIES *v.* FARNON (1909), 18 O. L. R. 174; 13 O. W. R. 586, 711.—**CAN.**

e. *Marriage & birth of children—Poor petitioner, resident abroad.*]—In an undefended suit for dissolution of marriage, where the husband was domiciled & resident in New Zealand & the petitioner was in poor circumstances & resident out of New Zealand, the ct. allowed the marriage & the births of the children to be proved by affidavit.—HORSLEY *v.* HORSLEY (1913), 32 N. Z. L. R. 1345.—**N.Z.**

W. R. 229. **Consd.** Gayer *v.* Gayer, [1917] P. 64. **Mentd.** Yates *v.* Kyffin-Taylor & Wark, [1899] W. N. 141.

4495. ——.]—If resp. has been convicted of bigamy, & witnesses to prove his bigamy reside at a distance, & cannot be produced without considerable expense, the ct. will permit such bigamy to be proved by affidavit.—MACARTNEY *v.* MACARTNEY (1866), L. R. 1 P. & D. 259; 36 L. J. P. & M. 38; 15 L. T. 193; 15 W. R. 229.
Annotation :—**Consd.** Gayer *v.* Gayer, [1917] P. 61.

4496. Petitioner resident abroad—Proof of cohabitation & separation.]—In a husband's suit for dissolution, where petitioner was resident in Australia, the ct. allowed the preliminary facts of the cohabitation & separation to be proved by affidavit.—ADAMS *v.* ADAMS & GUEST (1873), 29 L. T. 699; 22 W. R. 192.
Annotation :—**Consd.** Gayer *v.* Gayer, [1917] P. 61.

4497. —— **Proof of marriage & cohabitation.**]—*Ex p.* HOBSON, No. 3660, *ante*.

4498. Controverted facts—Circumstances negativing collusion—Suit for judicial separation.]—When there are controverted facts in a petition for judicial separation the ct. will not generally allow the case to be tried by affidavit, even in circumstances which negative any suspicion of collusion.—SUGGATE *v.* SUGGATE (1859), 23 J. P. 200.

4499. No answer filed—Suit for restitution of conjugal rights.]—Where no answer was filed in a suit for restitution of conjugal rights, the ct. allowed the petition to be proved by affidavit.—FORD *v.* FORD (1867), 36 L. J. P. & M. 86.

SECT. 13.—COMMISSIONS TO TAKE EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

See Matrimonial Causes Rules, 1924, r. 39; &, *generally*, EVIDENCE, Vol. XXII., p. 592, Nos. 6511 *et seq.*

4500. Preferable to evidence by affidavit—Proof of adultery.]—The Divorce Ct. has a discretion, under Matrimonial Causes Act, 1857 (c. 85), s. 46, to allow affidavit evidence of adultery in exceptional circumstances, but as a general rule should not allow it.

A wife petitioned for divorce on the grounds of desertion & adultery by her husband. She alleged that he was living with a woman, who passed as his wife in New York. The case was undefended. The wife asked for leave to prove the adultery in New York by affidavit evidence of two persons resident there to save the expense of a commission, as she was of limited means. The judge refused the application, & declined to exercise his discretion under the Act, because he disapproved of the recent practice of allowing adultery to be proved by affidavit evidence:—*Held:* in the circumstances, the judge was justified in refusing leave; &, further, if evidence were to be taken of absent persons, evidence given on commission would be preferable to affidavit evidence.—GAYER *v.* GAYER, [1917] P. 64; 86 L. J. P. 73; 116 L. T. 322; 33 T. L. R. 182; 61 Sol. Jo. 251, C. A.
Annotations :—**Expld.** Goodman *v.* Goodman & Pinfield, [1920] P. 67. **Mentd.** Laidler *v.* Laidler (1920), 90 L. J. P. 28.

Proof by affidavit, *see* Sect. 12, *ante*.

4501. In what proceedings—Husband's petition for damages only.]—NORTON *v.* MELBOURNE (LORD), No. 4504, *post*.

SUB-SECT. 2.—AFFIDAVITS IN SUPPORT OF APPLICATION.

See Matrimonial Causes Rules, 1924, r. 39.

4502. Necessity for—Affidavit showing legal necessity for examination.]—In a suit for a divorce, a party, alleged to be a necessary witness, about to leave the country, not allowed to be examined *de bene esse*, without an affidavit, showing a legal necessity for some examination.—BOODE *v.* BOODE (1847), 5 Notes of Cases, 385.

4503. —— **Affidavit showing urgency.**]—On being satisfied by affidavit that the matter was urgent, the ct., before service of citation, gave to a wife petitioner leave to send out a commission to examine witnesses abroad at her own expense, subject to the admissibility of such evidence at the trial, & reserved the question of costs.—VALLENTINE *v.* VALLENTINE, [1901] P. 283; 70 L. J. P. 89; 17 T. L. R. 564; *sub nom.* VALENTINE *v.* VALENTINE, 85 L. T. 171.

4504. Contents of—Efforts to procure attendance of witness at trial—Need not be stated.]—An action for crim. con. is a civil action within Evidence on Commission Act, 1831 (c. 22), s. 4, in which the ct. will grant a commission for the examination of a witness out of the jurisdiction. It is not necessary that the affidavit in support of an application for such a commission should state, that exertions have been made to procure the attendance of the witness at the trial.

The ct. granted a commission for the examination of a witness in an action for crim. con. with pltf.'s wife.—NORTON *v.* MELBOURNE (LORD) (1836), 3 Bing. N. C. 67; 2 Hodg. 114; 3 Scott, 398; 5 L. J. C. P. 343; 132 E. R. 335; *sub nom.* NORTON *v.* LAMB, 5 Dowl. 181.

4505. —— **Witness resident abroad.**]—MILLS *v.* MILLS, POLLAK *v.* POLLACK & DEANE & M'NAMARA, No. 4525, *post*.

SUB-SECT. 3.—WHEN ORDER MADE.

See Matrimonial Causes Rules, 1924, r. 39.

4506. General rule.]—CAMPBELL *v.* CAMPBELL, No. 4369, *ante*.

4507. Not where examination would have to be ex parte.]—An application for the examination of witnesses *de bene esse*, rejected.—ROBINS *v.* WOLSELEY (1755), 2 Lee, 149; 161 E. R. 294.
Annotation :—**Mentd.** Anon. (1857), Dea. & Sw. 295.

4508. Witness out of the jurisdiction.]—HOOD *v.* HOOD (1858), 2 Sw. & Tr. 112, n.; 161 E. R. 935.

4509. ——.]—HURLY'S DIVORCE BILL, [1908] W. N. 41, H. L.

4510. Risk of losing evidence—Witness residing in brothel.]—COOKE *v.* COOKE & QUAILE, No. 3930, *ante*.

4511. Witness about to go abroad.]—HURLY'S DIVORCE BILL, [1908] W. N. 41, H. L.

SUB-SECT. 4.—AT WHAT STAGE OF PROCEEDINGS ORDER MADE.

See Matrimonial Causes Rules, 1924, r. 39.

4512. After conclusion of pleadings.]—CAMPBELL *v.* CAMPBELL, No. 4369, *ante*.

4513. Not before issue joined.]—(1) The wife, petitioning for judicial separation on the ground of cruelty, moved for an order on the husband to deliver to petitioner, or her attorney, certain documents & papers alleged to have been taken from petitioner by the husband, & to be material

Sect. 13.—*Commissions to take evidence : Sub-sects.* 4,

to the conduct of her petition, especially to enable her to comply with an order of the ct. for particulars of dates, etc. The husband objected to give up the papers, but was willing to allow copies to be taken. The ct. ordered the papers to be produced by resp.'s attorney to petitioner's attorney, the latter to be at liberty to take copies, & reserved the question of costs of the motion ; no application having been made to the husband before notice of motion given.

(2) Before issue joined, an application for commission to examine witnesses is premature.—SHAW *v.* SHAW (1862), 2 Sw. & Tr. 642 : 31 L. J. P. M. & A. 95 ; 7 L. T. 254 ; 164 E. R. 1147.

Annotation :—As to (2) **Refd.** Fitzgerald *v.* Fitzgerald (1863), 3 Sw. & Tr. 397.

4514. Before expiry of time for appearance by co-respondent—Witness dangerously ill.]—In a suit for dissolution of marriage, the ct., before the time for entering an appearance by co-resp. had expired, allowed petitioner to examine a proposed witness who was dangerously ill.—STONE *v.* STONE & APPLETON (1862), 31 L. J. P. M. & A. 136.

4515. Before service of petition—Witness about to go abroad.]—BROWN *v.* BROWN, No. 4528, *post.*

4516. —— Risk of losing evidence.] —VALLENTINE *v.* VALLENTINE, No. 4503, *ante.*

4517. —— Saving of expense—Witness resident abroad.]—The ct. allowed a commission to issue, before service of the citation & petition for divorce, to examine witnesses at a place abroad, where resp. was, upon the ground that a great saving of expense would be thereby effected.—GRIBBON *v.* GRIBBON (1907), 24 T. L. R. 160 ; 52 Sol. Jo. 193.

SUB-SECT. 5.—FORM OF ORDER.

See Matrimonial Causes Rules, 1924, r. 39.

4518. Cross suits—Evidence to be admissible in both suits.]—OSBORNE *v.* OSBORNE, OSBORNE *v.* OSBORNE & MARTELLI, No. 4368, *ante.*

SUB-SECT. 6.—APPOINTMENT OF COMMISSIONER.

See Matrimonial Causes Rules, 1924, r. 39.

4519. By whom appointed—In absence of respondents — By court—Not petitioner.] — COOKE *v.* COOKE & QUAILE, No. 3930, *ante.*

4520. —— —— —— ——.]—When a commission to examine witnesses is granted in a suit in which no appearance has been entered, the comr. is nominated in the registry, & not by petitioner. —LODGE *v.* LODGE & SMYTHE (1863), 32 L. J. P. M. & A. 93.

4521. Who should be appointed—Person skilled in the law—Not shorthand writer.]—We do not think it is a normal practise to appoint a shorthand writer as a comr., &, if it is, it is a practise which ought not to be sanctioned. It is important that these commissions should be taken by a person skilled in the law, who might use such power as was vested in him in guiding & directing the examination (*per* CUR.).—BICKNELL *v.* BICKNELL, [1908] W. N. 97, C. A.

SUB-SECT. 7.—THE EXAMINATION.

See Matrimonial Causes Rules, 1924, r. 39.

4522. Notice of examination—Must be given to other side—Opportunity to attend & cross-examine.] —FITZGERALD *v.* FITZGERALD, No. 4527, *post.*

SUB-SECT. 8.—RE-OPENING COMMISSIONS.

See Matrimonial Causes Rules, 1924, r. 39.

4523. Whether court will order—Addition to evidence—Alleged omission.]—A witness, on behalf of petitioner in a matrimonial suit, being about to leave this country was examined under a commission. On the next day he appeared before the comr., & asked to be allowed to add to his evidence certain material facts which he alleged he had forgotten to state, having been flurried during the examination, by the frequent personal observations & interruptions of resp. who was then present. The statement as to the misconduct of resp. was confirmed by petitioner's solr., but not by the comr., though he made an affidavit. The judge ordinary, under these circumstances, refused to allow the commission to be re-opened, that the witness might supply the alleged omission in his evidence.—BEVAN *v.* M'MAHON & BEVAN (FALSELY CALLED M'MAHON) (1859), 2 Sw. Tr. 50 28 L. J. P. & M. 40 ; 164 E. R. 912

SUB-SECT. 9.—ADMISSIBILITY OF EVIDENCE TAKEN ON COMMISSION.

See Matrimonial Causes Rules, 1924, r. 39.

4524. Evidence taken according to foreign law—In absence of representatives of other side.]—HERBERT (LADY) *v.* HERBERT (LORD) (1819), 2 Hag. Con. 263 ; 3 Phillim. 31 ; 161 E. R. 737.

Annotations : —**Mentd.** Harrison *v.* Sparrow (falsely called Harrison) (1812), 3 Curt. 1 ; R. *v.* Millis (1844), 10 Cl. & Fin. 534; Fenton *v.* Livingstone, Livingstone *v.* Livingstone (1859), 5 Jur. N. S. 1183 ; Beamish *v.* Beamish (1861), 9 H. L. Cas. 274 ; Brook *v.* Brook (1861), 9 H. L. Cas. 193 Ogden *v.* (otherwise Philip), [1908] P. 46.

4525. Proof that witness out of jurisdiction—When evidence tendered—Presumption that witness resident abroad—From affidavit in support of application.]—Proof to satisfy the ct. that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered, may be less stringent when the witness is resident abroad than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose ; & where the affidavit to found the order for the commission had stated that the object was to examine A. B. resident abroad, & the summons was served on co-resps. :—*Held :* the presumption was that the witness continued abroad, unless the contrary were shown, & allowed the evidence to be used.—MILLS *v.* MILLS, POLLACK *v.* POLLACK & DEANE & M'NAMARA (1861), 2 Sw. & Tr. 310 ; 30 L. J. P. M. & A. 183; 4 L. T. 479 ; 164 E. R. 1015.

4526. Evidence taken on commission in another suit.]—The ct. will not order that the evidence taken under a commission in a cross-suit may be used at the hearing of a suit between same parties. —HILL *v.* HILL (1861), 30 L. J. P. M. & A. 197.

4527. Want of sufficient notice of examination to other side.]—Where it is necessary for petitioner to establish two points in order to obtain the prayer of the petition, the ct. would not, even if dissatisfied with the verdict of the jury on one point, send that down for a new trial, because, if a different verdict were found on that point, it would not be sufficient to ground the relief prayed.

The judge ordinary had held that notice given to the opposite solr. at a quarter before two p.m. of Saturday, in London of an examination of a witness to be held at Bath at two p.m. on the following Monday, was not a reasonable & sufficient notice to enable such solr. to attend & cross-examine, & had therefore refused to admit evidence so taken. In the circumstances, the ct. refused to interfere with the ruling of the judge ordinary.—FITZGERALD *v.* FITZGERALD (1864), 3 Sw. & Tr. 400; 4 New Rep. 157; 10 L. T. 510; 164 E. R. 1330.

4528. Examination before service of citation.]—When a petition has been filed the ct. will allow witnesses who are about to go abroad to be examined before service of the citation. *Qu.:* whether depositions taken upon such an examination are admissible in evidence at the hearing. —BROWN *v.* BROWN (1864), 33 L. J. P. M. & A. 203.

4529. Commission wrongly addressed—Court ceasing to exist—Whether objection waived by cross-examining witnesses.]—In a divorce suit a commission to examine witnesses in India was issued addressed to "The judges of the Supreme Ct. at Calcutta, or such person or persons as they or one of them may depute." The Supreme Ct. at Calcutta had been abolished in 1861, & all its powers transferred to a new Ct. called "The High Ct. of Judicature at Fort William in Bengal." The witnesses were examined by a person deputed by a judge of the High Ct. at Fort William:—*Held:* the evidence was receivable, for the commission must be taken to be addressed to the judges of the highest ct. for the time being at Calcutta.—WILSON *v.* WILSON (1883), 9 P. D. 8; 49 L. T. 430; 32 W. R. 282, C. A.

4530. Consideration of divorce bill.]—Evidence taken in India on commission, & received & acted on by the Q. B. Div. of the High Ct. of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill.—JONES' DIVORCE BILL, [1899] A. C. 348, H. L.

4531. ——.]—HURLY'S DIVORCE BILL, [1908] W. N. 41 H. L.

SUB-SECT. 10.—SECURITY FOR COSTS.

See, generally, Sect. 9, sub-sect. 4, *ante*.

See Matrimonial Causes Rules, 1921, r. 39 (B).

4532. Wife's costs.]—£30 ordered to be paid by the husband into the registry, towards defraying the expenses of interrogatories of the wife, before a requisition was allowed to issue to Ireland, to examine witnesses on an allegation.—FITZGERALD *v.* FITZGERALD (LADY) (1756), 2 Lee, 312; 161 E. R. 352.

4533. —— Conditional grant of commission—Payment into registry by husband.]—HOOD *v.* HOOD (1858), 2 Sw. & Tr. 112, n.; 164 E. R. 935.

4534. ——.]—The ct. having, with the consent of the husband & wife, made an order for a joint commission to issue for the examination of witnesses at Rome, directed the husband to advance to the wife a sum, the amount to be settled by the registrar, to enable her to defray her expenses of the commission.—BAILY *v.* BAILY & DELLA ROCCA (1861), 2 Sw. & Tr. 112; 30 L. J. P. M. & A. 47; 164 E. R. 935.

4535. —— Petition for alimony pendente lite.]—In a petition for alimony *pendente lite*, the ct. ordered a commission to issue to examine witnesses in Scotland, as to the husband's faculties, but it declined to make an order on the husband to give security for the wife's costs for the commission.—WILSON *v.* WILSON & HOWELL (1871), 26 L. T. 107; *previous proceedings*, L. R. 2 P. & D. 292.

SECT. 14.—STAY OF PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

See Matrimonial Causes Rules, 1924, r. 20.

4536. What operates as a stay—Appeal from interlocutory order.]—To a petition for dissolution of marriage resp. appeared absolutely, co-resp. under protest. Resp. then filed an answer, in which she merely stated facts to show that the ct. had no jurisdiction to entertain the suit. The ct. ordered the answer to be removed from the file, unless within a fortnight resp. amended it by pleading to the merits as well as to the jurisdiction. Resp. failed to amend her answer within the time allowed her, & appealed to the full ct. from the order:—*Held:* the appeal did not operate as a stay of proceedings, & directions were given for the mode of trial of the suit.—WILSON *v.* WILSON & HOWELL (1871), L. R. 2 P. & D. 292; 40 L. J. P. & M. 58: 25 L. T. 206; 19 W. R. 1072; *subsequent proceedings*, 26 L. T. 107.

4537. Appeal from order refusing—Application for leave—Election of remedies.]—The practice of staying proceedings for restitution under Divorce Rules, r. 176, on a summons by resp. is suitable only where the case ought not to be allowed to proceed in the usual course. It ought not to be adopted in cases where the ct. is satisfied that there is an issue fit to be tried whether resp. has deserted petitioner, or whether petitioner has been guilty of misconduct which should deprive him or her of the right to trial.

You must make your election either to file an answer & to defend the suit, or to appeal from my decision. I shall not stay the proceedings to facilitate an appeal from what is in my view a pure matter of discretion (DUKE, P.).—BARCROFT *v.* BARCROFT, [1921] P. 435; 90 L. J. P. 374; 126 L. T. 113; 37 T. L. R.

SUB-SECT. 2.—WHEN ORDERED.

A. In General.

4538. True bill found against witness for perjury—At former hearing.]—KENRICK *v.* KENRICK, No. 2758, *ante*.

4539. Reconciliation of parties—After decree nisi.]—After a decree *nisi* for dissolution of marriage at the suit of the wife had been pronounced, the wife renewed marital intercourse with her husband & informed her attorney that she did not wish any further proceedings to be taken in the suit. Upon an application by the husband to dismiss the petition, the ct. declined to accede to it, but said that, if both parties consented, it would order all proceedings in the suit to be stayed.—LEWIS *v.* LEWIS (1861), 2 Sw. & Tr. 394; 30 L. J. P. M. & A. 199; 4 L. T. 772; 7 Jur. N. S. 831; 164 E. R. 1048.

Annotations:—**Refd.** Laxton *v.* Laxton (1861), 30 L. J. P. M. & A. 208; Ousey *v.* Ousey (1875), 1 P. D. 56; Rutter *v.* Rutter (No. 2), [1921] P. 421.

PART XIII. SECT. 13, SUB-SECT. 9.

4530 i. *Consideration of divorce bill.*]—The House gave leave for evidence taken on commission to be read, & dispensed with the attendance of the witnesses examined on commission.—CARBERY DIVORCE BILL, [1920] 2 I. R. 345.—**IR.**

Sect. 14.—*Stay of proceedings: Sub-sect.* 2, *A.* & *B. Sect.* 15: *Sub-sect.* 1, *A.* & *B.*]

4540. Restitution suit—Respondent willing to return to cohabitation.]—CROTHERS *v.* CROTHERS, No. 4023, *ante.*

See, now, Matrimonial Causes Rules, 1924, r. 20.

Effect of separation by mutual consent—Or covenant in deed not to sue.]—*See* Sect. 5, sub-sect. 1, F. (*c*), (*d*), *ante.*

Cross-suits—Same issues raised—Consolidation.]—*See* No. 4368, *ante.*

Proceedings to dissolve marriage pending abroad.]—*See* CONFLICT OF LAWS, Vol. XI., p. 478, Nos. 1321 *et seq.*

B. Non-Compliance with Orders of Court.

Enforcement of orders of court, *see, generally,* Sect. 23, *post.*

4541. Discretion of court—How exercised.]—LEAVIS *v.* LEAVIS, No. 5915, *post.*

4542. Failure to give security for costs.]—(1) The inability of the husband, resp. in a matrimonial suit, to deposit in the registry, or give security for a sum of money to defray the wife's costs of the hearing pursuant to order, is no ground for refusing an attachment against him for non-compliance with the order.

(2) When the husband is petitioner, & does not comply with such an order, the ct. will stay the suit.

(3) Matrimonial Causes Act, 1857 (c. 85), s. 32, empowers the ct. in a suit for dissolution of marriage, to make such an order as to the wife's costs of the hearing, as it may make in a suit for judicial separation.—HEPWORTH *v.* HEPWORTH (1861), 2 Sw. & Tr. 414; 31 L. J. P. M. & A. 18; 5 L. T. 365; 10 W. R. 195; 164 E. R. 1057.

Annotation :—*Ads. to* (1) **Consd.** Osborne *v.* Osborne & Martelle, Osborne *v.* Osborne (1863), 33 L. J. P. M. & A. 38.

4543. ——.]—At the trial of a petition by a husband for divorce, the jury disagreed, & were discharged without giving a verdict. Before & during the hearing the wife had obtained the usual orders for security for her costs of the trial, & a sum of £45 had been paid into ct. The husband now proposed to have the petition retried, though he had not paid the balance of the wife's taxed costs not covered by the £45 in ct.:—*Held:* there was jurisdiction to stay all further proceedings by the husband until the whole of the wife's taxed costs had been paid or secured, & security given for the wife's further costs of the retrial.—KEMP-WELCH *v.* KEMP-WELCH & CRYMES, [1910] P. 233; 79 L. J. P. 92; 102 L. T. 787; 26 T. L. R. 461, C. A.

Annotations :—**Apld.** Sanders *v.* Sanders, [1911] P. 101; Waite *v.* Waite & Muir (1916), 32 T. L. R. 432. **Consd.** Silver *v.* Silver & Grenfell, [1924] P. 163. **Refd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903.

4544. ——.]—SILVER *v.* SILVER & GRENFELL, [1924] P. 163; 93 L. J. P. 53; 130 L. T. 719, C. A.

Security for costs, *see, generally,* Sect. 9, sub-sect. 4, *ante.*

4545. Failure to pay wife's costs.]—Where a party to a suit has failed to obey an order for the payment of costs, the ct. will not upon his application give judgment until the costs be paid, or a valid reason for their non-payment be given.—CHICHESTER *v.* MURE (FALSELY CALLED CHICHESTER) (1863), 32 L. J. P. M. & A. 120; 11 W. R. 686.

Annotation :—**Apld.** Keane *v.* Keane (1873), L. R. 3 P. & D.

4546. ·.]—(1) Where the wife, petitioner did not appear on the day of hearing, the ct., before dismissing the petition, required that a rule to show cause should be first served upon her, & intimated that in all such cases that practice should be followed.

(2) If in a matrimonial suit the wife be unable to go to trial in consequence of the non-payment of her costs by the husband, she should either apply at chambers to have the case stand over, or appear in ct. on the day of hearing & state her inability to proceed.—CURTIS *v.* CURTIS (1868), 38 L. J. P. & M. 9; 19 L. T. 610.

4547. ——.]—LEAVIS *v.* LEAVIS, No. 5915, *post.*

4548. —— **Bankruptcy of husband.**]—Where an order was made that the suit be stayed until the wife's costs were paid, the ct. held that the subsequent bkpcy. of petitioner did not cancel or vacate it, & refused to allow the petition to be heard until resp. was put in a position to defend herself. *Semble:* the ct. would also so rule under similar circumstances (bkpcy. of petitioner, & want of means by resp.) even though no order as to the wife's costs had been made.—MORRIS *v.* MORRIS & MORRIS (1867), 15 L. T. 545.

4549. —— **Admission of husband as pauper suitor.**]—Upon a husband's petition for divorce, the solr. for the wife incurred costs which were taxed, & ordered to be paid: but after the pleadings were closed & before the cause was set down, petitioner, without paying them, applied for & obtained leave to proceed *in formâ pauperis.* The wife's solr. thereupon took out a summons before the judge in chambers, calling upon petitioner to show cause why further proceedings should not be stayed by reason of petitioner not having complied with the order for payment of resp.'s taxed costs. The registrar who taxed the bill had refused to order a stay of proceedings in the event of the amount not being paid by petitioner. The judge ordered proceedings to be stayed until payment of the wife's taxed costs.—JOSEPH *v.* JOSEPH & BURNHILL (1897), 76 L. T. 236.

Annotations :—**Apld.** Kemp-Welch *v.* Kemp-Welch & Crymes, [1910] P. 233. **Refd.** Jinks *v.* Jinks, [1911] P. 120.

4550. Where non-payment due to wife's delay.]—Where the wife's costs for the hearing had not been paid into ct. owing to her own delay in filing a bill for taxation, the ct. refused to postpone the trial, or to make any special order to secure her costs after the verdict had gone against her.—BRIDGMAN *v.* BRIDGMAN & PUCKRIN (1869), 20 L. T. 87.

Annotation :—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

4551. Expenses of enforcement of order-Order staying proceedings not extended to.]—Resp. having obtained an order upon petitioner to pay to her or her attorney a certain amount of taxed costs, endeavoured to enforce such order by a writ of *fi. fa.*, but failed in recovering them. The ct. ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by petitioner, but would not extend the order to the expenses incurred in the suing out & execution of the writ of *fi. fa.*—KEANE *v.* KEANE (1873), L. R. 3 P. & D. 52; 42 L. J. P. & M. 12; 27 L. T. 768; 21 W. R. 248.

Annotation :—**Consd.** Kemp-Welch *v.* Kemp-Welch & Crymes, [1910] P. 233.

4552. —— **Costs in former suit.**]—Non-payment of the costs of a suit for dissolution of marriage, in which the husband, petitioner, has failed, is not a ground for staying proceedings in a suit by him

for dissolution on the ground of fresh adultery.—YEATMAN *v.* YEATMAN & RUMMELL (1869), 39 L. J. P. & M. 37; 21 L. T. 647; 18 W. R. 232.

Annotations:—**Consd.** Sanders *v.* Sanders, [1911] P. 101. **Refd.** Abdy *v.* Abdy (1896), 12 T. L. R. 524.

4553. —— — ·.]—KEMP-WELCH *v.* KEMP-WELCH & CRYMES, No. 4543, *ante*.

4554. —— ——.]—A husband's petition for divorce having been dismissed with costs, which had been taxed, & part of which remained unpaid, the husband filed a second petition for divorce, the adultery alleged in the second petition being prior in date to the filing of the first petition but with different co-resps.:—*Held:* all proceedings in the second petition ought to be stayed until the husband had paid the wife's costs of the first petition.

Adultery with a different co-resp. is not a different cause of action.—SANDERS *v.* SANDERS, [1911] P. 101; 80 L. J. P. 41; 104 L. T. 231; 55 Sol. Jo. 312, C. A.

Annotation **Expld.** Silver *v.* Silver & Grenfell, [1921] P. 163.

4555. —— - —.]—WAITE *v.* WAITE & MUIR, No. 5225, *post*.

4556. —— —— **Election to proceed to new trial on compliance with order for security.**]—A wife, resp. to a petition for divorce upon which the jury have disagreed, is entitled to have proceedings in a second trial stayed until her costs of the abortive trial are paid. But she may waive this right by causing her husband to change his position. She does not however waive it if, on her application to dismiss the petition for want of prosecution, she accepts an order for securing the payment of the costs of a second trial without mention of the unpaid costs of the abortive trial.—SILVER *v.* SILVER & GRENFELL, [1921] P. 163; 93 L. J. P. 53; 130 L. T. 719, C. A.

4557. Failure of wife to pay costs—Of former suit.]—The ct. refused to stay proceedings in a wife's suit for judicial separation on the ground of desertion, though the wife had not paid the costs of a former suit for judicial separation on the ground of adultery.—ABDY *v.* ABDY (1896), 12 T. L. R. 524.

Annotations:—**Expld.** Bishop *v.* Bishop, [1901] P. 325. **Consd.** Sanders *v.* Sanders, [1911] P. 101.

4558. Disobedience of order as to custody.]—CAVENDISH *v.* CAVENDISH & No. 5234,

Custody of children, *see* Sect. 9, sub-sect. 3, A., *ante*.

4559. Failure to pay alimony.]—LEAVIS *v.* LEAVIS, No. 5915, *post*.

4560. —— **Order made in another suit.**]—A suit for divorce brought by the husband was stayed by the ct. owing to non-compliance with an order for alimony, *pendente lite*, obtained by the wife in a subsequent suit for judicial separation, she having by act on petition raised the question of jurisdiction in answer to the husband's suit.—P. *v.* P. & T. (1910), 26 T. L. R. 607; 54 Sol. Jo. 683.

Alimony, generally, *see* Sect. 9, sub-sect. 1, *ante*; sect. 22, sub-sect. 1, *post*.

SECT. 15.—DISPOSING OF CAUSES.

SUB-SECT. 1.—BY ABATEMENT ON DEATH OF PARTIES.

A. In General.

4561. Nullity suit.]—Suit in the Spiritual Ct. to annul an incestuous marriage, pending which one of the parties dies, prohibition shall go as to annulling the marriage.—HINKS *v.* HARRIS (1693), Carth. 271; 4 Mod. Rep. 182; 90 E. R. 760; *sub nom.* HICKS *v.* HARRIS, Comb. 200; 12 Mod. Rep. 35; *sub nom.* HARRIS *v.* HICKS, 2 Salk. 548.

Annotations:—**Expld.** Brownsword *v.* Edwards (1751), 2 Ves. Sen. 243. **Consd.** R. *v.* Chadwick (1846), 11 J. P. 140. **Refd.** Ray *v.* Sherwood & Ray (1836), 1 Curt. 193. **Mentd.** R. *v.* Dibdin, [1910] P. 57.

4562. ——.]—The rule that H. shall not be bastardised after his death, holds only in the case of *bastard eigne & mulier puisne*. Spiritual Ct. cannot give sentence to annul marriage after parties are dead, because they proceed only *pro salute animæ*.—PRIDE *v.* BATH (EARL) & MONTAGUE (EARL) (1695), 1 Salk. 120; 3 Lev. 410; 91 E. R. 113.

Annotation:—**Mentd.** Pendrell *v.* Pendrell (1732), 2 Stra. 925.

4563. ——.]—Ecclesiastical ct. cannot annul marriage after death of one party as it bastardises the issue, but may punish the other for incest or fornication.—BROWNSWORD *v.* EDWARDS (1751), 2 Ves. Sen. 243; 28 E. R. 157, L. C.

Annotations:—**Mentd.** Doe d. Fonnereau *v.* Fonnereau (1780), 2 Doug. K. B. 487; Doe d. Wheedon *v.* Lea (1789), 3 Term Rep. 41; Doe d. Usher *v.* Jessep (1810), 12 East, 288; Doe d. Harris *v.* Howell (1829), 10 B. & C. 191; Malcolm *v.* Taylor (1832), 2 Russ. & M. 416; Doe d. Cadogan *v.* Ewart (1838), 7 Ad. & El. 636; Anon. (1817), 9 L. T. O. S. 168; Mortimer *v.* Hartley (1848), 6 C. B. 819; Spooner *v.* Payne (1849), 2 De G. & Sm. 439; Mortimer *v.* Hartley (1851), 3 De G. & Sm. 316; Mortimer *v.* Hartley (1851), 6 Exch. 47; Key *v.* Key (1853), 4 De G. M. & G. 73; Pearson *v.* Rutter (1853), 3 De G. M. & G. 398; Roberts *v.* Berry (1853), 3 De G. M. & G. 284; Evans *v.* Evans (1851), 23 L. J. Ch. 827; Grey *v.* Pearson (1857), 6 H. L. Cas. 61; Seccombe *v.* Edwards (1860), 28 Beav. 410; Cochrane *v.* Willis (1861), 4 De G. J. & Sm. 229; Collingwood *v.* Russell (1864), 5 New Rep. 1; Lautour *v.* A.-G. (1865), 5 New Rep. 231; *Re* Sanders' Trusts (1866), L. R. 1 Eq. 675; Finlason *v.* Tatlock (1870), L. R. 9 Eq. 258; Reed *v.* Braithwaite (1871), L. R. 11 Eq. 514; *In the Goods of* Crippen (1911), 80 L. J. P. 47.

4564. —— **Brought by father—Death of father before trial—Whether widow & executrix entitled to continue.**]—Under Poor Relief Act, 1601 (c. 2), s. 7, it has been decided that a father has sufficient interest to institute a civil suit to establish the nullity of his daughter's marriage; but where a father died after such suit instituted, & pleadings finished, but before trial:—*Held:* the ct. had no authority to allow the widow & executrix of the father to take up the suit at the point at which it was left by the father's death.—BEVAN *v.* MCMAHON & BEVAN (FALSELY CALLED MCMAHON) (1859), 2 Sw. & Tr. 58; 28 L. J. P. & M. 127; 2 L. T. 255; 23 J. P. 472; 5 Jur. N. S. 686; 8 W. R. 453; 164 E. R. 913.

B. Death of Petitioner.

4565. Death after decree nisi—Application to make decree absolute—By guardian of children—To secure variation of settlements.]—G. obtained a decree *nisi* for dissolution against his wife, & died before it could be made absolute. The petition prayed the ct. to deal with a post-nuptial marriage

PART XIII. SECT. 14, SUB-SECT. 2. B.

4559 i. *Failure to pay alimony.*]—Where a petition for divorce *a mensâ et thoro* was brought by a wife, & also a cross-petition by the husband, & the latter had not complied with an order for alimony made in the wife's petition, the ct. stayed the husband's cross-petition in which the wife's adultery was alleged.—ANNESLEY *v.* ANNESLEY (1913), 47 I. L. T. 38.—**IR.**

4559 ii. —— .]—Where pltf. in an action for divorce had been ordered to pay alimony, *pendente lite*, to deft., & was in arrear with payments recently due, the ct., on deft.'s application, stayed all proceedings in such action until the arrears were paid.—BERRY *v.* BERRY (1924), 45 N. L. R. 161.—**S. AF.**

Sect. 15.—*Disposing of causes: Sub-sect.* 1, *B., C.,*

settlement; & the guardian of the minor children of petitioner prayed to be allowed to intervene for the purpose of making the decree *nisi* absolute, & of obtaining an order of the ct. in respect of the settlement:—*Held:* the suit had abated by the death of petitioner, & no other party had any right to move in the matter.—GRANT *v.* GRANT & BOWLES & PATTISON (1862), 2 Sw. & Tr. 522; 31 L. J. P. M. & A. 174; 6 L. T. 660; 164 E. R. 1099.

Annotations:—**Folld.** Stanhope *v.* Stanhope (1886), 11 P. D. 103. **Refd.** Chichester *v.* Mure (1863), 32 L. J. P. M. & A. 146.

4566. —— —— By personal representatives.]—A husband who had obtained a decree *nisi* for dissolution of his marriage died before the time for making it absolute had arrived:—*Held:* the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute.—STANHOPE *v.* STANHOPE (1886), 11 P. D. 103; 55 L. J. P. 36; 54 L. T. 906; 50 J. P. 276; 34 W. R. 446; 2 T. L. R. 447, C. A.

Annotations:—**Refd.** Dunn *v.* Dunn (1888), 13 P. D. 91; Arnison *v.* Smith (1889), 58 L. J. Ch. 335; Thomson *v.* Thomson & Rodschinka, [1896] P. 263; Evans *v.* Evans & Blyth, [1904] P. 378; *Re* Stillwell, Brodrick *v.* Stillwell, [1916] 1 Ch. 365.

4567. Death after decree absolute—Order for costs against co-respondent—Enforcement by executors.]—Petitioner obtained a decree absolute for dissolution of marriage. Co-resp. was condemned in costs, but as he was out of the jurisdiction, no application was made for an order for taxation. Petitioner died after the decree absolute. On the return of co-resp. to this country, after a lapse of more than six years, the ct. made an order for the taxation of costs against him, on the application of the exor. of petitioner.—HAWKS *v.* HAWKS & FENWICK (1876), 1 P. D. 137; 45 L. J. P. 41; 34 L. T. 659; 24 W. R. 489.

4568. —— Continuance of suit by executors—To vary settlements.]—THOMSON *v.* THOMSON & RODSCHINKA, No. 5596, *post.*

Variation of settlements.]—*See* Sect. 22, sub-sect. 5, *post.*

C. Death of Respondent.

4569. General rule—Whether petition & affidavit removed from file.]—A petition for dissolution of marriage abates on the death of resp., but the ct. will not, on the application of petitioner, order that the petition & affidavit in support be removed from the file.—BROCAS *v.* BROCAS (1861), 2 Sw. & Tr. 383; 30 L. J. P. M. & A. 172; 5 L. T. 137; 164 E. R. 1044.

4570. Effect on claim for damages—Against co-respondent—Distinct causes of action.]—In a petition by a husband for the dissolution of his marriage, damages were claimed against co-resp. in respect of his alleged adultery with resp. After the petition & citations had been duly served upon resp. & co-resp., resp. died:—*Held:* although the claim for divorce had abated by the death of resp., the claim for damages against co-resp. had not abated, &, therefore, petitioner was entitled to proceed in respect of that claim.—M. *v.* M. & A. (1910), 26 T. L. R. 305; 54 Sol. Jo. 309.

Annotations:—**Consd.** Stocker *v.* Stocker, Brice & Patterson, [1917] P. 264. **Folld.** Monsell *v.* Monsell & Cain, [1922] P. 34. **Consd.** Kent *v.* Atkinson, [1923] P. 142.

4571. —— ——.]—(1) On a husband's petition for dissolution of marriage a decree *nisi* was made on Apr. 19, 1921, with an order for co-resp. to pay £600 damages into ct. This sum was paid in, but resp. died before decree absolute. The husband took out a summons for payment out to him of the damages:—*Held:* the claim for divorce against the wife & the claim for damages against co-resp. were distinct causes of action, & the latter had not abated on the death of resp.

(2) As a matter of procedure the ct. can only deal with the damages after decree absolute. In this case six months having elapsed since the decree *nisi*, petitioner was given liberty to apply in chambers as to the distribution of the damages without further notice to co-resp.

(3) Leave was also given for the infant children of the marriage to attend on this application, on an undertaking by their solr. to be responsible for costs.—MONSELL *v.* MONSELL & CAIN, [1922] P. 34; 91 L. J. P. 33; 126 L. T. 541; 38 T. L. R. 197.

Annotation:—*As to* (1) **Consd.** Kent *v.* Atkinson, [1923] P. 142.

D. Death of Co-Respondent.

4572. Death while suit pending—Dismissal from suit.]—*Semble:*—when co-resp. dies pending a suit for dissolution of marriage, a motion should be made for leave to strike his name out of the proceedings.—SUTTON *v.* SUTTON & PEACOCK (1863), 32 L. J. P. M. & A. 156.

4573. —— ——.]—When co-resp. named in a petition dies after the commencement of the proceedings, the right form of application to be made by petitioner is to strike his name out of the suit.—WALPOLE *v.* WALPOLE & CHAMBERLAIN, [1901] P. 86; 70 L. J. P. 23; 84 L. T. 63; 17 T. L. R. 113.

4574. —— —— Trial of charges.]—In a husband's petition for divorce an appearance was entered for co-resp. L. Shortly thereafter L. died, & an order was made that he should be dismissed from the suit:—*Held:* notwithstanding that order, the charge of adultery by resp. with L. could be gone into at the trial.—WIGGLESWORTH *v.* WIGGLESWORTH, BENNETT & SMITH (1911), 27 T. L. R. 463.

4575. Liability of estate—For petitioner's costs—Petitioner appointed receiver—Opportunity for administration by widow.]—WADDELL *v.* WADDELL & CRAIG, No. 5983, *post.*

4576. —— For damages.]—BRYDGES *v.* BRYDGES & WOOD, No. 5904, *post.*

E. Wife's Costs and Alimony.

Security for costs, *see* Sect. 9, sub-sect. 4, *ante.*

Orders for costs on final decree, *see* Sect. 18, *post.*

4577. Death of husband—Liability of estate—Payment into court.]—Where a husband, resp. in divorce proceedings, died on the eve of the trial, an order for the wife's costs, limited to the amount lodged in ct., was afterwards made against the husband's exors., to whom leave was given to attend the taxation.—CUNNINGHAM *v.* CUNNINGHAM (1897), 77 L. T. 405.

Annotations:—**Distd.** Maconochie *v.* Maconochie, Maconochie *v.* Maconochie & Blake (1916), 86 L. J. P. 10; Coleman *v.* Coleman & Simpson, [1920] P. 71.

4578. No order for security obtained in husband's lifetime.]—Upon the death of a husband, a party in a consolidated matrimonial suit, the causes of action being purely personal, the suit abates; & the Divorce Div. has no jurisdiction to entertain an application against the legal personal representative of the deceased husband in respect of taxation & payment of the wife's costs of suit, where no taxation or order

for security of those costs had been applied for or made by the wife against the husband during his lifetime.—MACONOCHIE *v.* MACONOCHIE, MACONOCHIE *v.* MACONOCHIE & BLAKE, [1916] P. 326; 86 L. J. P. 10; 115 L. T. 790; 33 T. L. R. 50; 61 Sol. Jo. 57.

Annotation:—**Apld.** Coleman *v.* Coleman & Simpson, [1920] P. 71.

4579. —— —— Death before obedience to order for security.]—Where in a suit brought by a husband for divorce an order has been made that the husband shall pay his wife's taxed costs & pay into ct., or give security for money towards her future costs, & the husband dies before the order has been obeyed, the ct. has no jurisdiction to enforce payment against his exors. In such a case the suit is at end & there is nothing in the Divorce Acts or in the practice of the ct. to enable it to be revived or the petitioner's exors. to be brought before the ct.—COLEMAN *v.* COLEMAN & SIMPSON, [1920] P. 71; 89 L. J. P. 107; 122 L. T. 801; 36 T. L. R. 255.

4580. Death of wife—Orders for costs & alimony—Enforcement by executors.]—A wife presented a petition for divorce, & the husband was ordered to pay alimony *pendente lite* & to pay the taxed costs up to a certain stage. The wife died before the petition was heard. Her exors. applied to be added as petitioners so as to enable them to enforce the above orders. The ct. refused to make the order.—SCHENCK *v.* SCHENCK (1908), 21 T. L. R. 739; 52 Sol. Jo. 551.

BY DISMISSAL OR WITHDRAWAL OF PETITION.

A. In General.

4581. Case not established against respondents—No appearance or further steps by petitioner—Dismissal on motion of co-respondent—Petitioner condemned in costs.]—At the trial of issues joined in a suit for dissolution of marriage on the ground of the wife's adultery, no one appearing on behalf of petitioner, the jury returned a verdict that resp. had not committed adultery with co-resp. No application having been afterwards made for a new trial, the ct., upon the motion of co-resp., dismissed the petition, & condemned petitioner in costs.—POTTS *v.* POTTS & BATEMAN (1862), 32 L. J. P. M. & A. 32; 11 W. R. 192.

4582. Petition for dissolution—Allegations ground for judicial separation only—Refusal to amend prayer.]—Where, on a petition for dissolution of marriage by a wife, the only facts which in the opinion of the ct. petitioner is at liberty to prove would be ground for a decree of judicial separation only, & petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed.—ROWLEY *v.* ROWLEY (1865), 4 Sw. & Tr. 137; 34 L. J. P. M. A. 97; 12 L. T. 505; 11 Jur. N. S. 532; 164 R. 1468; *affd.* (1866), L. R. 1 Sc. & Div. 63.

Annotations:—**Mentd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185; Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306; Besant *v.* Wood (1879), 12 Ch. D. 605; Hall *v.* Hall & Richardson (1879), 27 W. R. 664; Rose *v.* Rose (1883), 8 P. D. 98; Wood *v.* Wood (1887), 36 W. R. 33; Coe *v.* Aldridge (otherwise Morton) (1888), 13 P. D. 210; McGregor *v.* McGregor (1888), 21 Q. B. D. 424; Gooch *v.* Gooch, [1893] P. 99; Balcombe *v.* Balcombe, [1908] P. 176.

4583. Suit improperly presented—Affidavit of wife petitioner—Dismissal stayed till after payment of wife's costs.]—A suit having been instituted on the part of a wife for a dissolution of her marriage, in which the husband had appeared & answered, an application was made on his behalf that the petition should be dismissed on an affidavit from the wife that the suit had been improperly instituted, & that she had returned to cohabitation.—The ct. ordered such application to stand over until the wife's attorney had had an opportunity to tax his costs & enforce them against resp.—DIXON *v.* DIXON (1871), L. R. 2 P. & D. 253; 40 L. J. P. & M. 38; 25 L. T. 135; 19 W. R. 787.

4584. Whether court will permit withdrawal—Without respondent's consent.]—When resp. has appeared, the ct. will not allow petitioner to withdraw the petition, unless resp. consent or has had notice of the motion.—LUTWYCHE *v.* LUTWYCHE & COX (1859), 28 L. J. P. & M. 56; 5 Jur. N. S. 76.

4585. —— Issues coming on for trial before jury.]—RYDER *v.* RYDER, No. 4586, *ante*.

B. For Want of Prosecution.

(a) In General.

4586. Dismissal by consent—Whether agreement made order of court.]—When issues raised in a suit for dissolution of marriage come on for trial by a jury, petitioner will not be allowed to withdraw the record; but on his application, if there is no opposition by the other parties, the petition will be dismissed. When by agreement between the parties a petition for dissolution of marriage is dismissed, the ct. will not allow such agreement to be made an order of ct. for the purpose of enforcing its terms.—RYDER *v.* RYDER (1861), 30 L. J. P. M. & A. 164.

(b) The Application to

4587. Notice of application—Must be given by applicant—Unless application by consent.]—LUTWYCHE *v.* LUTWYCHE & COX, No. 4584, *ante*.

4588. —— —— Notice of abandonment given to applicant.]—Where a notice was given by petitioner's solr. to the solrs. of resp. & co-resp. of the abandonment of the petition, the ct., on a motion made on the part of resp. & co-resp., supported by an affidavit of service of notice of motion on petitioner's solrs., dismissed the petition & condemned petitioner in resp.'s & co-resp. costs.—SYMONS *v.* SYMONS & PIKE (1862), 2 Sw. & Tr. 435; 31 L. J. P. M. & A. 84; 6 L. T. 163; 10 W. R. 449; 164 E. R. 1065.

4589. —— —— Rescission of decree nisi.]—In a suit for dissolution at the instance of the wife a decree *nisi* had been pronounced, but subsequently the parties came together again, & on the wife's application the decree *nisi* was rescinded on proof that notice had been given to the husband.—TROWARD *v.* TROWARD (1884), 32 W. R. 864.

4590. Mode of application—By rule nisi.]—

PART XIII. SECT. 15, SUB-SECT. 2.—A.

f. *Petition for dissolution—Withdrawal after hearing & before decree.*]—A petitioner in a divorce suit may, with the leave of the ct., withdraw the petition after the hearing & before a decree has been pronounced, & the ct. should not refuse leave to withdraw it unless resp. has some rights in the suit which the withdrawal would affect. Resp. has no right to ask that a decree of divorce shall be pronounced.

Leave granted to a petitioning wife to withdraw her petition, after hearing & before decree pronounced, on payment to resp. husband of his taxed costs, as between solr. & client, of the suit & of all proceedings in it, including the summons for leave to withdraw.—ALLARDICE *v.* ALLARDICE (1904), 23 N. Z. L. R. 926.—**N.Z.**

g. —— *Whether notice of discontinuance effective.*]—A divorce suit cannot be effectively discontinued by the filing of notice of discontinuance as usual in civil actions.—TAIT *v.* TAIT (1907), 27 N. Z. L. R. 220.—**N.Z.**

Sect. 15.—*Disposing of causes: Sub-sect.* 2, *B.* (*b*), (*c*), (*d*) & (*e*); *sub-sect.* 3.

The ct. refused to grant a rule calling on petitioner to show cause why co-resp. should not be dismissed from a suit for dissolution of marriage, on the ground that it had not been prosecuted with due diligence, but granted a rule *nisi* for the dismissal of the petition on that ground.—HANCOCK *v.* HANCOCK & SMITH (1867), L. R. 1 P. & D. 334; 36 L. J. P. & M. 86.

4591. —— By summons in chambers.]—An application to dismiss a petition for dissolution by consent ought now to be made by summons in chambers & not by motion in open ct.—SLATER *v.* SLATER & BOLDERSON (1900), 69 L. J. P. 48.

(*c*) *When Order for Dismissal made.*

4592. No appearance by petitioner at hearing.]—If at the hearing no one appears on behalf of petitioner, resp. has a right to have the petition dismissed.—DESMAREST *v.* DESMAREST (1861), 31 L. J. P. M. & A. 34.

4593. —— Evidence of petitioner's intention not to go on with suit.]—Where petitioner fails to appear at the hearing, the ct. will either grant a rule *nisi* to dismiss the petition, or if information be laid before it tending to show that petitioner does not intend to go on with his suit, will dismiss it at once.—ROUND *v.* ROUND, GINN *v.* GINN (1869), 20 L. T. 87.

4594. —— ——.]—CLARK *v.* CLARK, No. 4757, *post.*

4595. Delay in prosecution.]—If petitioner delay filing the record & setting down the cause as ready for trial for the space of one month from the final settling of the record, resp. may file the record & set the cause down as ready for trial; or resp. may take a rule to show cause why the petition should not be dismissed.—STUART *v.* STUART (1862), 3 Sw. & Tr. 219; 32 L. J. P. M. & A. 110; 8 L. T. 703; 11 W. R. 463; 161 E. R. 1258.

4596. ——.]—HANCOCK *v.* HANCOCK & SMITH, No. 4590, *ante.*

Undue delay as discretionary bar to relief, *see* Sect. 7, sub-sect. 4, B., *ante.*

4597. Reconciliation between parties.]—Where the wife has petitioned against the husband & the proceedings are ended, before hearing, by her return to cohabitation, the petition will be dismissed, on the husband's application, only on payment of taxed costs.—COOPER *v.* COOPER (1864), 3 Sw. & Tr. 392; 33 L. J. P. M. & A. 71; 164 E. R. 1327.

Annotations:—**Folld.** Warwick *v.* Warwick (1901), 45 Sol. Jo. 639. **Consd.** Leavis *v.* Leavis, [1921] P. 299.

4598. ——.]—If the parties return to cohabitation whilst a matrimonial suit is pending, the petition will not necessarily be struck out of the list for want of prosecution whilst the costs of petitioner's solr. are unpaid. The proper course is for the case to be put into the reserved list.—WARWICK *v.* WARWICK (1901), 85 L. T. 173; 17 T. L. R. 632; 45 Sol. Jo. 639.

Annotation:—**Refd.** Jinks *v.* Jinks, [1911] P. 120.

4599. —— Lapse of twenty years—Attempt to revive suit.]—SCHARRER *v.* SCHARRER (1909), *Times*, July 7, C. A.

4600. Failure to apply to have decree made absolute.]—Where a resp. husband asks that a wife shall elect to have a decree *nisi* made absolute, or have her petition dismissed, the decree *nisi* may be made absolute on the husband providing the necessary costs.—GOLD *v.* GOLD (1908), 52 Sol. Jo. 715.

4601. —— Pendency of petition for maintenance.]—The wife obtained, in Feb. 1889, a decree *nisi* for the dissolution of her marriage. She afterwards petitioned for permanent maintenance, & that petition was still pending; the registrar not having, as yet, reported thereon. In Apr. 1889, the husband applied to have the divorce suit dismissed for want of prosecution, in that petitioner had not applied to have the decree *nisi* made absolute:—*Held:* the pendency of the proceedings for maintenance was a valid excuse for the delay, & the motion was dismissed with costs.—SOUTHERN *v.* SOUTHERN (1890), 62 L. T. 5.

(*d*) *Form and Contents of Order.*

4602. Form—Rule nisi in the first instance—Delay in prosecuting suit.]—HANCOCK *v.* HANCOCK & SMITH, No. 4590, *ante.*

4603. —— —— No appearance by petitioner.]—CURTIS *v.* CURTIS, No. 4546, *ante.*

4604. —— —— Unless clear evidence of petitioner's intention not to proceed.]—ROUND *v.* ROUND, GINN *v.* GINN, No. 4593, *ante.*

4605. Contents—Recital of domicil & lex domicilii of respondent.]—CLARK *v.* CLARK, No. 4757, *post.*

Dismissal on terms.]—*See* Sub-sect. 2, B. (*e*),

(*e*) *Dismissal on Terms.*

4606. Payment of wife's costs—& costs of motion.]—The ct. will not dismiss a petition by the husband for dissolution of marriage, except upon payment of the wife's taxed costs & the costs of the motion.—PEARCE *v.* PEARCE (1860), 30 L. J. P. M. & A. 182.

4607. —— Reconciliation of parties.]—COOPER *v.* COOPER, No. 4597, *ante.*

4608. —— ——.]—WARWICK *v.* WARWICK, No. 4598, *ante.*

4609. —— ——.]—(1) A wife, petitioner in a suit for judicial separation, cannot, by merely giving notice of change of solrs., deprive the solr. who has hitherto represented her in the suit of his right to carry in his bill & tax his costs in the Divorce Div., so as to compel him to have recourse to an action at common law against the husband for necessaries.

Where the parties to a matrimonial suit have returned to cohabitation, a solr. who has acted for the wife is entitled to object to an order for dismissal of the petition unless provision is made for his costs, & the proceedings may be stayed, pending the carrying in of his bill & the taxation of his costs.

(2) The reasonableness of the items in the bill can be discussed & dealt with by the taxing officer upon the taxation in the Divorce Div.—JINKS *v.* JINKS, [1911] P. 120; 80 L. J. P. 84; 104 L. T. 655; 27 T. L. R. 326; 55 Sol. Jo. 366.

4610. Payment of co-respondent's costs—No

PART XIII. SECT. 15, SUB-SECT. 2.—B. (c).

h. *Failure to take a step in the cause—What amounts to a "step."*]—The Supreme Ct. has power to dismiss a petition in divorce for want of prosecution, & a single judge will exercise that power following the ordinary practice of the ct. The costs of the motion are payable by petitioner in any event. The ct. ordered a petition to stand dismissed unless petitioner should take the next step in the suit within fourteen clear days:—*Held:* (1) a summons for a change of solr. is not a step in a cause; (2) a summons upon which no order is made is not a step in a cause. *Semble:* a summons taken out by a solr. who is not the solr. in the cause is not a step.—WHITE *v.* WHITE & MCLELLAND (1880), O. B. & F. 163.—**N.Z.**

evidence against co-respondent.]—In a suit, by a husband, for dissolution of marriage, the co-resp. appeared, but filed no answer. Upon a motion, by petitioner, for the dismissal of the petition, as against co-resp., on the ground that there was no evidence against him, it was held that the application could only be granted upon payment of co-resp.'s costs.—SMITH *v.* SMITH & MILLET (1864), 34 L. J. P. M. & A. 11.

4611. Payment of alimony up to time of dismissal—Delay in petitioning for alimony.]—The husband petitioned the ct. for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery & made counter-charges against petitioner of adultery & cruelty, which he denied, & directions were given as to the mode of trial of the facts in issue. Petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, resp. filed a petition for alimony:—*Held:* if a wife use due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to her up to the time of the withdrawal; but if the wife delay to present her petition up to the last moment, so that the husband has not had time to answer it, the ct. will not refuse to allow him to withdraw, until he has filed an answer to such petition, & paid what the ct. may allot upon it.—TWISLETON *v.* TWISLETON & KELLY (1872), L. R. 2 P. & D. 339; 26 L. T. 265; 20 W. R. 448.

Alimony pendente lite.]—*See* Sect. 9, sub-sect. 1,

3.- COMPROMISE OF PRO

Authority of counsel to consent, compromise or refer, *see* BARRISTERS, Vol. III., p. 339, Nos. 291 *et seq.*

4612. Whether binding on petitioner—Agreement to accept separation deed—Reference to adjust terms—Absence of fraud or mistake.]—(1) Where a wife, petitioner in a suit for a judicial separation, had entered into a compromise, by which the record was withdrawn from the jury, & the terms of the separation were to be settled by an arbitrator:—*Held:* petitioner was not at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in the terms of the agreement that she ought not to be bound by it;

(2) The referee had no need to consider the question of cruelty, as the amount of permanent alimony was not varied by the amount of marital delinquency; (3) in allotting it, regard might properly be had to the status of both parties, but it could never be increased for the purpose of mulcting the guilty party.—HOOPER *v.* HOOPER (1861), 3 Sw. & Tr. 251; 30 L. J. P. M. & A. 49; 164 E. R. 1270.

Annotations:—As to (1) **Refd.** Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306; Hall *v.* Hall & Richardson (1879), 27 W. R. 664. *As to* (3) **Refd.** Phillips *v.* Barnet (1876), 45 L. J. Q. B. 277.

4613. —— Petitioner agreeing to withdraw for good consideration—No fraud or duress.]—An agreement for good consideration that petitioner in a suit for dissolution of marriage will withdraw from the suit is binding, if it has not been obtained by fraud or duress.—STERBINI *v.* STERBINI (1870), 39 L. J. P. & M. 82; 22 L. T. 552.

4614. —— Respondent prepared to carry out terms.]—STANES *v.* STANES, No. 3040, *ante.*

4615. Validity of compromise—Agreement to withdraw on payment of sum to petitioner by co-respondent—Void as against public policy.]—An agreement, by which co-resp. to a petition by a husband for dissolution of marriage agrees to secure to petitioner a sum of money in consideration of his withdrawing from the suit, will not be enforced in equity at the suit of the husband; such an agreement being void as against public policy, & Matrimonial Causes Act, 1857 (c. 85), s. 33.—GIPPS *v.* HUME (1861), 2 John. & H. 517; 31 L. J. Ch. 37; 5 L. T. 307; 7 Jur. N. S. 1301; 70 E. R. 1163; *sub nom.* GIBBS *v.* HUME, 26 J. P. 196; 10 W. R. 38.

*Annotations:—***Consd.** Brown *v.* Brine (1875), 1 Ex. D. 5; **Distd.** Upton *v.* Henderson (1912), 106 L. T. 839.

4616. Suit on ground of wife's adultery-Compromise giving wife custody of child.]—Pltf., Mrs. H., who was the wife of deft., claimed specific performance of an agreement for a separation deed entered into upon the compromise of a suit in the Divorce Ct. which was instituted by the husband against the wife for a divorce on the ground of adultery. The agreement was signed by both husband & wife after the husband's evidence in support of his case had been heard & before the wife's defence had been commenced, & was in these terms:—"Petition & answer dismissed. Deed of separation with usual covenants; costs of preparing deed to be borne by Mr. H. Mr. H. to pay Mrs. H. for herself & child or children £150 a year quarterly. Mrs. H. to maintain the child or children. Mr. H. to pay wife's costs. In case of difference in working out these terms matter to be referred to Mr. W. & Dr. D.":- *Held:* (1) this ct. had power to enforce specific performance of an agreement for a separation deed & for the compromise of a suit in the Divorce Ct. without infringing Jud. Act prohibiting interference with proceedings pending in another branch of the ct.; (2) the ct. would not refuse specific performance of an agreement for a separation deed on the ground that it provided for the wife having the custody of the children; (3) the husband & wife were competent to make a binding agreement for compromise of a divorce suit, & this agreement was not too vague to be enforced by the ct.; (4) the agreement on the face of it being complete, the arbn. clause could only come into force in case of difference between the parties, & did not oust the jurisdiction of the ct. to settle the deed itself.—HART *v.* HART (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.

Annotations:—Generally. **Refd.** Bradley *v.* Bradley (1882), 51 L. J. P. 87; Harrison *v.* Harrison (1887), 12 P. D. 130; Wood *v.* Wood (1891), 64 L. T. 586.

4617. —— Agreement by wife to withdraw countercharges—On payment by husband of wife's taxed costs—Husband guilty of adultery.]—WEEKES *v.* WEEKES, WEEKES *v.* WEEKES & MARSHALL (1905), 21 T. L. R. 227.

4618. —— Covenant by co-respondent not to come within fixed radius—Sum payable on breach—Not contrary to public policy.]—A deed of May, 1911, recited that pltf. had filed a petition for dissolution of his marriage on the ground of his wife's adultery with deft., & that it had been agreed that, in consideration of £3,000 paid to trustees, the income of which was to be paid to deft. until breach of his covenant therein contained, & from such breach the £3,000 should be held for pltf. or his wife absolutely, or for deft. if there should be no breach, further proceedings in respect of the adultery should not be taken. Deft. covenanted

k. *Whether binding on petitioner.*]—JORDAN *v.* JORDAN (1914), 6 O. W. N. 543; 17 D. L. R. 810.—**CAN.**

Sect. 15.—*Disposing of causes: Sub-sects.* 3, 4 & 5. *Sect.* 16: *Sub-sect.* 1, *A., B. & C.*]

with pltf. & his wife that he would not during fifteen years come within a radius of ten miles of the mansion house, so long as the pltf. or his wife should continue to reside there without their written consent. Pltf. applied for dismissal of his divorce petition, & deft. admitted breach of his covenant. Pltf. claimed an injunction & payment of the £3,000:—*Held:* (1) the payment of the £3,000 depended entirely upon deft.'s future conduct, & was not compensation for the wrong; (2) the deed was not void as being contrary to public policy as operating as a restraint of trade, or as imposing an undue restriction upon deft.'s personal liberty, & pltf. not being put to his election between alternative remedies, & the £3,000 not being a penalty, pltf. was entitled to an injunction & to an order that the trustees should pay over to him the £3,000.—UPTON *v.* HENDERSON (1912), 106 L. T. 839; 28 T. L. R. 398; 56 Sol. Jo. 481.

Annotation:—*Generally.* **Mentd.** Denny's Trustee *v.* Denny & Warr, [1919] 1 K. B. 583.

4619. Power to make agreement rule of court—In King's Bench Division.]—An action for judicial separation in the Divorce Div. was compromised by the parties, & an agreement of compromise signed by them which provided that a separation deed should be executed; that the agreement might be made a rule of the High Ct., & that resp. should pay petitioner's taxed costs. A separation deed was afterwards executed, but resp. refused to pay the taxed costs, & the agreement was made an order of the Q. B. Div. for the purpose of enforcing payment:—*Held:* there was power to make the agreement an order of ct. in the Q. B. Div., & as the agreement of compromise had been reduced to an agreement to pay costs, the discretion of the ct. to make the order had been rightly exercised.—SMYTHE *v.* SMYTHE (1887), 18 Q. B. D. 544; 56 L. J. Q. B. 217; 56 L. T. 197; 35 W. R. 346; 3 T. L. R. 357.

Annotation:—**Refd.** Graves *v.* Graves (1893), 69 L. T. 120.

4620. —— In Divorce Division.]—In an undefended suit for judicial separation, terms were signed before the case came into the list, the parties agreeing "to an order of the ct. staying proceedings . . . upon the terms hereinbefore contained, except for the purpose of carrying out & enforcing such terms." Upon the case coming into the day's cause list & being called on, counsel for petitioner asked that the proceedings be stayed, & that the terms be filed with the object of making them a rule of ct. thereafter, if it should become necessary to do so:—*Held:* the ct. had jurisdiction.—HOWARD *v.* HOWARD (1897), 77 L. T. 140.

4621. Enforcement of compromise—Specific performance—Whether jurisdiction of court ousted by provision for reference—Wife given custody of children.]—HART *v.* HART, No. 4616, *ante*.

4622. —— By injunction.]—UPTON *v.* HENDERSON, No. 4618, *ante*.

4623. Construction of agreement—Agreement by respondent to pay taxed "costs of suit"—Whether costs of settlement of deed included.]—The parties to a wife's suit for judicial separation entered into an agreement for the settlement of it, which provided (*inter alia*) that a separation deed should be executed; that the husband should pay the wife's taxed "costs of suit"; & that the agreement might be made a rule of ct.:—*Held:* the costs of & incident to the preparation & settlement of the deed were not "costs of suit" which the husband was bound to pay.—LANCASTER *v.* LANCASTER, [1896] P. 118; 65 L. J. P. 34; 74 L. T. 64; 44 W. R. 440; 40 Sol. Jo. 419, C. A.

SUB-SECT. 4.—BY STRIKING OUT.

4624. When cause will be struck out—Necessary papers not filed.]—Where the papers required by the practice of the ct. to be delivered to the judge of the full ct. three days before the hearing of a cause have not been delivered the court will order the cause to be struck out of the list.—EVANS *v.* EVANS (1859), 29 L. J. P. M. & A. 53.

4625. —— —— Minutes.]—If the minutes required by the practice of the ct. to be filed before the hearing are not so filed, the cause will be struck out of the list.—MURPHY *v.* MURPHY (1862), 31 L. J. P. M. & A. 162.

4626. No appearance by parties—Jury discharged.]—When a jury has been sworn to try issues in a matrimonial suit, & neither of the parties appears, the ct. will discharge the jury.—HAYDON *v.* HAYDON & COOKE (1860), 30 L. J. P. M. & A. 112.

4627. —— Absence of petitioner & witnesses—Inadvertence.]—When a petition for divorce came on for hearing, petitioner & his witnesses, owing to an inadvertence in his solr.'s office, were not in attendance. Thereupon the ct. ordered that co-resp. should be dismissed from the suit with costs. Petitioner afterwards moved to have the order set aside. At the date of the motion the order had not been drawn up & no judgment had been sealed:—*Held:* as the judgment had not taken a final form the ct. had jurisdiction to set aside the order, & in the circumstances the ct. ought to do so.—GEERING *v.* GEERING & MOCKFORD (1921), 38 T. L. R. 109.

4628. Setting aside order to strike out—Before order drawn up & judgment sealed.]—GEERING *v.* GEERING & MOCKFORD, No. 4627, *ante*.

4629. Effect of striking out—Subsequent petition—Original petition not removed from file.]—ONSLOW *v.* ONSLOW, JONES & CAMPBELL, No. 4352, *ante*.

SUB-SECT. 5.—BY TRIAL OR HEARING.

See Sect. 16, *post*.

SECT. 16.—THE TRIAL OR HEARING.

SUB-SECT. 1.—MODE OF TRIAL—TRIAL BY JURY.

A. In General.

See Matrimonial Causes Rules, 1924, r. 30 (B).

4630. Application for—To whom made—Jurisdiction of registrar.]—SCULLY *v.* SCULLY, No. 4638, *post*.

B. In Suits for Dissolution of Marriage.

See Matrimonial Causes Act, 1857 (c. 85), s. 36; Matrimonial Causes Rules, 1924, r. 30 (B).

PART XIII. SECT. 15, SUB-SECT. 4.

1. *When cause will be struck out—Of consent—Statements admittedly incorrect—Public policy.*]—A petition in divorce ordered to be removed from the file, by consent of petitioner & resp., on the grounds (1) that it was admitted that the statements in it were incorrect, & (2) that it is the policy of the law that matters should not be published, even if they are true, if the publication will serve no good purpose.—*P. v. P.* (1904), 21 N. Z. L. R. 959.—**N.Z.**

PART XIII. SECT. 16, SUB-SECT. 1.—B.

m. *When directed to try issues of fact.*]—A jury is properly summoned under Jury Act, 1913, B. C., to try the issues of fact in a divorce action.—

4631. Power of court to direct—Though no request by either party.]—Though neither of the parties desires a jury, the ct. may still direct the issues to be tried before one. Where facts are in dispute before the full ct., it is the most convenient mode of trial; but where the principal issues were addressed to the discretion of the ct. under Matrimonial Causes Act, 1857 (c. 85), s. 31, it directed the petition to be heard without a jury.—RATCLIFF *v.* RATCLIFF & ANDERSON (1858), 1 Sw. & Tr. 217; 27 L. J. P. & M. 60; 31 L. T. O. S. 269; 6 W. R. 866; 164 E. R. 700.

4632. —— Principal issues addressed to discretion of court.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 4631, *ante*.

4633. —— ——.]—The power given to the ct. by sect. 36 of Matrimonial Causes Act, 1857 (c. 85), to direct questions of fact arising in proceedings under the Act to be tried before a jury, does not extend to issues raised between the parties on matters which, under the proviso to sect. 31, give the ct. a discretion as to dissolving a marriage, though petitioner's case may have been proved. When, therefore, the case is directed to be tried before a jury, such issues should not be included in the record prepared under r. 22.—KRETZSCHMAR *v.* KRETZSCHMAR & REINECKER (1859), 28 L. J. P. & M. 128.

4634. When directed—Facts in dispute before full court.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 4631, *ante*.

4635. —— New trial—Jury dispensed with by consent in first trial.]—GIPPS *v.* GIPPS & HUME, No. 3064, *ante*.

4636. —— Issues unfit to be decided on affidavit—Showing cause against decree nisi.]—(1) The Queen's Proctor can only intervene, in his official capacity, in a suit for dissolution of marriage when he alleges collusion. He may, however, as one of the public, show cause against a decree *nisi* being made absolute.

(2) Resp., by pleading in answer to a petition for dissolution of marriage material facts, of which no evidence is given at the hearing, does not bring them before the ct., within Matrimonial Causes Act, 1860 (c. 144), s. 7; but such facts may, after a decree *nisi* has been pronounced, be set up by one of the public as ground for not making the decree absolute.

(3) When the affidavit filed by a person showing cause against a decree being made absolute & the affidavits in answer raise issues not proper to be decided on affidavits, the ct. will order the issues to be tried by a jury. They cannot be tried by the ct. itself on oral evidence.—MASTERS *v.* MASTERS (1864), 4 New Rep. 200; 34 L. J. P. M. & A. 7.

Annotation:—As to (1) **Refd.** Hudson *v.* Hudson (1875), 1 P. D. 65.

4637. —— —— ——.]—Where the Queen's Proctor appeared to show cause against a decree *nisi*, pronounced upon the wife's cross-petition, being made absolute, & filed affidavits charging adultery at other dates & places than the acts charged in the husband's petition, & affidavits were filed in answer which denied such charges, the ct. refused to reverse the decree upon the affidavits, but directed an issue to be settled for trial by a jury.—STUDHOLME *v.* STUDHOLME & CULLUM (1876), 25 W. R. 165.

4638. —— Trial of issue of adultery.]—(1) The parties to an issue of adultery are entitled as of right to a trial by jury under Matrimonial Causes Act, 1857 (c. 85), s. 28, & that right is not affected by Juries Act, 1918 (c. 23), being specially preserved by sect. 1 (d) of that Act. (2) *Semble*: the application for trial by a jury is competently made by summons returnable before a registrar.—SCULLY *v.* SCULLY (1920), 90 L. J. P. 104; 124 L. T. 574; 37 T. L. R. 84.

C. In Other Suits.

See Matrimonial Causes Act, 1857 (c. 85), s. 36; Matrimonial Causes Rules, 1924, r. 30 B.

4639. Judicial separation—Discretion of court—Trial of questions of fact.]—Matrimonial Causes Act, 1857 (c. 85), ss. 28 & 36, leave it in the discretion of the ct. to direct the issues in a suit for judicial separation to be tried by a jury; but the ct. will generally make such order at the prayer of either party, & in the present case did so on the undertaking of resp. not to interfere with or annoy petitioner pending the suit.—MARCHMONT *v.* MARCHMONT (1858), 1 Sw. & Tr. 228; 27 L. J. P. & M. 59; 31 L. T. O. S. 302; 6 W. R. 870; 164 E. R. 705.

4640. —— —— ——.]—(1) Although in a suit for judicial separation the ct., under Matrimonial Causes Act, 1857 (c. 85), s. 36, may in its discretion refuse to direct that questions of fact be tried by a jury, it will generally at the request of either of the parties allow a jury. The circumstance that cruelty is in issue is no ground for refusing a jury.

(2) If the wife asks for a special jury it does not follow as a matter of course that the costs of the special jury will be allowed as against the husband.—TAYLOR *v.* TAYLOR (1863), 32 L. J. P. M. & A. 126; 9 L. T. 24.

4641. Nullity of marriage—Discretion of court.]—C—— *v.* C—— (1862), No. 4340, *ante*.

4642. Restitution of conjugal rights—Cross-prayer for nullity on ground of impotence—Discretion of court.]—In suits other than those for dissolution of marriage, the ct. may in its discretion refuse to order the cause to be tried by a jury. The answer to a petition for restitution of conjugal rights, alleged the impotence of petitioner, & prayed for a decree of nullity of marriage. The ct. refused to allow the issue joined on the answer to be tried by a jury, although resp. asked for one.—RICKETTS *v.* RICKETTS (1866), 35 L. J. P. & M. 92; 13 L. T. 761.

4643. Jactitation of marriage—Where no defence.]—It is not the practice of the ct. to order a suit of jactitation of marriage to be tried by a jury if deft. has put in no defence.—THOMPSON *v.* ROURKE, [1892] P. 244; 61 L. J. P. 132; 67 L. T. 137; 8 T. L. R. 652; 36 Sol. Jo. 592.

4644. Act on petition—Discretion of court—Issues of fact.]—The ct. has a discretion under Matrimonial Causes Act, 1857 (c. 85), s. 36, as to the mode of trial of an act on petition. In spite of Divorce Rule 61, which probably did not contemplate issues of fact as likely to arise on the trial of an act on petition, & although on an act on petition questions of law are generally combined with the issues of fact, & inconvenience may result from a trial of such questions with a jury the ct., will not refuse a jury if one of the parties wish for it, although a jury is not the proper tribunal for the purpose according to the old practice.—

n. *Claim for damages against co-respondent—Whether trial by jury imperative.*]—It is not imperative that a claim for damages against a co-resp. in a divorce action be tried by a jury; the matter is one of procedure entirely & subject to ordinary rules of ct. If either party desires a jury trial he must apply as in an ordinary action.—ELKOWECH *v.* ELKOWECH, [1921] 2 W. W. R. 345; 16 Alta. L. R. 519.—CAN.

Sect. 16.—*The trial or hearing: Sub-sect.* 1, *C.; sub-sects.* 2, 3 & 4, *A. & B*

LOWENFELD *v.* LOWENFELD, [1903] P. 177; 72 L. J. P. 57; 89 L. T. 146; 19 T. L. R. 542, C. A.
Annotation:—**Refd.** Sackville-West *v.* A.-G. (1909), 26 T. L. R. 33.

Legitimacy suits.]— BASTARDY, Vol. III., p. 370, Nos. 115–117.

SUB-SECT. 2.—PLACE OF TRIAL.

See Matrimonial Causes Rules, 1924, r. 40.

See, now, Administration of Justice Act, 1920 (c. 81), s. 1; Matrimonial Causes at Assizes Order, 1922, No. 757.

4645. Trial in courts other than Divorce Division —At Assizes—Only in special circumstances.]—Assuming that the ct. has the power to send the main issue in a petition for dissolution to be tried before a judge of Assize, who could pronounce no sentence in the suit, it is power to be exercised very sparingly, & only in peculiar circumstances. —EVANS *v.* EVANS & ROBINSON (1858), 1 Sw. & Tr. 216; 31 L. T. O. S. 269; 164 E. R. 699.
Annotation:—**Refd.** Snowball *v.* Snowball (1871), 24 L. T. 673.

4646. —— —— Majority of witnesses far from London.]—Where, upon a petition for dissolution of marriage, it appeared that by far the greater part of the witnesses to the facts in the suit resided at a great distance from London, the ct. directed issues upon the charges & countercharges of adultery & cruelty to be tried at the assizes.—RICHARDES *v.* RICHARDES & JONES (1861), 30 L. J. P. M. & A. 48.
Annotation:—**Refd.** Snowball *v.* Snowball (1871), 24 L. T. 673.

4647. —— —— Framing of issues—As issue sent by Court of Chancery.]—Where an issue is ordered to be tried at the assizes, under Matrimonial Causes Act, 1857 (c. 85), s. 40, it should be framed as an issue sent by the Ct. of Ch.—HOGG *v.* HOGG (1860), 32 L. J. P. M. & A. 209.
Annotation:—**Refd.** Snowball *v.* Snowball (1871), 24 L. T. 673.

4648. —— —— Not where husband objects.]—The ct. will not direct the issues of fact in a matrimonial suit to be tried in another ct. against the wishes of the husband, at whose cost the litigation is carried on.—SNOWBALL *v.* SNOWBALL (1871), L. R. 2 P. & D. 263; 40 L. J. P. & M. 56; 24 L. T. 673; 19 W. R. 787.

SUB-SECT. 3.—POSTPONEMENT OF TRIAL.

4649. Notice of application to other side.]—The ct. will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party.—HEPWORTH *v.* HEPWORTH (1861), 2 Sw. & Tr. 514; 30 L. J. P. M. & A. 198; 5 L. T. 120; 164 E. R. 1096.

SUB-SECT. 4.—PROCEDURE AT TRIAL.

A. In General.

4650. Where case conducted by respondent in person—Witnesses called without opening speech.]—(1) To entitle a person to a decree of judicial separation on the ground of cruelty the acts relied on must be of such a nature as to show that further cohabitation is unsafe, there must be proof of ill-treatment & bodily injury, or of a reasonable apprehension of such bodily injury. Acts of cruelty condoned & not revived by subsequent misconduct would not be a legitimate foundation for a decree of judicial separation, though condonation were not pleaded. Condonation is not absolute forgiveness, but forgiveness on the implied condition that the misconduct condoned shall not be repeated.

(2) *Semble:* if the evidence establish a plain case of condonation, the ct. will take notice of it, although not pleaded.

(3) Where resp. conducts his own case, the most convenient course is, that he should at once call his witnesses without making an opening speech, then give his evidence, & reserve any comments on the case for his summing up.—CURTIS *v.* CURTIS (1858), 1 Sw. & Tr. 192; 27 L. J. P. & M. 73; 31 L. T. O. S. 272; 164 E. R. 688; *affd.* (1859), 4 Sw. & Tr. 234.
Annotations:—*As to* (1) **Refd.** Kelly *v.* Kelly (1870), L. R. 2 P. & D. 59; Moosbrugger *v.* Moosbrugger, Moosbrugger *v.* Moosbrugger & Martin (1913), 109 L. T. 192. *Generally,* **Mentd.** *Re* Curtis (1859), 28 L. J. Ch. 458.

4651. Order of speeches—As between respondent & co-respondent—May be arranged by counsel.]—ROBINSON *v.* ROBINSON & LANE, No. 2777, *ante.*

4652. —— Speech for co-respondent—No evidence called by co-respondent—After opening of respondent's case.]—GLENNIE *v.* GLENNIE & BOWLES, No. 3087, *ante.*

4653. —— —— —— After closing speech for petitioner.]—Where counsel for co-resp. has called no evidence, he is entitled to address the jury after petitioner's counsel.—JEFFREE *v.* JEFFREE & NUTTALL (1910), 54 Sol. Jo. 655.

4654. —— —— Evidence called by co-respondent—After speech for respondent.]—ROBINSON *v.* ROBINSON & LANE, No. 2777, *ante.*

Right to begin.]—*See* Sub-sect. 4, B., *post.*

Hearing cases in camera.]—*See* Sect. 1, sub-sect. 2, *ante.*

4655. Addressing jury as to damages—Whether co-respondent entitled to—Where no answer filed.]—LYNE *v.* LYNE & BLACKNEY, No. 3937, *ante.*

4656. Evidence in answer to countercharge—Time for calling.]—At the hearing of a petition by the husband for dissolution of marriage on the ground of his wife's adultery, in which the wife made a countercharge of adultery against him:—*Held:* petitioner might, as part of the case opened by him, give his own evidence & call his witnesses in answer to resp.'s charge, or that he might in the alternative reserve his answer to the charge until resp.'s witnesses in support of it had been examined, but that he was not entitled to divide his case by giving his own evidence in the opening, & afterwards calling his witnesses in reply to resp.'s case.—JACKMAN *v.* JACKMAN & WILLOUGHBY (1889), 14 P. D. 62; 58 L. J. P. 72; 60 L. T. 936; 37 W. R. 624.

4657. Time to deny countercharges—Whether in examination in chief—Or after respondent's case.]—WILLIAMS *v.* WILLIAMS & GAZZARD (1897), *Times,* Nov. 4.

PART XIII. SECT. 16, SUB-SECT. 4.—A.

o. *Order of speeches—Speech for co-respondent—No evidence called by co-respondent—Co-respondent called as witness for respondent.*]—In addressing juries there is no reason why the practice in civil cases ought not to prevail in divorce suits, & counsel for a co-resp. who calls no evidence is not bound to address the jury at the close of petitioner's case, but may wait until he has had an opportunity of hearing co-resp.'s evidence, when called as a witness for resp. & has himself examined him when so called.—THOMSON *v.* THOMSON (1892), 11 N. Z. L. R. 483.—**N.Z.**

p. —— —— —— *Petitioner's right to reply.*]—EVANS *v.* EVANS (No. 2) (1910), 30 N. Z. L. R. 291.—**N.Z.**

q. *Action for dissolution—Right of petitioner to limit claim to judicial*

Examination & cross-examination of witnesses, *see* Sect. 11, sub-sects. 6, 7, *ante*.

4658. Adjournment—Of motion—Omission to state material facts in affidavits.]—Where affidavits in support of a motion omit to state material facts, which facts existed at the date when the affidavit was made, the ct. may allow such motion to stand over. But where a motion cannot be granted by reason of the non-existence at the date of the affidavit of material facts, such motion must be rejected.—SERRELL *v.* SERRELL & BAMFORD (1862), 2 Sw. & Tr. 636; 31 L. J. P. M. & A. 114; 7 L. T. 221; 164 E. R. 1145.

4659. —— For further evidence—Amendment of petition & re-service—Treatment as new petition at resumed hearing.]—After the hearing of an undefended petition had been adjourned for further evidence, an allegation was added to the petition by the leave of the ct., & it was re-served upon resp. When it again came on for hearing, the ct. treated it as a new petition, & required evidence of all the facts necessary to found a decree, as well as of the additional allegation.—WALKER *v.* WALKER (1862), 31 L. J. P. M. & A. 117.

4660. Discharge of jury—Right of sheriff to fee for summoning.]—A cause set down in the jury list entitles the sheriff to his fee for summoning the jury, even though taken by the judge alone.—BLACKBURN *v.* BLACKBURN (1907), 51 Sol. Jo. 345.

Consent of parties.]—Before a jury can be discharged it is necessary that all parties should express their consent.—JONES *v.* JONES & ROOSEJONES (1913), 108 L. T. 1038.

4662. Exclusion of witnesses from court.]—With regard to contested probate & matrimonial cases, my view is that the rule which has been for so long observed in the Admiralty Ct. should be adopted here—viz. that all witnesses should remain out of ct. until they have given their evidence. Sometimes counsel have to apply that witnesses should remain out of ct., & it must be often unpleasant for them to have to do so. I wish the existing practice in this ct. to be reversed, & that in future in all contested cases the witnesses should remain out of ct. If in any particular case their presence is immaterial, counsel may intimate that there is no objection to the witnesses remaining in ct. I am satisfied that it is most desirable that this rule should be adopted here, as it is on the other side of the ct.; & if I find that the witnesses in a case have remained in ct., their conduct will be open to serious comment (GORELL BARNES, P.).—PRACTICE NOTE (1908), 24 T. L. R. 263.

B. Right to Begin.

Order of speeches as between respondent & co-respondent, *see* Sub-sect. 4, A., *ante*.

4663. Petitioner's right to begin—Need to prove fact of marriage—Trial without jury.]—GIBSON *v.* GIBSON (1859), Sea. & Sm. 116.

4664. —— —— —— Main issue on respondent.]—(1) Where the judge ordinary is sitting without a jury, as the question of the fact of the marriage must be proved before him, the right to begin is not taken from petitioner from the consideration that the only real issue in the case lies upon resp.

(2) There being cross-issues of adultery in the husband's petition for dissolution standing for trial before a jury, the judge ordinary suspended his judgment until these issues were disposed of.—BURROUGHS *v.* BURROUGHS (1862), 2 Sw. & Tr. 544; 31 L. J. P. M. & A. 56; 5 L. T. 771; 164 E. R. 1108.

Annotations:—*As to* (1) **Apld.** Meara *v.* Meara (1865), 14 W. R. 50. *Generally*, **Mentd.** Blackborne *v.* Blackborne (1868), L. R. 1 P. & D. 563.

4665. —— —— —— ——.]—MEARA *v.* MEARA, No. 4040, *ante*.

4666. —— —— Suit for dissolution—Marriage traversed in cross-suit for nullity.]—SERRELL *v.* SERRELL & BAMFORD, No. 4334, *ante*.

4667. —— Judicial separation—Cross-suit for nullity—Amendment of prayer to nullity.]—A wife presented a suit for judicial separation on the ground of the husband's alleged cruelty. The husband by his answer denied the charges of cruelty, & claimed a decree of nullity on the ground of the wife's incapacity. The wife then amended her petition, & after denying the husband's allegation, sought a declaration of nullity on the ground of the husband's incapacity:—*Held:* the burden of proof was on the wife, who had therefore the right to begin.—L. *v.* L. (OTHERWISE M.) (1908), 25 T. L. R. 43; 53 Sol. Jo. 32.

4668. Respondent's right to begin—Restitution suit—Cross-charge of cruelty.]—In a petition for restitution of conjugal rights by the husband, to which the wife answered by pleading his cruelty, & the husband took issue thereon, the ct., after hearing counsel, held that substantially the affirmative issue was on resp., & that her counsel had a right to begin.—CHERRY *v.* CHERRY (1858), 1 Sw. & Tr. 319; 28 L. J. P. & M. 36; 32 L. T. O. S. 198; 164 E. R. 747.

Annotations:—**Distd.** Burroughs *v.* Burroughs (1862), 2 Sw. & Tr. 544. **Apld.** Smith *v.* Smith, Smith *v.* Smith & Charlesworth, [1900] P. 66.

4669. —— —— Trial with jury.]—MEARA *v.* MEARA, No. 4040, *ante*.

4670. —— —— Cross-petition for dissolution on ground of adultery.]—Where a wife petitioned for restitution of conjugal rights, & the husband in answer alleged that she had committed adultery, &, in a cross-petition, claimed the dissolution of his marriage on that ground:—*Held:* the husband's counsel ought to begin.—SMITH *v.* SMITH, SMITH *v.* SMITH & CHARLESWORTH, [1900] P. 66; 69 L. J. P. 44.

4671. —— —— Separation admitted—Proof of justification.]—RUSSELL *v.* RUSSELL (1895), cited in Halsbury's Laws of England, Vol. XVI., p. 541; *Times*, Apr. 5; *on appeal*, [1895] P. 315, C. A.; [1897] A. C. 395, H. L.

Annotations:—**Mentd.** Oldroyd *v.* Oldroyd, [1896] P. 175; Armytage *v.* Armytage (1898), 78 L. T. 689; Walker *v.* Walker (1898), 77 L. T. 715; Synge *v.* Synge, [1900] P. 180; Jeapes *v.* Jeapes (1903), 89 L. T. 74; Frowd *v.* Frowd, [1904] P. 177; Beer *v.* Beer (1906), 94 L. T. 704; Baron *v.* Baron (1908), 24 T. L. R. 273; Harriman *v.* Harriman, [1909] P. 123; Brooking-Phillips *v.* Brooking-Phillips, [1913] P. 80; Butland *v.* Butland (1913), 29 T. L. R. 729; Greene *v.* Greene, [1916] P. 188; Moss *v.* Moss, [1916] P. 155; Fisk *v.* Fisk (1920), 122 L. T. 803; Foster *v.* Foster, [1921] P. 438; Walter *v.* Walter, [1921] P. 302; Harnett *v.* Harnett, [1924] P. 126; Thomas *v.* Thomas, [1924] P. 194.

4672. —— Nullity suit—Marriage admitted on pleadings.]—HAYWARD *v.* HAYWARD (1858), Sea. & Sm. 116, n.

Annotation:—**Distd.** Gibson *v.* Gibson (1859), Sea. & Sm. 116.

separation—Respondent not defending—Whether entitled to notice before decree.]—On a petition for divorce on the ground of desertion constituted by failure to comply with an order for the restitution of conjugal rights, the petition asking for further or other relief, it is competent for petitioner before pronouncement of the decree *nisi* to limit her claim to one for judicial separation. In such case, where resp. has entered an appearance but filed no defence, the decree may be made without notice to resp., & resp. has no right to be heard.—PEARCE *v.* PEARCE (1905), 25 N. Z. L. R. 683.—**N.Z.**

PART XIII. SECT. 16, SUB-SECT. 4.—B.

r. *Question of law—Argued before trial—Right of party bringing question before court, to begin.*]—Where a question of law is ordered to be argued

Sect. 16.—*The trial or hearing: Sub-sect.* 4, *B.; sub-sect.* 5, *A., B., C. & D.* (*a*), (*b*) & (*c*).]

4673. —— Dissolution suit—No traverse of adultery—Issues joined on counter-charges of adultery & cruelty.]—Where resp. in her answer has not traversed the adultery alleged in the petition, but sets up countercharges of adultery, cruelty, & misconduct, upon which counter-charges issue has been joined, upon a trial of these issues before a jury, it is for resp. to begin. When these issues have been disposed of by the jury, it is not competent to resp. to cross-examine the witnesses called to establish the allegations in the petition, either as to these allegations or as to the counter-charges contained in the answer.—BACON *v.* BACON & BACON (1859), 2 Sw. & Tr. 53; Sea. & Sm. 68; 29 L. J. P. M. & A. 61; 164 E. R. 911.

4674. —— —— —— Issue joined on plea of connivance.]—PARKER *v.* PARKER & MCLEOD (1859), 4 Sw. & Tr. 261, n.; Sea. & Sm. 150, n.; 164 E. R. 1516.

4675. —— Jactitation suit.] — ASCROFT *v.* TREVOR (OTHERWISE FOLEY) (1906), as reported in *Times*, Mar. 13.

SUB-SECT. 5.—ASSESSMENT OF DAMAGES.

A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189.

See, generally, DAMAGES, Vol. XVII., pp. 78, *et seq.*

Bars to relief disentitling petitioner to damages.] —*See* Sect. 7, sub-sect. 3, D. (*f*), *ante.*

4676. General rule.]—(1) Claims for damages in divorce are, by Matrimonial Causes Act, 1857 (c. 85), s. 33, to be tried on the same principles & in the same manner as actions for criminal conversation, which were abolished by the Act, were tried at common law. This action was originally considered technically to lie in trespass, &, therefore, the husband was only required to prove the fact of adultery, not to prove special damage. But the action either was, or soon came to be, in substance an action on the case. Thus in divorce a jury could from the first find that the adultery was proved but the husband had substained no damage.

(2) The damages, if any, have always been compensatory only, & not exemplary or punitive. (3) The grounds on which damages are given are: the actual value of the wife lost; compensation to the husband for the injury to his feelings, the blow to his honour, & hurt to his family life. The value of the wife has two aspects: (*a*) pecuniary, & (*b*) what may be called the *consortium* aspects: (*a*) depends on her fortune & her ability & assistance in the home or business; (*b*) depends upon her character & abilities as wife or mother. (4) The conduct of the adulterer has little bearing on (*a*), but may be very relevant as to (*b*), as an aid to estimating the value of the wife, *e.g.* the ease with which he effected his purpose may show that the wife was of small value. His conduct may also be relevant in estimating the injury to the husband's feelings.

(5) The husband's own character & conduct are, on a claim for damages, as fully in issue as that of his wife.

(6) The amount of compensation cannot depend on the wealth or poverty of co-resp., but the way in which he has used his wealth in gaining his end may be relevant in the same way as his conduct generally. Both the rank & the fortune of co-resp. are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife, or measuring the extent of the injury inflicted on the husband. Moreover, general evidence may be given as to a co-resp's. rank & fortune, because to give damages which it is impossible for co-resp. to pay might defeat the aim of giving any.

(7) As a matter of strict law the cts. can give damages against a co-resp. who was ignorant that resp. was married, but it is against sound practice to do so, because the balance of authority is against it; such damages savour of a punitive character; a wife who passes herself off as a single woman may well be deemed valueless; to give damages in such a case conflicts with the practice of the ct. as to costs.

(8) As to costs: the ct. has always had a discretion, but it is too late to question the long-established practice that they should not be given against a co-resp. who has no knowledge. (9) The burden of proving knowledge has always, perhaps regrettably, been thrown on petitioner, but this also is settled practice.—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, [1920] P. 126; 89 L. J. P. 151; 122 L. T. 804; 36 T. L. R. 265.

Annotations:—*As to* (3) **Refd.** Gray *v.* Gee (1923), 39 T. L. R. 429. *As to* (5) **Refd.** Ewer *v.* Ewer & Charlton (1920), 123 L. T. 240; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814. *As to* (7) **Refd.** Ewer *v.* Ewer & Charlton (1920), 123 L. T. 240. *As to* (8) **Consd.** Taylor *v.* Taylor & Kraft (1920), 123 L. T. 112. **Refd.** Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206.

4677. Findings necessary before damages can be assessed—Damnification of husband—Wrongful act of co-respondent.]—DARBISHIRE *v.* DARBISHIRE & BAIRD, No. 4717,

B. By Whom Assessed.

By jury.] — *See* Supreme Court of Judicature Act, 1925 (c. 49), s. 189 (2).

C. Duty to Assess.

4678. Power of jury to refuse—Conduct of parties.]—Where a husband petitions for a divorce on the ground of the adultery of his wife with co-resp., & a claim for damages is made against the latter, the jury are not bound to assess the damages at any sum, however small, if they are of opinion that the conduct of the parties has been such as to disentitle petitioner to any compensation, even though the adultery is proved.—GIBSON *v.* GIBSON & WEST (1906), 94 L. T. 619; 22 T. L. R. 361.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4679. —— No damage sustained by petitioner.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

before trial the party bringing the question before the ct. is entitled to begin.—SALAMAN *v.* SALAMAN, [1923] N. Z. L. R. 300.—**N.Z.**

PART XIII. SECT. 16, SUB-SECT. 5.—B.

s. *By judge—Trial by consent without jury.*]—The parties consented to an order that the trial should take place before a judge without a jury. A decree for divorce was pronounced, & the judge assessed the damages:—

D. Principles governing Assessment.

(a) In General.

See Supreme Court of Judicature Act, 1925 (c. 49), s. 189 (2).

4680. Same as in former actions for criminal conversation.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), Sea. & Sm. 110; 1 Sw. & Tr. 565; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4681. ——.]—In assessing damages against co-resp., the jury are to take into consideration the same circumstances as would have been considered by a jury in an action for crim. con.—COMYN *v.* COMYN & HUMPHREYS (1860), 32 L. J. P. M. & A. 210.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4682. —— **Infringement of petitioner's rights.**]—LORD *v.* LORD, No. 4692, *post*.

4683. ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante*.

4684. ——.]—The grounds on which damages may be recovered for adultery are the same as those for damages in an action for crim. con. at common law prior to the enactment of Matrimonial Causes Act, 1857 (c. 85). The grounds are for the infringement by co-resp. of the rights of petitioner, & a right to some damages may possibly exist without demonstration of guilty knowledge on the part of co-resp. that the woman, with whom he was misconducting himself, was a wife. But while under the old law the costs of an action for crim. con. followed the general common law practice as to costs then observed, costs under Matrimonial Causes Act, 1857 (c. 85), s. 34, are in each case in the discretion of the ct., whether of the whole or of any part of the proceedings, & in the case of a co-resp., whether of a claim for damages alone or of the proceedings as a whole, & to say that in every case, where the guilty knowledge of co-resp. does not appear, he must escape being condemned in costs is to limit the clear discretion of the ct. as to costs, the exercise of which must depend upon the peculiar facts of each individual case.

There is no absolute rule of law that a husband who claims damages or costs against a co-resp. must prove that co-resp. knew that resp. was a married woman. The ct. has power to give damages & costs if the circumstances show the co-resp. ought to have known the fact.—LANGRICK *v.* LANGRICK & FUNNELL, [1920] P. 90; 89 L. J. P. 114; 123 L. T. 94; 36 T. L. R. 308; 64 Sol. Jo. 531.

Annotations:—**Consd.** Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206. **Expld.** Taylor *v.* Taylor & Kraft (1920), 123 L. T. 112.

(b) Damages Compensatory.

4685. Not punitive.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), Sea. & Sm. 110; 1 Sw. & Tr. 565; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4686. ——.]—KEYSE *v.* KEYSE & MAXWELL, No. 4715, *post*.

4687. ——.]—DARBISHIRE *v.* DARBISHIRE & BAIRD, No. 4717, *post*.

4688. ——.]—The claim for damages is based on the idea that the husband has suffered for the loss of his wife, & you are not here to punish, & you are failing in your duty & are violating your oath if you give damages by way of punishing co-resp. (HANNEN, P.).—THORMAN *v.* THORMAN & GREENBANK (1890), 54 J. P. 409.

4689. ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante*.

(c) Where Co-Respondent ignorant that Respondent married.

Liability of co-respondent for costs, *see* Sect. 18, Sub-sect. 4, C., *post*.

4690. Whether bar to claim for damages.]—DARBISHIRE *v.* DARBISHIRE & BAIRD, No. 4717, *post*.

4691. ——.]—At the time when co-resp. first became improperly intimate with the resp. he was not aware that she was a married woman. Within about a month after the first act of adultery he had reason to believe that she was a married woman. He still continued the adulterous intercourse:—*Held:* costs could not be ordered against co-resp.

The law is, to my mind, quite clear. The co-resp. cannot be condemned in costs any more than he could be ordered to pay damages (JEUNE, P.).—NEWBY *v.* NEWBY & WHITE (1897), 77 L. T. 142.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4692. ——.]—(1) Where in a petition by the husband for divorce on the ground of adultery claiming damages against co-resp., no evidence was given on behalf of petitioner that co-resp. knew that resp. was a married woman:—*Held:* damages might, nevertheless, be assessed against co-resp.

(2) In a proceeding for dissolution of marriage, the burden of showing that co-resp. knew that resp. was a married woman is cast on petitioner, &, in the absence of evidence, a jury should assume that co-resp. had no reason for believing resp. was other than a single woman.

(3) Although co-resp. accepts the risk of his conduct, if he did not know resp. was married, then the wrong he did to petitioner was done unwittingly, & in assessing the amount of damages, the jury ought to bear this in mind.

(4) The rules at common law in actions for crim. con. applied to claims for damages in divorce cases.—LORD *v.* LORD, [1900] P. 297; 69 L. J. P. 54.

Annotations:—*As to* (1) **Consd.** Watson *v.* Watson & Watts (1905), 21 T. L. R. 320; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Sweeting *v.* Sweeting & Rowlands (1919), 36 T. L. R. 15; Smith *v.* Smith & Reed, [1922] P. 1. *As to* (2) **Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206; Smith *v.* Smith & Reed, [1922] P. 1. *As*

Held: having consented to a trial without a jury, co-resp. was estopped from insisting upon an assessment by a jury.—WILLIAMS *v.* WILLIAMS & HUTTON (1909), 14 B. C. R. 313; 11 W. L. R. 498.—CAN.

Sect. 16.—*The trial or hearing: Sub-sect.* 5, *D.* (*c*) & & *E.* (*a*)

to (3) **Refd.** Sweeting *v.* Sweeting & Rowlands (1919), 36 T. L. R. 15; Langrick *v.* Langrick & Funnell, [1920] P. 90.

4693. ——.]—Where a man commits adultery with a woman, who is in fact a married woman, but there is no evidence that he knew that she was married, he takes the risk as regards damages being assessed against him, but where the woman held herself out to commit adultery as if she were not a married woman, then the damages, if any, should be reduced to next to nothing.—WATSON *v.* WATSON & WATTS (1905), 21 T. L. R. 320.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4694. ——.]—A husband petitioned for a divorce & claimed damages on the ground of his wife's adultery with a named co-resp. There was no evidence that co-resp. knew that the woman was married when he had intercourse with her:—*Held:* petitioner was entitled to recover damages against co-resp., but the fact that there was no evidence to prove that the latter knew resp. was a married woman should be taken into account by the jury in assessing the amount.—VENABLES *v.* VENABLES & WHEELER (1916), 114 L. T. 566; 32 T. L. R. 330.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4695. ——.]—SWEETING *v.* SWEETING & ROWLANDS, No. 5033, *post.*

4696. ——.]—LANGRICK *v.* LANGRICK & FUNNELL, No. 4684, *ante.*

4697. —— **Co-respondent reckless as to status of respondent.**]—SMITH *v.* SMITH & REED, No. 4848, *post.*

4698. —— **Damages savouring of punitive character—Conflict with practice as to costs.**]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

4699. Matter in mitigation of damages—Absence of evidence of knowledge.]—LORD *v.* LORD, No. 4692, *ante.*

4700. —— ——.]—VENABLES *v.* VENABLES & WHEELER, No. 4694, *ante.*

4701. —— **Respondent passing as single woman.**]—WATSON *v.* WATSON & WATTS, No. 4693, *ante.*

4702. —— ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

——.]—*See, generally,* Sub-sect. 5, F., *post.*

4703. Whether co-respondent must plead ignorance—Effect of absence of plea.]—Although a co-resp. is not bound to plead that he had not known that resp. was a married woman, still the absence of such a plea is a matter which the jury may fairly take into consideration.—JONES *v.* JONES & PHILLIPS (OTHERWISE REDFERN) (1893), 9 T. L. R. 590.

4704. Onus of proof of knowledge—On petitioner.]—LORD *v.* LORD, No. 4692, *ante.*

(*d*) *Conduct of Parties.*

4705. General rule.]—In order that it may assess damages on the principles that have been held to govern their assessment, the ct. requires to be fully informed as to the history of the marriage & as to the character & conduct of both the husband & the wife. If the evidence of petitioner is taken on commission or is allowed to be given by affidavit, it should none the less, if he claims damages, give all possible information on these matters.—EWER *v.* EWER & CHARLTON (1920), 123 L. T. 240; 36 T. L. R. 517.

4706. Relations of petitioner & respondent before adultery.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), Sea. & Sm. 110; 1 Sw. & Tr. 565; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4707. Circumstances of adulterer's introduction into family.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), Sea. & Sm. 110; 1 Sw. & Tr. 565; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4708. Ground for refusing to assess damages at all.]—GIBSON *v.* GIBSON & WEST, No. 4678, *ante.*

4709. Conduct of wife.]—DARBISHIRE *v.* DARBISHIRE & BAIRD, No. 4717, *post.*

4710. Conduct of co-respondent.] — BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

4711. Conduct of husband.] — BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

E. Measure of Damages.

(*a*) *Compensation for Loss of Wife.*

4712. General rule.]—GIBBER *v.* SLOPER (1738), Bull. N. P. 5th ed., p. 27.

Annotations:—**Consd.** Duberley *v.* Gunning (1792), 4 Term Rep. 651. **Refd.** Lynch *v.* Knight (1861), 5 L. T. 291.

4713. ——.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), Sea. & Sm. 110; 1 Sw. & Tr. 565; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4714. ——.]—In an assessment of damages against a co-resp. the measure of damages is the value of the wife of whom the husband has been deprived. As a general rule, evidence of co-resp.'s means is inadmissible. *Semble:* the jury may take his wealth into consideration, if he has used it as a means of seducing the wife.—COWING *v.* COWING & WOLLEN (1863), 33 L. J. P. M. & A. 149.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4715. ——.]—(1) In assessing damages against a co-resp. the jury is not to seek to punish him, but is only to give compensation for the loss which the husband has sustained, & is to consider whether this loss has been caused by the action of co-resp. (2) In a case where the wife has not been seduced away from the husband by co-resp. the jury must take into consideration the conduct

of the husband & the protection or assistance which he may have afforded to her after the separation. (3) The means of co-resp. are not in any way to be considered as a measure of damages.—KEYSE *v.* KEYSE & MAXWELL (1886), 11 P. D. 100; 55 L. J. P. 54; 34 W. R. 791.

Annotations:—*As to* (1) **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126; Ewer *v.* Ewer & Charlton (1920), 123 L. T. 240. *As to* (3) **Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4716. ——.]—In an undefended suit for dissolution of marriage brought by the husband against his wife upon the ground of her adultery with co-resp., damages were claimed against the latter, & the jury awarded £150, adding, that, if co-resp. had been in a better position, they would have awarded more. The judge thereupon told them that this would not do, as the real question to be considered in such cases was the injury done to petitioner through the wrongful act of co-resp., whose means & position were irrelevant upon the assessment by the jury of the quantum of damages. The jury then reconsidered their verdict upon this point, & awarded £500.—BIKKER *v.* BIKKER & WHITEWOOD (1892), 67 L. T. 721; 1 R. 496.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4717. —— **Distinction between wives virtuous & otherwise—Wife's separate income.**]—A claim for damages in a divorce case is founded upon the hypothesis that the husband has suffered injury by being deprived of his wife's society through the wrongful act of co-resp. In order to award any damages, it is necessary to find, (*a*) that the husband has in fact been damnified, (*b*) that such damage has been brought about by the wrongful act of co-resp., without any fault on the part of the husband. It is no part of the functions of the jury to punish the adulterer for his immorality. Their sole duty is to compensate the husband for the injury, if any, which he had suffered through the wrongful act of co-resp. If a husband has a virtuous wife taken from him by the contrivance of another man, he is entitled to damages commensurate with the loss of such a wife; but if she has led a loose life before marriage, her value is not the same as that of a virtuous woman. In estimating the amount of damages to be awarded, the fact that the wife was earning money, of a portion of which petitioner had the advantage, may properly be taken into account; but co-resp.'s means must be left entirely out of the question.

If the man's wife goes & walks the streets, the husband is not entitled to come here & recover damages against any man who goes & consorts with that woman. If the man does not know that the woman with whom he commits adultery is a married woman, then is not consciously committing wrong to any man & is not liable in damages; & so far is that doctrine carried that this ct. never even gives costs against a co-resp. who is proved not to have known that the woman was married, because he is only the unconscious instrument with which the wife carries out her wrong against her husband (HANNEN, P.).—DARBISHIRE *v.* DARBISHIRE & BAIRD (1890), 62 L. T. 664; 54 J. P. 408.

Consd. Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206.

4718. —— **Loss of consortium.**]—EVANS *v.* EVANS & PLATTS, No. 4723, *post*.

4719. —— —— **Pecuniary value of wife—Conduct of adulterer.**]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante*.

4720. Death of wife after action brought—Compensation to date of death.]—If, in an action for adultery, it appear that the wife has died since the commencement of the action, the jury should give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of the wife's death, & also for the shock to the feelings of the husband; & this is so, though it appear that there was no suspicion of the wife's infidelity till she was on her death-bed, & though the husband continued to treat her kindly up to the time of her death.—WILTON *v.* WEBSTER (1835), 7 C. & P. 198, N. P.

Annotations:—**Consd.** Lynch *v.* Knight (1861), 5 L. T. 291; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Kent *v.* Atkinson, [1923] P. 142.

—— **Whether petition for damages only maintainable.**]—*See* Sect. 5, sub-sect. 3, F. (*b*), *ante*.

(b) Where the Parties have Separated.

Whether petition for damages only maintainable.]—*See* Sect. 8, sub-sect. 1, F. (*b*), *ante*.

4721. Petitioner not precluded from recovery.]—A husband is not precluded from recovering damages from co-resp. by reason of the fact that there had been a separation between himself & his wife before adultery was committed by her.—GARDNER *v.* GARDNER & BAMFIELD (1901), 17 T. L. R. 331.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4722. Separation in consequence of intimacy with co-respondent.]—In a petition by the husband for dissolution of marriage claiming damages, it appeared that petitioner & his wife had entered into a separation deed in consequence of her intimacy with co-resp., & that she committed adultery with him after the date of the deed:—*Held:* petitioner was entitled to the same amount of damages as he would have been had no separation deed been executed.—IZARD *v.* IZARD (1889), 14 P. D. 45; 58 L. J. P. 83; 60 L. T. 399; 37 W. R. 496.

Annotation:—**Refd.** Evans *v.* Evans, [1899] P. 195.

4723. —— **Separation caused by wife's cruelty—Adultery destroying hopes of reconciliation.**]—Upon a husband's petition for dissolution of marriage claiming damages, it appeared that the husband & wife separated after a cohabitation of only a few months on account of the wife's overbearing & insulting conduct & language towards her husband, culminating in actual violence to him on more than one occasion. It was proved, & not denied, that, rather more than a year after the separation, co-resp., who had been acting as her solr., committed adultery with resp., & that this improper intimacy continued for about twelve months:—*Held:* notwithstanding the separation & the fact that it had been caused by the violent conduct of resp. towards petitioner, the latter was entitled to some damages; loss of

Sect. 16.—*The trial or hearing: Sub-sect.* 5, *E.* (*b*) *&* (*c*), *F. & G. Sect.* 17: *Sub-sects.* 1 *&* 2.]

"*consortium*" was not the only ground on which damages ought to be assessed against a co-resp., the fact of co-resp.'s frequent adultery having rendered reconciliation absolutely out of the question was a material element for consideration in fixing damages; the jury were entitled to consider also, & to decide as a matter to be inferred from all the circumstances of the case, whether resp. & co-resp. had not misconducted themselves together at a time anterior to the date proved by affirmative evidence & admitted & alleged by co-resp. as the first date when adultery took place between himself & resp.—EVANS *v.* EVANS & PLATTS, [1899] P. 195; 68 L. J. P. 70; 81 L. T. 60.

Annotations:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Gardner *v.* Gardner & Bamfield (1901), 17 T. L. R. 331.

4724. Conduct of petitioner after separation material—Whether protection & assistance afforded to wife.]—KEYSE *v.* KEYSE & MAXWELL, No. 4715, *ante.*

(*c*) *Co-Respondent's Rank and Fortune.*

4725. Co-respondent's means — Damages not determined by.]—In an action for crim. con. evidence on the part of pltf. to show the amount of deft.'s property is not admissible; but, in an action for breach of promise of marriage, it is otherwise.—JAMES *v.* BIDDINGTON (1834), 6 C. & P. 589, N. P.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4726. —— ——.]—KEYSE *v.* KEYSE & MAXWELL, No. 4715, *ante.*

4727. —— ——.]—DARBISHIRE *v* DARBISHIRE & BAIRD, No. 4717, *ante.*

4728. —— ——.]—BIKKER *v.* BIKKER & WHITEWOOD, No. 4716, *ante.*

4729. —— ——.]—BURNE *v.* BURNE & HELVOET, No. 5016, *post.*

4730. —— Wealth used to seduce respondent.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), 1 Sw. & Tr. 565; Sea. & Sm. 110; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4731. —— ——.]—COWING *v.* COWING & WOLLEN, No. 4714, *ante.*

4732. —— ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

4733. Co-respondent's rank—Factor for consideration.]—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), 1 Sw. & Tr. 565; Sea. & Sm. 110; 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4734. —— Material in determining capacity to pay.]—BURNE *v.* BURNE & HELVOET, No. 5016, *post.*

4735. —— ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

4736. —— Considered when of assistance in ascertaining value of wife—Or measuring extent of injury to husband.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

F. Matters in Aggravation and Mitigation.

See, generally, DAMAGES, Vol. XVII., p. 120, Nos. 290 *et seq.*

Conduct of parties, *see* Sub-sect. 5, D. (*d*), *ante.*

Means of co-resp., *see* Sub-sect. 5, E. (*c*), *ante.*

Loss of wife, *see* Sub-sect. 5, E. (*a*), *ante.*

4737. Matters in mitigation—Neglect of wife by husband.]—CALCRAFT *v.* HARBOROUGH (EARL), No. 4000, *ante.*

4738. —— Ill-treatment of wife by husband.]—In an action for crim. con. evidence may be given, in reduction of damages, that the wife, before the criminal intercourse took place, had complained of her husband's treatment of her.—WINTER *v.* WROOT (1834), 1 Mood. & R. 404, N. P.

Annotation:—**Refd.** Plumer *v.* Plumer & Bygrave (1859), Sea. & Sm. 147.

4739. —— Worthlessness of wife—Immorality.]—WINTER *v.* HENN, No. 2822, *ante.*

4740. —— —— ——.]—DARBISHIRE *v.* DARBISHIRE & BAIRD, No. 4717, *ante.*

4741. —— —— ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

Co-respondent ignorant that respondent married.]—*See* Sub-sect. 5, D. (*c*), *ante.*

4742. Matters in aggravation—Marriage settlements.]—HEAVISIDE *v.* LARDNER (prior to 1860), cited 29 L. J. P. M. & A. at p. 160.

Annotation:—**Folld.** Bell *v.* Bell & Anglesey (1860), 29 L. J. P. M. & A. 159.

4743. —— ——.]—*Qu.:* whether the ct. has power to deal with marriage-settlements on a decree for dissolution of marriage under Matrimonial Causes Act, 1859 (c. 61), s. 5, unless there be children of the marriage: *Semble:* the position of the husband, as regards the marriage settlements, may properly be submitted to the jury for their consideration in the assessment of damages.—BELL *v.* BELL & ANGLESEY (MARQUIS) (1859), 1 Sw. & Tr. 565; Sea. & Sm. 110: 29 L. J. P. M. & A. 159; 1 L. T. 243; 8 W. R. 178; 164 E. R. 861.

Annotation:—**Refd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4744. —— Frequency of adultery—Reconciliation rendered impossible.]—EVANS *v.* EVANS & PLATTS, No. 4723, *ante.*

4745. —— Injury to feelings of husband—Blow to honour—Hurt to family.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

G. Agreements as to Damages.

4746. Agreement before trial—Between counsel—Whether court bound by.]—(1) The ct. is not

at liberty to recognise an agreement made between the counsel of petitioner & co-resp. in respect of the amount of damages to be paid, but is bound by the assessment of the jury.

(2) Where petitioner had entered into a covenant binding his estate with the payment of an annuity to resp., in the event of her surviving him, the ct. directed the annuity, when recovered, to be paid for the benefit of the children of the marriage. —CALLWELL *v.* CALLWELL & KENNEDY (1860), 3 Sw. & Tr. 259; 164 E. R. 1274.

Annotations:—As to (2) **Refd.** Blandford *v.* Blandford (1892), 67 L. T. 392. *Generally,* **Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Niboyet *v.* Niboyet (1878), 4 P. D. 1.

Extent of authority for counsel to compromise.]—*See, generally,* BARRISTERS, Vol. III., p. 339, Nos. 291 *et seq.*

4747. Agreement after trial—Whether court will sanction.]—FORSTER *v.* FORSTER & BERRIDGE, No. 5846, *post.*

4748. —— ——.]—If an order be made that the damages be paid to petitioner in the suit, there is nothing to prevent him from coming to terms with co-resp., & accepting a less sum than that assessed. Where there was reason to apprehend that little or nothing would be recovered if co-resp. were pressed for the full amount of the assessed damages, the ct., on receiving an assurance that no application would be made on behalf of petitioner, who declared his ability & willingness to maintain the only child of the marriage, to alter the settlement, ordered the damages to be paid to him, with the view of enabling him to come to terms in respect of them with co-resp., who was willing to pay part, but unable to pay all. —DALE *v.* DALE & MACDONELL (1867), 15 L. T. 595.

question for the opinion of the ct. under Matrimonial Causes Act, 1857 (c. 85). If the facts ascertained by the verdict are sufficient for the ct. to found a decree on, the function of the jury is discharged.

(2) The ct., being of opinion that cruelty was not proved against the husband, but being satisfied with his conduct towards his wife, directed the damages, after payment of the surplus costs of petitioner, if any, to be settled on resp. *dum casta vixerit,* & for life; after her death, or on breach of the above condition, the fund to go to the two children of the marriage; *Semble:* (3) in some cases the ct. would grant a new trial on the ground of excessive damages.—NARRACOTT *v.* NARRACOTT & HESKETH (1864), 3 Sw. & Tr. 408; 4 New Rep. 158; 33 L. J. P. M. & A. 132; 10 L. T. 389; 10 Jur. N. S. 640; 12 W. R. 1064; 164 E. R. 1333; *subsequent proceedings* (1865), 4 Sw. & Tr. 76.

Annotations:—As to (1) **Refd.** Barnes *v.* Barnes & Beaumont (1868), 38 L. J. P. & M. 10. *As to* (2) **Refd.** Gladstone *v.* Gladstone (1876), 1 P. D. 442.

4750. —— —— **Issue not referrable to new jury —Alternatives open to petitioner.**]—In a suit for dissolution of marriage, brought by the wife by reason of the cruelty & adultery of her husband, the jury found a verdict for petitioner on the question of cruelty, but were unable to agree to a verdict on that of adultery, & were discharged. The ct. refused to allow the question of adultery only to be referred to a new jury, but gave petitioner the alternative, either to have a rule, calling upon resp. to show cause why a decree of judicial separation should not be made on the ground of his cruelty, or to set down all the questions at issue, both adultery & cruelty, for, a second trial.—GODRICH *v.* GODRICH (1872), L. R. 2 P. & D. 392; 41 L. J. P. & M. 45; 26 L. T. 855; 20 W. R. 616.

SECT. 17.—FINDING AND DECREE.

SUB-SECT. 1.—JUDGMENTS AND VERDICTS.

4749. Disagreement of jury on one issue—Jury discharged—Validity of discharge—Allegation of cruelty.]—(1) The husband petitioned for dissolution of marriage, & prayed damages. Co-resp. traversed the adultery, & charged the husband generally with cruelty to his wife, which latter fact might call for the exercise of the discretion of the ct. under Matrimonial Causes Act, 1857 (c. 85). During petitioner's case, some witnesses were asked as to the general terms on which he lived with his wife. On the part of co-resp. witnesses deposed to certain acts of violence committed on the wife by the husband, & the ct. admitted evidence in reply limited to those particular acts & occasions. The jury found a verdict for petitioner on the issue of adultery, & assessed the damages at £2,500. On stating that they could not agree on the issue of cruelty, they were discharged by the judge ordinary. On motion for a new trial, the ct. held that it had rightly discharged the jury from giving a verdict on the issue of cruelty, as it was ultimately a

SUB-SECT. 2.—DECREE.

4751. Decree of nullity—Declaratory sentence.] —HESELTINE *v.* MURRAY (LADY AUGUSTA) (1794), 2 Add. 400, n.; 162 E. R. 341.

Annotations:— **Consd.** Nokes *v.* Milward (falsely called Nokes) (1824), 2 Add. 386. **Refd.** Sussex Peerage Claim (1844), 6 State Tr. N. S. 79.

4752. —— **Contemplated marriage settlement—Property to be in settlor—"Until said intended marriage."**]—By a settlement made in contemplation of marriage a father transferred £25,000 to the trustees of the settlement to be held upon trust for him "until the said intended marriage," & thereafter upon the trusts of the settlement. The marriage took place, but afterwards a decree absolute was made declaring it "to be & to have been absolutely null & void" on the ground of the husband's impotence:—*Held:* "until the said intended marriage" meant a valid & effectual marriage, & as the marriage had been declared null & void *ab initio.* the settlor was absolutely entitled to the settled funds, under the express

PART XIII. SECT. 17, SUB-SECT. 1.

t. *Duty of judge to determine issue between parties.*]—In an action of separation & aliment brought by a wife against her husband, the Lord Ordinary, after proof, found one act of cruelty proved which might entitle pursuer to decree, but he superseded further consideration of the case in order that defender, if so advised, might tender to pursuer an unconditional undertaking to refrain in future from acts of violence, under certification that, if he failed to give that undertaking, decree of separation & aliment would be pronounced. Thereafter defender having given the required undertaking, the Lord Ordinary dismissed the action: *Held:* the Lord Ordinary was bound to determine the issue between the parties by granting or refusing decree of separation & aliment, & the course which he had adopted was incompetent. —DAWSON *v.* DAWSON, [1925] S. C. 221.—**SCOT.**

PART XIII. SECT. 17, SUB-SECT. 2.

a. *Decree of judicial separation—On ground of cruelty—Granted when divorce decree refused.*]—Where a decree of divorce is refused on petition by a wife, a decree of judicial separation on the ground of cruelty proved may be sought & granted even though it is not asked for in her petition.—DAVEY *v.* DAVEY, [1923] 2 W. W. R. 686; 4 D. L. R. 1199; 32 B. C. R. 267.—**CAN.**

b. *Decree nisi—Whether granted.*]

Sect. 17.—*Finding and decree: Sub-sects.* 2 & 3, *A., B. & C.*]

trust in his favour.—*Re* WOMBWELL'S SETTLEMENT, CLERKE *v.* MENZIES, [1922] 2 Ch. 298; 92 L. J. Ch. 18; 127 L. T. 295.

Annotation:—**Refd.** Nepean (otherwise Lee Warner) *v.* Nepean (1925), 94 L. J. P. 42.

4753. Decree of judicial separation—Wife's cruelty—Attachment of condition—Provision of alimony.]—The ct. has no jurisdiction to order that a husband who obtains a decree of judicial separation by reason of his wife's cruelty, should make any provision for her maintenance.—DART *v.* DART (1863), 3 Sw. & Tr. 208; 32 L. J. P. M. & A. 125; 9 L. T. 23; 9 Jur. N. S. 474; 11 W. R. 551; 164 E. R. 1254.

Annotations:—**Expld.** Goodden *v.* Goodden, [1891] P. 395. **Refd.** Goodden *v.* Goodden, [1892] P. 1.

4754. Decree nisi—Ground of refusal—Intended application for new trial.]—When petitioner in a suit for dissolution has obtained the verdict of a jury, it is no ground for refusing to make a decree *nisi* that notice of an intended application for a new trial has been given.—STONE *v.* STONE & APPLETON (1863), 3 Sw. & Tr. 212; 32 L. J. P. M. & A. 117; 9 L. T. 24; 11 W. R. 809; 164 E. R. 1255; *subsequent proceedings* (1864), 3 Sw. & Tr. 608.

Annotations:—**Refd.** Yeatman *v.* Yeatman (1864), 33 L. J. P. M. & A. 54. **Mentd.** *R. v.* Manning (1883), 12 Q. B. D. 241; Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

4755. —— Date of decree—Petition amended.]—AMBLER *v.* AMBLER & HOGHTON, No. 3651, *ante*.

4756. —— Form of decree—Where petition dismissed—Appeal pending.]—In a case where a petition for dissolution of marriage had been dismissed on the ground that petitioner had been guilty of connivance, & petitioner had appealed from that decree to the House of Lords, the ct., upon the application of petitioner, inserted in the decree the ground upon which the petition had been dismissed.—GIPPS *v.* GIPPS & HUME (1863), 2 New Rep. 135; 32 L. J. P. M. & A. 179; 11 W. R. 1063; *subsequent proceedings* (1864), 11 H. L. Cas. 1, H. L.

4757. —— —— —— Evidence as to respondent's domicil.]—A wife whose domicil of origin was in the State of New York, having married in England a husband of the same domicil, obtained in France a decree of divorce which was binding between the parties in the State of New York. She subsequently filed a petition for restitution of conjugal rights in the English cts., & by her reply put resp. to the proof of his domicil & of the law of his domicil as to the validity of the French divorce. Shortly before the hearing she gave notice that she did not intend to proceed with the petition & did not in fact appear. Resp. was allowed to adduce evidence as to his domicil & as to the law of his domicil with regard to the validity of the French decree of divorce & to have these facts embodied in the order dismissing the petition.—CLARK *v.* CLARK (1921), 37 T. L. R. 815.

4758. —— Effect of—On status of parties—Marriage undissolved.]—HULSE *v.* HULSE & TAVERNOR, No. 5097, *post*.

4759. —— —— —— —.]—The status of a married woman is not affected by the pronouncing of a decree *nisi* for the dissolution of the marriage. She continues to be subject to all the disabilities of coverture until the decree is made absolute. Action for taking goods of pltf. Plea: coverture of pltf. at the time of the alleged taking & of plea pleaded. Prior to the alleged taking a decree *nisi* had been pronounced for the dissolution of pltf.'s marriage which was made absolute after plea & before the trial:—*Held:* pltf. was still a married woman notwithstanding the decree *nisi*, & the plea was proved.—NORMAN *v.* VILLARS (1877), 2 Ex. D. 359; 46 L. J. Q. B. 579; 36 L. T. 788; 42 J. P. 292; 25 W. R. 780, C. A.

Annotations:—**Consd.** Stanhope *v.* Stanhope (1886), 11 P. D. 103. **Apld.** Sinclair *v.* Fell, [1913] 1 Ch. 155. **Refd.** Ellis *v.* Ellis (1883), 8 P. D. 188.

4760. —— —— —— —.]—ELLIS *v.* ELLIS, No. 4185, *ante*.

4761. —— —— Covenant to settle after-acquired property.]—Testator, who died in 1824, gave property, after certain trusts which determined, to his brother S. for life, remainder to the children of S. F., one of the children of S., who had acquired a vested interest subject to S.'s life interest, married H. On the marriage the husband & wife covenanted to assign to the trustees of the settlement any personal estate which the wife or the husband in her right should "become possessed of or entitled to during the coverture." There was issue of the marriage. On May 27, 1871, a decree *nisi* for the dissolution of the marriage was pronounced by the Divorce Ct. On Aug. 11, H. & F. executed a deed appointing a new trustee of their marriage settlement. On Oct. 26, S., the tenant for life, died. On Dec. 5, the decree *nisi* was made absolute. F. married again:—*Held:* the interest of F. in testator's personal estate was not bound by the covenant in her marriage settlement.—*Re* PEARSON'S TRUSTS (1872), 26 L. T. 393; 20 W. R. 522.

Annotation:—**Consd. & N.F.** Sinclair *v.* Fell, [1913] 1 Ch. 155.

4762. —— —— —— —.]—By a marriage settlement dated in 1879, it was expressly agreed that if the wife during the then intended coverture, or her husband in her right, should at one & the same time & from the same source become entitled to any real or personal property of the value of £200 or upwards the property should be settled. On Jan. 12, 1911, a decree *nisi* for the dissolution of the marriage was pronounced. On Jan. 22, 1911, the wife became entitled under her mother's will to certain funds which exceeded in value the amount mentioned in the settlement. On July 24, 1911, the decree *nisi* was made absolute:—*Held:* the funds fell into possession during the coverture contemplated by the settlement & were therefore bound by the covenant to settle after-acquired property.—SINCLAIR *v.* FELL, [1913] 1 Ch. 155; 82 L. J. Ch. 105; 108 L. T. 152; 29 T. L. R. 103; 57 Sol. Jo. 145.

4763. —— —— Suit by trustees to administer marriage settlement—Whether husband necessary party.]—A husband, against whom a decree *nisi* for divorce has been pronounced, is not a necessary party to a suit instituted by the trustees of his marriage settlement against his wife & child for the purpose of having the trusts of the settle-

—There is no provision under the divorce law in force in British Columbia for granting a decree *nisi* in the first place.—PURDY *v.* PURDY (1910), 16 B. C. R. 493.—**CAN.**

c. —— *Grant of simultaneous decrees.*]—Where husband & wife have both claimed a dissolution of the marriage, & petitioner has established his case, the ct. can nevertheless go on & hear the case of resp., &, if this is established, grant, simultaneously, decrees *nisi* on the suit of each.—HALL *v.* HALL (1902), 21 N. Z. L. R. 251.—**N.Z.**

d. —— ——.]—DONALD *v.* DONALD (1863), 1 Macph. (Ct. of Sess.) 741; 35 Sc. Jur. 434.—**SCOT.**

e. —— ——.]—WALKER *v.* WALKER (1871), 9 Macph. (Ct. of Sess.) 1091; 43 Sc. Jur. 477.—**SCOT.**

f. *Decree for restitution—Form*

ment administered.—STEPHENSON *v.* STRUTT (1872), 26 L. T. 690; 20 W. R. 745.

4764. —— Rectification—Place of marriage.]—A decree *nisi* by mistake misstated the place where the marriage was solemnised. On motion, the ct. ordered it to be amended.—SKEATS *v.* SKEATS & WHITE (1865), 35 L. J. P. & M. 47.

4765. —— —— ——.]—MARSHALL *v.* MARSHALL, No. 3686, *ante*.

4766. ·.]—HAMPSON *v.* HAMPSON, No. 6068, *post*.

Decree absolute—Effect of.]—*See* Sect. 25, subsect. 6, *post*.

4767. Decree for restitution—Service—Substituted service.]—In suits for restitution of conjugal rights, substituted service on resp. of the decree may be ordered as well as of the petition & the demand for return to cohabitation. The divorce rules 221 & 222, as to service out of the jurisdiction, apply to substituted as well as personal service.—PALMER *v.* PALMER, *Re* THOMASSON'S PETITION, [1921] P. 378; 90 L. J. P. 361; 125 L. T. 864; 37 T. L. R. 867; *sub nom.* PALMER *v.* PALMER, THOMASSON *v.* THOMASSON, 65 Sol. Jo. 736.

Decree absolute.]—*See* Sect. 25, *post*.

SUB-SECT. 3.—CUSTODY OF AND ACCESS TO CHILDREN.

A. In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193; Matrimonial Causes Rules, 1924, r. 73.

Orders for custody pendente lite.]—*See* Sect. 9, sub-sect. 3, A., *ante*.

Orders for custody after decree.]—*See* Sect. 22, sub-sect. 6, A., *post*.

B. Jurisdiction of Court.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193.

4768. To order permanent custody—Whether before decree absolute.]—In the interval between a decree *nisi* for dissolution of marriage being pronounced & its being made absolute, the only order the ct. can make as to the custody of children is an *interim* order, under Matrimonial Causes Act, 1857 (c. 85), s. 35.—CUBLEY *v.* CUBLEY & SMITH (1861), 30 L. J. P. M. & A. 161.

4769. In proceedings for dissolution—Petition dismissed.]—SEDDON *v.* SEDDON & DOYLE, No. 4991, *post*.

4770. To make interim order—On decree for restitution.]—The ct. has power, under Matrimonial Causes Act, 1884 (c. 68), s. 6, to make an *interim* order as to custody of the children of the marriage, & to save expense will make such an order at the time of the pronouncing of a decree of restitution of conjugal rights.—PAINE *v.* PAINE (1902), 50 W. R. 382.

4771. In restitution suit.]—The ct has no power in suits of restitution of conjugal rights, to make any order as to the custody of children of the marriage.—CHAMBERS *v.* CHAMBERS (1870), 39 L. J. P. & M. 56; 22 L. T. 727; 18 W. R. 528.

4772. ——.]—PAINE *v.* PAINE, No. 4770, *ante*.

4773. In nullity suit.]—LANGWORTHY *v.* LANGWORTHY, No. 6057, *post*.

4774. In separation suit—Parties resident within jurisdiction when suit begun—Though matrimonial domicil foreign.]—ARMYTAGE *v.* ARMYTAGE, No. 2321, *ante*.

4775. Child over sixteen.]—(1) The ct. has power, as between the father & mother, to order that one of the parents shall have the custody of the child during minority, but it cannot make an order against a child of sixteen years of age contrary to the child's wishes, unless the child is a ward of ct.

(2) Adultery by the wife which justifies a divorce ought not to be regarded for all time & under all circumstances as sufficient to disentitle her to access to, or even to the custody of, her daughter, who is under sixteen. The statutory power of the ct. in respect of the custody of a child is to be exercised with discretion, & the benefit & interest of the infant is the paramount consideration & not the punishment of the guilty spouse.—STARK *v.* STARK & HITCHINS, [1910] P. 190; *sub nom.* MOZLEY STARK *v.* MOZLEY STARK & HITCHINS, 79 L. J. P. 98; 101 L. T. 770; 26 T. L. R. 194, C. A.

Annotations:—As to (2) **Consd.** B. *v.* B., [1924] P. 176 **Refd.** Clarke *v.* Clarke & Lindsay (No. 1) (1913), 57 Sol. Jo. 644.

4776. When child a ward of court.]—STARK *v.* STARK & HITCHINS, No. 4775, *ante*.

C. When Granted.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 1; Matrimonial Causes Rules, 1924, r. 73.

4777. Principles on which court acts—Benefit of child.]—STARK *v.* STARK & HITCHINS, No. 4775, *ante*.

PART XIII. SECT. 17, SUB-SECT. 3.—B.

g. *In alimony suit.*]—It may be proper in some cases to disregard the intention of Infants Act that applications for the custody of children be made by petition & not by way of statement of claim. But if the question of the custody of children comes up as a corollary of a judgment in an action for alimony it should be dealt with as a distinct matter & only after the question of alimony or no alimony has been determined, otherwise there is danger of all the considerations with regard to the custody of children not being properly taken into account.—O'LEARY *v.* O'LEARY, [1923] 1 W. W. R. 501.—**CAN.**

PART XIII. SECT. 17, SUB-SECT. 3.—C.

4777 i. *Principles on which court acts—Benefit of child.*]—Where a husband has done no wrong & is able & willing to support his wife & child, the ct. will not take away from him the custody of his infant child merely because the wife prefers to live away from him, & because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the ct. not to lay down a rule which will encourage the separation of parents, who ought to live together & jointly take care of their children. The discretion given to the ct. over the custody of infants, by R. S. O. 1897, c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.—*Re* MATHIEU (1898), 29 O. R. 546.—**CAN.**

4777 ii. —— ——.]—The guiding principle for the Ct. in awarding the custody of an infant between parents living apart under a separation deed is the interest of the child.—WOOD *v.* WOOD, [1919] 3 W. W. R. 246.—**CAN.**

4777 iii. —— ——.]—A wife applied for the custody of the children of a marriage which had been dissolved on her petition on the ground of the husband's misconduct. The children had for some time been in the husband's custody, where they were well cared-for & happy. No suggestion of immorality or drunkenness was made against the wife, but it was shown that in the past she had left the children very much to the care of the husband. The children were one boy aged ten & two girls aged seven & six:—*Held:*

Sect. 17.—*Finding and decree: Sub-sect.* 3, *C., D., E. & F.*

4778. Order unnecessary—Children in custody of petitioner—Respondent in America.]—ROBOTHAM *v.* ROBOTHAM, No. 5467, *post.*

4779. —— —— Respondent in Australia.]—(1) A. deserted his wife & went to Australia in Mar. 1854; in 1858 the wife filed a petition for judicial separation by reason of desertion; the husband was personally served, but gave no appearance. The ct. pronounced for the judicial separation, but refused to make any order for the custody of children. It seemed unnecessary, as they were now in the mother's custody, & the father in Australia.

(2) *Semble:* when permanent custody is intended to be asked for, it should be inserted in the prayer of the petition.—SEYMOUR *v.* SEYMOUR (1859), 1 Sw. & Tr. 332; 32 L. T. O. S. 286; 7 W. R. 296; 164 E. R. 753.

4780. On decree of dissolution—Though respondent entitled to custody at common law—Age of child.]—BOYD *v.* BOYD & COLLINS, No. 4997, *post.*

4781. —— For guilt of wife.]—BENT *v.* BENT & FOOTMAN, No. 5394, *post.*

4782. —— Child not to be taken out of jurisdiction.]—(1) A decree of dissolution of marriage at the suit of the wife having been pronounced, the ct. directed that, until further order, she should have the custody of a child [a boy of seven years of age], the only issue of the marriage, that she should not remove it out of the jurisdiction without the permission of the ct. & that the father should have reasonable access to it.

(2) Under a post-nuptial settlement, two-thirds of the dividends of certain stock, to which the wife at the time of the marriage was entitled, were settled upon the wife for life for her separate use, & the remaining one-third on the husband for life, with benefit of survivorship for life, the corpus of the fund, after the death of the survivor, to go to the issue of the marriage. The ct. directed that, until further orders, the husband's portion of the income of the settled property should be paid to the wife, & in the event of her death in his lifetime the whole of the income, until further order, should be applied to the benefit of the child.—BOYNTON *v.* BOYNTON (1861), 2 Sw. & Tr. 275; 30 L. J. P. M. & A. 156; 4 L. T. 258; 9 W. R. 620; 164 E. R. 1001; *previous proceedings* (1858), 1 Sw. & Tr. 324.

Annotations:—*As to* (1) **Refd.** Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39. *As to* (2) **Consd.** Wigney *v.* Wigney (1882), 7 P. D. 177.

4783. On decree of nullity.]—JACKSON (OTHERWISE MACFARLANE) *v.* JACKSON, No. 5045, *post.*

D. To Whom Custody Given.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 1; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193.

4784. Discretion of court.]—The jurisdiction as to the custody & education of children committed to the English & Scottish cts. by Conjugal Rights Amendment Act, s. 1861 (c. 86), & Matrimonial Causes Act, 1857 (c. 85), is identical & very extensive, & involves great responsibility for its judicious exercise. We are bound to have regard, not to any mere technicalities, or hard & fast rules of practice, but to the real interests of all the parties whom our decision may affect, & to do, for all, what may seem most judicious (LORD O'HAGAN).—SYMINGTON *v.* SYMINGTON (1875), L. R. 2 Sc. & Div. 415, H. L.

Annotations:—**Consd.** Witt *v.* Witt, [1891] P. 163; B. *v.* B., [1924] P. 176. **Refd.** Handley *v.* Handley, [1891] P. 124.

4785. Successful party.]—HYDE *v.* HYDE, No. 4803, *post.*

4786. —— If health satisfactory.]—The ct. in its decree for a judicial separation, on the ground of the husband's adultery, ordered that the wife should have the custody of the children under fourteen until they should attain that age, on proof that the husband continued the adulterous intercourse. The application of the wife for the custody of the children was opposed, on the ground that she was not of sound mind. The evidence of medical men adduced by the parties conflicting, & it appearing that they were not much conversant with affections of the brain, the ct. directed a personal examination of the wife by an eminent physician, & upon his certificate gave her the custody of the children.—DUGGAN *v.* DUGGAN (1859), 29 L. J. P. M. & A. 159; 23 J. P. 647.

4787. —— Though guilty of connivance.]—In a suit for dissolution petitioner had obtained a decree *nisi*, & before the decree absolute the Queen's Proctor intervened & charged petitioner with connivance, & conduct conducing to resp.'s adultery. On an application by resp. for an order for the custody of the children, & the payment of an allowance for their maintenance, the ct. refused to treat it on the same principles as an interim order, &, on the ground that the suit had gone far enough to convict resp. of adultery, refused to make the order.—SHEWELL *v.* SHEWELL & FOX (1869), 20 L. T. 404.

4788. —— Though paternity disputed.]—Petitioner obtained a decree for a divorce from his wife, & applied for the custody of two children, both of whom were born during the marriage. The elder child was begotten before the marriage, & petitioner was not the father of it. Resp. contended that the eldest child was illegitimate, & petitioner was not entitled to its custody. The ct. gave petitioner the custody of both children.—M. *v.* M. (1906), 22 T. L. R. 325.

4789. Guilty wife.]—BENT *v.* BENT & FOOTMAN, No. 5394, *post.*

4790. —— Claiming under terms of separation deed.]—By a deed of separation a husband & wife agreed to live separately for the rest of their lives, & the husband covenanted to pay to the wife a sum of 15*s.* per week, & to permit her to have the custody of the children of the marriage, wholly freed from his authority, as if she were a *feme sole.* The marriage was afterwards dissolved on the ground of the wife's adultery:—*Held:* the husband's agreement to permit his wife to have the custody of the children ought not to be enforced.—JUMP *v.* JUMP (1883), 8 P. D. 159; 52 L. J. P. 71; 31 W. R. 956.

Annotations:—**Mentd.** Saunders *v.* Saunders & Beck (1893), 69 L. T. 498; Ollier *v.* Ollier, [1914] P. 240.

the interests of the children would be best conserved by giving the custody of the girls to the mother & of the boy to the father.—MORTON *v.* MORTON (1911), 31 N. Z. L. R. 77.—**N.Z.**

h. *Order unnecessary—Children in custody of respondent—Wife granted judicial separation.*]—A wife was held entitled to a judicial separation & aliment from her husband on proof of a single act of personal violence following upon frequent & long continued threats, but she was not entitled to the custody of a child in pupillarity, there being no reason to apprehend danger to its health or morals if allowed to remain with the father.—STEUART *v.* STEUART (1870), 8 Macph. (Ct. of Sess.) 821; 42 Sc. Jur. 480.—**SCOT.**

PART XIII. SECT. 17, SUB-SECT. 3.—D.

4785 i. *Successful party.*]—When a wife obtains a decree for judicial separation on the ground of her husband's cruelty & adultery, & there is nothing to impeach her own conduct, the ct. will allow her to have the custody of the children.—MACLEOD *v.* MACLEOD (1871), 6 B. L. R. 318.

4791. Formal custody—Child to be looked after by wife's parents.]—PRYOR *v.* PRYOR, COWIE & MACDONALD, No. 3581, *ante*.

Compare Sect. 22, sub-sect. 6, *post*.

E. Variation or Rescission.

4792. Grounds for—Wishes of child over sixteen.]—STARK *v.* STARK & HITCHINS, No. 4775, *ante*.

4793. Jurisdiction.]—ROBOTHAM *v.* ROBOTHAM, No. 5467, *post*.

F. Declaration of Unfitness of Guilty Parent.

(a) Conduct of Respondent Justifying Order.

See Guardianship of Infants Act, 1886 (c. 27), s. 7.

4794. General rule—Aggravated misconduct.]—Upon a wife's petition for judicial separation on the grounds of her husband's desertion & adultery, the ct. will require very strong evidence of the aggravated character of the conduct of the husband before making an order, under Guardianship of Infants Act, 1886 (c. 27), s. 7, that he is a person unfit to have the custody of his children.—WOOLNOTH *v.* WOOLNOTH (1902), 86 L. T. 598; 18 T. L. R. 453; 46 Sol. Jo. 359.

4795. —— ——.]—The ct., on granting, at the instance of a husband, a decree of divorce by reason of the misconduct of the wife, refused to make a declaration under Guardianship of Infants Act, 1886 (c. 27), s. 7, that the wife was unfit to have the custody of the children, there being no aggravated circumstances.—BAGNALL *v.* BAGNALL & HOBBS (1910), 26 T. L. R. 659; 54 Sol. Jo. 738.

4796. Adultery with aggravated cruelty.]—SKINNER *v.* SKINNER, No. 4810, *post*.

4797. Violence to petitioner—Ill-treatment of child.]—The ct., while declining to lay down any general principles which should guide the ct. in making, or refusing to make at the suit of a successful petitioner, a declaration under Guardianship of Infants Act, 1886 (c. 27), s. 7, to the effect that resp. is a person unfit to have the custody of the child or children of the marriage, made such a declaration in a suit by the wife for judicial separation on the ground of cruelty, where the misconduct proved included the taking of the only child of the marriage, an infant at the time under a year old, out of the house in its nightdress, & of threats culminating in a murderous assault upon petitioner & her mother, for which resp. was sentenced to a term of penal servitude.—HANDFORD *v.* HANDFORD (1890), 63 L. T. 256.

4798. —— ——.]—WEBLEY *v.* WEBLEY, No. 4802, *post*.

4799. Gross misconduct—Child not ill-treated.]—The ct. appended to its decree for judicial separation, granted upon the ground of gross misconduct on the husband's part, a declaration in terms of Guardianship of Infants Act, 1866 (c. 27), s. 7, that he was a person unfit to have the custody of the only child of the marriage, a girl, notwithstanding the fact that all the witnesses concurred in saying that resp. was very fond of his child, & had never been cruel in any way to her personally.—HITCHINGS *v.* HITCHINGS (1892), 67 L. T. 530.

4800. Adultery & desertion.]—WOOLNOTH *v.* WOOLNOTH, No. 4794, *ante*.

4801. Sodomy.]—C. *v.* C. (1905), 22 T. L. R. 26.

(b) Rescission of Order.

4802. On ground of reformation—Onus of proof.]—The wife petitioned for a judicial separation on the ground of her husband's cruelty, & she also prayed that the ct. would append to the decree a declaration, in terms of Guardianship of Infants Act, 1886 (c. 27), s. 7, that resp. was a person unfit to have the custody of the children of the marriage. The cruelty proved was, substantially, that resp. pinched & kicked petitioner, & threw cold water over her, & told her that he did so in order to make her miscarry. One of the children was in bed with her at that time. Resp. put petitioner out of the house at night in her nightdress; it was then raining; the children were very frightened & screamed, & a policeman afterwards went to the house & fetched them away, & took them to a neighbour's house, in which petitioner had sought refuge. Resp. on many occasions ill-used the children & made them cry, he made use of filthy language in their presence, & used epithets to one of the children about petitioner, or to petitioner in presence of that child, & the boy afterwards used those epithets to petitioner:—*Held:* resp. was a person unfit to have the custody of the children; & the effect of declaring him so to be under Guardianship of Infants Act, 1886 (c. 27), s. 7, was merely to put upon him the *onus* of affirmatively proving himself a reformed character, & fit to be entrusted with the children's custody, in case of any application which might be made in respect of their custody after petitioner's death.—WEBLEY *v.* WEBLEY (1891), 64 L. T. 839.

Annotation:—**Folld.** Hitchings *v.* Hitchings (1892), 67 L. T. 530.

G. Access.

4803. Guilty father — Boy of thirteen.]—Guardianship for nurture continues until a child attains the age of fourteen. Until that age the child cannot exercise his own choice as to quitting or remaining with his father. The ct., in its decree for a judicial separation, on the ground of the adultery of her husband, on proof that the husband continued to live in adultery & that the child of the marriage, a boy aged thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to it.—HYDE *v.* HYDE (1859), 29 L. J. P. M. & A. 150; 23 J. P. 471.

Annotation:—**Folld.** Duggan *v.* Duggan (1859), 29 L. J. P. M. & A. 159.

4804. —— Boy of seven.]—BOYNTON *v.* BOYNTON, No. 4782, *ante*.

4805. Guilty mother.]—After a decree *nisi* for dissolution of marriage on the ground of the wife's adultery, the ct. will not order that she have access to the children of the marriage.—CLOUT *v.* CLOUT & HOLLEBONE (1861), 2 Sw. & Tr. 391; 30 L. J. P. M. & A. 176; 5 L. T. 139; 164 E. R. 1047.

Annotations:—**Consd.** B. *v.* B., [1924] P. 176. **Refd.** Bent

PART XIII. SECT. 17, SUB-SECT. 3. E.

k. *Right of parties to action to apply for.*]—Where in a final decree of separation or divorce provision has been made with respect to the custody, maintenance & education of the pupil children of the marriage:—*Held:* it is incompetent for either party to apply in the action for an alteration of such provision unless right to apply has been reserved in the decree.—SANDERSON *v.* SANDERSON, [1921] S. C. 686; 58 Sc. L. R. 476.—**SCOT.**

PART XIII. SECT. 17, SUB-SECT. 3. G.

4805 i. *Guilty mother.*]—When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage.—KELLY *v.* KELLY & SAUNDERS (1870), 5 B. L. R. 71.—**IND.**

Sect. 17.—*Finding and decree: Sub-sect.* 3, *G. & H.*; *s.* 4 & 5. *Sect.* 18: *Sub-sects.* 1 & 2.]

v. Bent & Footman (1861), 30 L. J. P. M. & A. 175; Handley *v.* Handley & Wroughton (1890), 39 W. R. 97.

4806. ——.]—BENT *v.* BENT & FOOTMAN, No. 5394, *post.*

II. Practice and Procedure.

4807. Whether must be specially prayed in petition.]—SEYMOUR *v.* SEYMOUR, No. 4779, *ante.*

4808. ——.]—The ct. will not, at the hearing of a suit, order that petitioner have the custody of the children of the marriage unless the petition prays for such custody.—BODDY *v.* BODDY & GROVER (1860), 30 L. J. P. M. & A. 163.

4809. —— On motion to make decree absolute—Notice of intention to apply given to respondent.]—The ct. will grant custody of children on the motion for making a decree *nisi* absolute without petition, notice having been given previously to the other side of the intention to apply for such custody.—DAVIES *v.* DAVIES (1866), 15 W. R.

4810. Service of notice of application—Where respondent does not appear.]—The ct., having found resp. guilty of adultery & cruelty [of an aggravated character] pronounced a decree *nisi* dissolving the marriage, & upon the application of counsel for petitioner, & upon proof of the service, by posting a registered letter containing a notice of this application, upon resp. made an order declaring resp. to be a person unfit to have the custody of the children of the marriage, in terms of Guardianship of Infants Act, 1886 (c. 27), s. 7.—SKINNER *v.* SKINNER (1888), 13 P. D. 90; 57 L. J. P. 104; 58 L. T. 923; 52 J. P. 406; 36 W. R. 912.

Annotation:—**Distd.** Woolnoth *v.* Woolnoth (1902), 18 T. L. R. 453.

4811. Evidence in support of application—At hearing of principal petition—Must be admissible in cause.]—The ct. will not, at the hearing of a cause, entertain an application for the custody of children if it is founded upon evidence not admissible in the cause, nor an application for permanent alimony. They should be made on a motion day. But at the hearing the ct. may direct that petitioner have the custody of children until further order, if the facts proved in the cause would warrant such an order, *e.g.* if the adultery of resp. be proved.—WALLACE *v.* WALLACE (1862), 32 L. J. P. M. & A. 34; 8 Jur. N. S. 1082; 11 W. R. 30.

4812. Order for custody until further order—When granted.]—WALLACE *v.* WALLACE, No. 4811, *ante.*

4813. Inquiry as to fitness of parent—Allegation of insanity.]—DUGGAN *v.* DUGGAN, No. 4786, *ante.*

SUB-SECT. 4.—ORDER FOR DAMAGES.

4814. Peremptory order—Inability of co-respondent to pay apprehended.]—Where damages, awarded by a jury against co-resp. in a suit by the husband for dissolution had been ordered to be paid to petitioner, & it appeared that he was in danger of losing them, the ct. ordered they should be paid within ten days after the service of the order.—BENT *v.* BENT & FOOTMAN (1861), 30 L. J. P. M. & A. 189; 5 L. T. 120; 10 W. R. 448.

4815. —— ——.]—In a suit by the husband for dissolution of marriage on the ground of the wife's adultery, damages to the amount of £500 were assessed against co-resp. The ct. granted a decree *nisi* & condemned him in costs. On affidavits, showing that co-resp. was removing his effects, & evading service of a peremptory order for payment of the damages, the ct. allowed a writ of *fi. fa.* to issue forthwith, without requiring personal service of the order.—PRITCHARD *v.* PRITCHARD & BEAN (1870), L. R. 2 P. & D. 53; 39 L. J. P. & M. 46; 22 L. T. 629.

Annotation:—**Refd.** *Re* Muirhead, *Ex p.* Muirhead (1876), 2 Ch. D. 22.

4816. Bankruptcy of co-respondent—Payment into court ordered—Rescission of order—Payment to petitioner.]—Damages having been given against a co-resp., an order was made that the amount should be paid into the registry of the ct. within a certain time. Before such order had been made, the co-resp. became a bkpt., & a trustee of his property was appointed. The damages were not paid into the registry, nor could they be proved under the bkpcy. In order to facilitate the latter step, the ct. rescinded its former order, & directed that the damages should be paid to petitioner himself.—PATTERSON *v.* PATTERSON & GRAHAM (1870), L. R. 2 P. & D. 189; 40 L. J. P. & M. 5; 23 L. T. 568; 19 W. R. 232.

Annotations:—**Dbtd.** *Re* Muirhead, *Ex p.* Muirhead (1876), 2 Ch. D. 22. **Consd.** *Re* O'Gorman, *Ex p.* Bale, [1899] 2 Q. B. 62.

4817. Rescission of decree nisi—Intervention of King's Proctor—Effect on order for damages.]—RAVENSCROFT *v.* RAVENSCROFT & SMITH, No. 4833, *post.*

4818. —— —— ——.]—When a petitioning husband has by concealing his own adultery obtained a decree *nisi* & an award of damages & costs against co-resp. the rescision of the decree on the intervention of the King's Proctor involves setting aside the award of damages & costs.—BALDWIN *v.* BALDWIN & STOWELL (1919), 35 T. L. R. 616.

4819. Decree nisi refused—Although damages awarded.]—STORY *v.* STORY & O'CONNOR, No. 3471, *ante.*

4820. Co-respondent out of jurisdiction—Sanction by court of voluntary payment.] — The ct. sanctioned the voluntary payment of a sum of money in lieu of damages by a co-resp. who was not subject to the jurisdiction of the ct.—LUCAS *v.* LUCAS & GEORGETTI (1909), 25 T. L. R. 248.

Enforcement—Against representative of co-respondent.]—*See* EXECUTORS, Vol. XXIV., p. 633, No. 6598.

—— **Process of execution.**]—*See* Nos. 5905, 5961–5966, *post.*

—— **Payment into court.**]—*See* No. 5905, *post.*

SUB-SECT. 5.—ORDER FOR COSTS.

See Sect. 18, *post.*

SECT. 18.—ORDER FOR COSTS.

SUB-SECT. 1.—IN GENERAL.

4821. Abatement of suit—Death of husband or wife—Application for wife's costs—Court cannot entertain.]—A suit by the wife against her husband, having abated by the wife's death; the ct. will

1. *When made—Costs not vexatiously incurred.*]—The test as to allowance of costs appears to be whether or not they have been vexatiously incurred.—GLENNIE *v.* GLENNIE (1863), 1 Ch. Ch. 155.—**CAN.**

not, at the petition of the Proctor, direct the costs incurred by the wife to be paid by the husband.—CHEALE *v.* CHEALE (1828), 1 Hag. Ecc. 374; 162 E. R. 617.

4822. —— —— —— ——.]—MACONOCHIE *v.* MACONOCHIE, MACONOCHIE *v.* MACONOCHIE & BLAKE, No. 4578, *ante*.

4823. Postponement of order—Until final verdict—Intervention of King's Proctor.]—In a suit for dissolution by the wife, a decree *nisi* had been pronounced. The Queen's Proctor intervened, & charged petitioner with adultery. The ct. refused to postpone the payment of the wife's costs by the husband until the result of the Queen's Proctor's intervention was known.—GLADSTONE *v.* GLADSTONE (1875), L. R. 3 P. & D. 260; 44 L. J. P. & M. 46; 32 L. T. 404.

Annotation:—**Refd.** Butler *v.* Butler (1890), 15 P. D. 126.

4824. —— —— ——.]—Where there were cross-petitions for dissolution & the wife had succeeded in obtaining a decree *nisi*, & the Queen's Proctor subsequently intervened, & an application was made on behalf of the wife for the payment out to her solicitor of a sum of money paid into the registry by the husband to secure the wife's costs of both trials:—*Held:* having regard to r. 201 of the Rules & Regulations of the Divorce Court, the whole question of costs must be postponed until the questions raised by the Queen's Proctor's intervention were decided, & the decree either made absolute or dismissed.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM (1889), 14 P. D. 160; 59 L. J. P. 71; 38 W. R. 272.

4825. Form of order—Terms to be stated—Not "usual order for wife's costs."]—BETTON-BRIGHT *v.* BETTON-BRIGHT, No. 4952, *post*.

SUB-SECT. 2.—DISCRETION OF COURT.

4826. Costs within discretion of court.]—WELLS *v.* WELLS & COTTAM, No. 4865, *post*.

4827. ——.]—JONES *v.* JONES, No. 2320, *ante*.

4828. ——.]—RUSSELL *v.* RUSSELL, No. 4307, *ante*.

4829. ——.]—PALMER *v.* PALMER & STOCKLEY, No. 4961, *post*.

4830. ——.]—BURNE *v.* BURNE & HELVOET, No. 5016, *post*.

4831. ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante*.

4832. —— **Absolute discretion.**]—By Matrimonial Causes Act, 1857 (c. 85), s. 51, the ct. which hears the suit has absolute authority over costs, & no appeal as to costs only lies. The settled practice of the ct. is, that the wife, if she fails, will not be entitled to taxed costs beyond the sum of money paid into ct. by the husband at the order of the registrar. In the present case the ct. rejected a motion for an order on the husband to pay the balance of the wife's taxed costs above such sum of money paid into ct., & condemned the wife's solr. in costs of the motion. *Qu.:* whether, if dissatisfied with the registrar's order, the wife's solr. ought not then to have applied to the judge ordinary to vary such order.—GLENNIE *v.* GLENNIE & BOWLES (1863), 3 Sw. & Tr. 109; 7 L. T. 696; 164 E. R. 1214.

Annotations:—**Refd.** Allen *v.* Allen & Bell, [1891] P. 248; Brown *v.* Brown, [1915] P. 83.

4833. ——.]—In a husband's suit for dissolution, the jury found that his wife had committed adultery with one of co-resps., & assessed the damages at £100. The ct. pronounced a decree *nisi*, but, before it was made absolute, the Queen's Proctor intervened, & charged the husband with adultery, connivance, & collusion. The issue of adultery, which was of a very profligate character, was proved against the husband, whereupon the ct. reversed the decree *nisi*, including that part which condemned the co-resp. in costs, & intimated that it would make no order on him to pay the damages. The ct. has a complete discretionary power over costs & damages, & the verdict of the jury gives the petitioner no indisputable right to the damages assessed.

The question of costs is one entirely within the discretion of the ct. It is a question which must depend upon the circumstances of each case. Without going fully into the matter, it is obvious that there may be a case in which, although the husband may have committed an act of adultery, the ct. would hold that he is entitled to recover his costs against co-resp., whose adultery had been established; on the other hand, there may be cases in which the ct. would come to the conclusion that petitioner's conduct was so bad that he ought never to have come to the ct., & therefore that co-resp. ought not to be condemned in costs (*per* CUR.).—RAVENSCROFT *v.* RAVENSCROFT & SMITH (1872), L. R. 2 P. & D. 376; 41 L. J. P. & M. 28; 26 L. T. 265; 20 W. R. 448.

Annotations:— **Apld.** Yowell *v.* Yowell, Serrash & Burleigh (1875), 24 W. R. 59. **Refd.** Bernstein *v.* Bernstein, [1893]

4834. ——.]—HYDE *v.* HYDE & FELLGATE, No. 4845, *post*.

4835. —— — —.]—(1) Matrimonial Causes Act, 1857 (c. 85), s. 31, gives the ct. an absolute discretion as to costs.

(2) It is an established rule not to award costs in favour of a husband petitioning for a divorce against a co-resp. who had no knowledge that resp. was a married woman; but is too broad a statement of the rule to say that co-resp. must have such knowledge at the time he first misconducted himself. In a case where adultery after knowledge is established the ct. is not precluded from awarding costs by mere fact that co-resp. has also committed adultery at a date before he had knowledge.

(3) In a case where the proof of such prior misconduct depended only on confession the ct. gave costs against co-resp.—NORRIS *v.* NORRIS & SMITH,

PART XIII. SECT. 18, SUB-SECT. 2.

4826 i. *Costs within discretion of court.*]—In divorce proceedings where a wife brings an unsuccessful appeal, her costs of the appeal are in the discretion of the ct.—MOSES *v.* MOSES (1920), 27 C. L. R. 490.—**AUS.**

4826 ii. ——.]—Where in an action of divorce a wife has been unsuccessful in the Outer-House, & then presents a reclaiming note, the question whether she is entitled to her expenses, if she is again unsuccessful, must depend on whether the case was a fair one to bring before the ct.—THOMSON *v.* THOMSON, [1908] S. C. 179; 45 Sc. L. R. 95; 15 S. L. T. 503.—**SCOT.**

4826 iii. ——.]—A lady possessing a considerable private fortune brought an action of divorce for adultery against her husband, in which the Lord Ordinary assoilzied defender, & on a reclaiming note the Division adhered. Defender was awarded only half his expenses in the Outer-House, on the ground that his conduct had been so indiscreet as to afford reasonable cause for suspicion, but, as in the Inner-House he was defending a judgment in his favour, he was awarded the full expenses of the reclaiming note.—BENNET CLARK *v.* BENNET CLARK, [1909] S. C. 591; 46 Sc. L. R. 529; 1 S. L. T. 415.—**SCOT.**

Sect. 18.—*Order for costs: Sub-sects.* 2 & 3, *A.*

[1918] P. 129; 87 L. J. P. 119; 118 L. T. 507; 34 T. L. R. 224; 62 Sol. Jo. 585.

Annotations:—**Consd.** Sweeting *v.* Sweeting & Rowlands (1919), 36 T. L. R. 15; Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Folld.** Burne *v.* Burne & Helvoet, [1920] P. 17.

4836. —— Judicial discretion.]—GIBBS *v.* GIBBS & HEATHCOTE, No. 5024, *post.*

4837. Exercise of discretion—Conduct of all parties.]—(1) It is no ground for a new trial that the judge in his summing-up did not give as much weight to some parts of the evidence as they may have deserved.

(2) The exercise of the discretion as to costs vested in the ct. by Matrimonial Causes Act, 1857 (c. 85), s. 34, depends upon the opinion of the ct. as to the conduct of all the parties in each case; & even if it is proved that co-resp. knew resp. to be a married woman when the adultery was committed, it does not necessarily follow that he will be condemned in the whole of the costs. Where a resp., in her answer, charged petitioner with wilful neglect & misconduct, & that charge was negatived by the verdict of the jury, & a decree was granted on the ground of her adultery with co-resp. & with another person who was not a party to the suit, the ct., being of opinion that the conduct of petitioner had been such as to invite reasonable challenge, refused to condemn co-resp. in the whole of the costs of the suit, & condemned him in those costs only which had been incurred in proving resp.'s adultery with him.—CODRINGTON *v.* CODRINGTON & ANDERSON (1865), 4 Sw. & Tr. 63: 34 L. J. P. M. & A. 60; 11 Jur. N. S. 287; 13 W. R. 527; 164 E. R. 1439.

4838. —— Whether restricted—By insertion in petition of claim for damages.]—(1) The insertion in a petition of a claim for damages does not deprive the ct. of the power to make such order as to costs as may seem just, given by Matrimonial Causes Act, 1857 (c. 85), s. 51.

(2) On the trial of an issue of adultery the alleged adulterer was called as a witness, & simply denied the charge without entering into any details or offering any explanation of his conduct. The jury were unable to agree upon their verdict, & the issue was tried a second time. On the second trial the alleged adulterer was again examined, &, besides denying the adultery, entered into full details & explained his conduct. The jury found that he was not guilty of the charge. The ct. refused to condemn petitioner in his costs on the ground that by his suspicious conduct & by his reticence on the first trial, he had contributed to put petitioner to the expense of a second trial.—WEST *v.* WEST & PARKER, WEST *v.* WEST (1870), L. R. 2 P. & D. 196; 40 L. J. P. & M. 11; 23 L. T. 786; 19 W. R. 392.

4839. —— —— Agreement between husband & wife.]—WEEKES *v.* WEEKES, WEEKES *v.* WEEKES & MARSHALL (1905), 21 T. L. R. 227.

4840. Allowance of wife's costs.]—BUTLER *v.* BUTLER, No. 5216, *post.*

4841. —— Where wife has separate property.]—In a suit for the restitution of conjugal rights, the wife having a separate property of her own, is liable to pay her own costs.

Under the circumstances of this case . . . the husband ought not to pay the wife's costs: in the general course the husband pays costs because he is supposed to have a fortune & the wife nothing but what she had from him; but here the case is directly the reverse (SIR GEORGE LEE).—HOLMES *v.* HOLMES (1755), 2 Lee, 90; 2 Hag. Con. 205, n.: 161 E. R. 274.

Annotations:—**Folld.** Davis *v.* Davis (1789), 2 Hag. Con. 204, n. **Distd.** Beevor *v.* Beevor (1809), 3 Phillim. 261.

4842. —— ——.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *ante.*

4843. —— ——.]—ROBINSON *v.* ROBINSON & LANE, No. 2777, *ante.*

4844. —— ——.]—JONES *v.* JONES, No. 2320, *ante.*

4845. —— ——.]—On a motion to condemn a wife, resp. in divorce proceedings, in costs incurred by her husband in those proceedings & in endeavouring to enforce an order made against her in favour of petitioner for the custody of the children of the marriage, & for disobeying which she had been declared to be in contempt, the ct. refused to receive affidavits which had been filed by her, in which she gave an illusory address or no address at all, & proceeded upon petitioner's uncontradicted affidavits to deal with the motion. The ct. has absolute discretion to make such order as to costs as to it may seem just, & the ct. will not inquire whether, at the time the wife committed the wrongful act, she had or had not any separate estate, but will only consider what is just at the time when it has to arrive at a decision; & if the ct. finds that at that time there is property of the guilty wife upon which an order for costs, if made, can operate, the guilty wife, like any other unsuccessful litigant, will be condemned in costs.—HYDE *v.* HYDE & FELLGATE (1888), 59 L. T. 523.

—*See, generally*, Sub-sect. 3, E., *post.*

4846. Costs against co-respondent.]—(1) The question of condemning co-resp. in costs is entirely in the discretion of the ct.

(2) If a co-resp. who has misconducted himself with a woman in ignorance of the fact that she was a married woman continues to live in adultery with her after being informed of that fact, he will not necessarily be condemned in costs.—ROBINSON *v.* ROBINSON & WILSON (1898), 78 L. T. 391; 14 T. L. R. 363.

Annotation:—**Folld.** Burne *v.* Burne & Helvoet, [1920] P. 17.

4847. ——.]—LANGRICK *v.* LANGRICK & FUNNELL, No. 4684, *ante.*

4848. —— Statutory discretion.]—The awarding of costs against a co-resp. is in the statutory discretion of the ct., & the rule of practice that has obtained, that costs should not be awarded against a co-resp. who is not proved to have been aware that resp. was a married woman, is of questionable justice. In the exercise of its discretion the ct. awarded damages & costs against a co-resp. who, unaware that resp. was a married woman, was reckless & indifferent whether she was married or not.

Though there has grown up a practice in the Divorce Ct. not to condemn a co-resp. in costs unless it is proved that he knew that resp. was a married woman, that practice does not override the general discretion given to the judge by statute to give costs in such a case if the circumstances make it reasonable. A similar rule as to damages is well established.—SMITH *v.* SMITH & REED, [1922] P. 1; 91 L. J. P. 9; 126 L. T. 350; 38 T. L. R. 57.

4849. Application for costs—Application out of time.]—CONRADI *v.* CONRADI & FLASHMAN, No. 5057, *post.*

4850. —— ——.]—SOMERVILLE *v.* SOMERVILLE & WEBB, No. 5058, *post.*

SUB-SECT. 3.—BETWEEN HUSBAND AND WIFE.

A. In General.

See Matrimonial Causes Rules 1924, rr. 91–93.

Discretion of court.]—*See* Sub-sect. 2, *ante*.

4851. Husband liable for wife's costs.]—In a suit for nullity of marriage brought by the husband, a *de facto* marriage being admitted, the husband is to bear the expenses of the wife.—BIRD (*alias* BELL) *v.* BIRD (1753), 1 Lee, 209; 161 E. R. 78.

Annotations:—**Refd.** Miles *v.* Chilton (1819), 1 Rob. Eccl. 684; Foden *v.* Foden, [1894] P. 307.

4852. ——.]—In a matrimonial cause, a husband is liable to pay the costs of the wife.—FITZGERALD *v.* FITZGERALD (LADY) (1754), 1 Lee, 649; 161 E. R. 237.

4853. ——.]—HOLMES *v.* HOLMES, No. 4841, *ante*.

4854. — —D'AGUILAR *v.* D'AGUILAR, No. 4064, *ante*.

4855. — -BEEVOR *v.* BEEVOR, No. 4918, *post*.

4856. ——.]—BROWN *v.* BROWN, No. 5043, *post*.

4857. ——.]—FYLER *v.* FYLER, No. 4919, *post*.

4858. ——.]—BRITTAIN *v.* BRITTAIN & CAMP, No. 4010, *ante*.

4859. —— **Unless wife has separate property.**]—The husband liable to the costs of the wife, unless she has a separate income sufficient both for her own support, & for the payment of her costs.—BELCHER *v.* BELCHER (1836), 1 Curt. 444; 163 E. R. 156.

4860. —— ——.]—The ct. refused to tax the costs of the wife against the husband, he being possessed of no property whatever, & having been shortly before discharged from prison, as an insolvent debtor, although not proceeding *in formâ pauperis*, but declined, at his prayer, to appoint a day for hearing the cause.

It is the general practice, that the husband must pay the costs incurred by the wife; but that rule is liable to some modifications; where, for instance, the wife has a separate income (DR. LUSHINGTON). —WALKER *v.* WALKER (1837), 1 Curt. 560; 163 E. R. 196.

Annotations:—**Consd.** Ward *v.* Ward (1859), 1 Sw. & Tr. 484; Hepworth *v.* Hepworth (1861), 2 Sw. & Tr. 411. **Refd.** Bishop *v.* Wildbore (1855), 9 Moo. P. C. C. 408; Spratt *v.* Spratt (1857), Dea. & Sw. 276.

4861. —— ——.]—(1) It is a rule of the Divorce Div. that a wife cannot be condemned in costs unless it is shown that she has separate estate.

(2) This rule is equally applied where the King's Proctor has obtained on motion the rescission of a decree *nisi* granted to a wife petitioner.—MORRIS *v.* MORRIS (1915), 112 L. T. 999; 31 T. L. R. 217.

See, further, Sub-sect. 3, E., *post*.

4862. Although co-respondent condemned in all costs—Recovery from co-respondent unlikely.] —EVANS *v.* EVANS & ROBINSON, No. 4948, *post*.

4863. —— **Interlocutory motion—Made or opposed unsuccessfully.**]—HEPWORTH *v.* HEPWORTH, No. 4269, *ante*.

4864. —— **Decision adverse to wife—No separate property.**]—JONES *v.* JONES, No. 2320, *ante*.

4865. Nullity suit by father of husband—No reasonable defence by wife.]—Petitioner, father of a *de facto* husband, sued for decree of nullity by reason of undue publication of banns. The *de facto* wife defended the suit, the issue in which was tried by a jury, who found a verdict against her & the ct. made a decree of nullity. On motion to condemn the husband in the wife's costs:—*Held:* Matrimonial Causes Act, 1857 (c. 85), s. 51, gave the ct. power so to do, if the circumstances of the case warranted it; but as the wife, by not going into the witness box, had shown that she had no reasonable ground of defence to lay before the jury, her costs were not made necessary by the conduct of the husband, & rejected the motion.—WELLS *v.* WELLS & COTTAM (1864), 3 Sw. & Tr. 593; 11 L. T. 318; 10 Jur. N. S. 1208; 164 E. R. 1405; *sub nom.* WELLS *v.* COTTAM (FALSELY CALLED WELLS) & WELLS, 34 L. J. P. M. & A. 12; 13 W. R. 279.

Liability of husband's representative.] — *See* EXECUTORS, Vol. XXIV., p. 632, Nos. 6595–6597.

B. Petition by Wife.

See Matrimonial Causes Rules, 1924, rr. 91–93.

4866. —— **Nullity suit—Impediment known to wife at time of marriage—Infringement of affinity laws.**]—AUGHTIE *v.* AUGHTIE (1810), 1 Phillim. 201; 161 E. R. 961.

4867. —— —— —— ——.]—A decree will be made declaring a marriage with a deceased wife's sister null & void, although it is shown that both parties at the time of the celebration of the marriage were aware of the impediment.

I consider myself called upon to declare this marriage null & void, but I shall refuse petitioner her costs (BUTT, J.).—ANDREWS *v.* ROSS (1888), 14 P. D. 15; 58 L. J. P. 14; 59 L. T. 900; 37 W. R. 239.

Annotations:—**Consd.** Bonaparte *v.* Bonaparte, [1892] P. 402; Moss *v.* Moss, [1897] P. 263; Grant *v.* Giannetti, [1913] P. 137.

4868. Petition successful—Wife possessed of separate property—No application by husband for relief.]—BARROW *v.* BARROW, No. 4935, *post*.

4869. —— **Costs follow decree—Where no order made.**]—A wife, in whose favour a decree for a dissolution of marriage is made, is entitled to costs against her husband, where no order has been made.—KAYE *v.* KAYE (1858), 4 Sw. & Tr. 239; 27 L. J. P. & M. 54; 164 E. R. 1507.

Annotation:—**Consd.** Chetwynd *v.* Chetwynd (1865), 34 L. J. P. M. & A. 65.

4870. —— —— ——.]—PEACOCK *v.* PEACOCK, No. 3207, *ante*.

4871. —— —— ——.]—Where the ct. decrees a dissolution of marriage at the suit of the wife, costs follow the decree as a matter of course, if the ct., in pronouncing its decree, gives no directions as to costs.—DIXON *v.* DIXON (1859), 28 L. J. P. & M. 96.

Annotation:—**Consd.** Chetwynd *v.* Chetwynd (1865), 34 L. J. P. M. & A. 65.

4872. Petition unsuccessful—Collusion between parties.]—TODD *v.* TODD, No. 3156, *ante*.

4873. —— —— **Wife's solicitors parties thereto.**] —(1) A wife having obtained a decree *nisi* in a petition for divorce, the Queen's Proctor intervened, & she was proved to have obtained the decree by collusion, to which her solrs. were parties. The petition was accordingly dismissed. The husband in the course of the proceedings had paid into the registry two sums of money to cover the wife's costs of the two proceedings:—*Held:* the wife was not entitled to an order that such money should be paid out to her or her solrs.

(2) It is not the practice of the ct. to order the husband to give security for his wife's costs

PART XIII. SECT. 18, SUB-SECT. 3.—B.

m. *Petition successful.*]—A wife obtained a decree nisi for dissolution of marriage on June 1, 1920, & the decree was made absolute on Dec. 15, 1920, & she applied for costs required by her in order to bring the same to a hearing:—*Held:* she was entitled to an order that resp. furnish the costs.—AVERY *v.* AVERY, [1921] 2 W. W. R. 873.—**CAN.**

n. ——.]—NEHEMIA *v.* NEHEMIA (1913), 32 N. Z. L. R. 1183.—**N.Z.**

Sect. 18.—*Order for costs: Sub-sect.* 3, *B. & C.* (*a*), (*b*) & (*c*).]

incidental to an intervention of the Queen's Proctor.—BUTLER *v.* BUTLER (1890), 15 P. D. 32; 62 L. T. 477; *sub nom.* BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM, 59 L. J. P. 30; *affd. on appeal*, 15 P. D. 126. C. A.

Annotations:—*As to* (1) **Consd.** Russell *v.* Russell, [1892] P. 152. *Generally*, **Refd.** Palmer *v.* Palmer & Stockley, [1914] P. 116.

4874. —— Conduct of husband condoned.]—DENNING *v.* DENNING (*circa* 1886), cited 57 L. T. 375.

Annotation:—**Consd.** Thompson *v.* Thompson (1886), 57 L. T. 374.

4875. —— Groundless allegations against husband.]—At the hearing of a suit for divorce preferred by the wife, the charges of cruelty were withdrawn, & those of adultery were found to be not proved, the petition being accordingly dismissed. The question as to the wife's costs was reserved for further argument. No order had been made upon the husband to secure any sum for his wife's costs. The ct., after hearing counsel for both the parties, now refused to order resp. to pay the costs of petitioner.—THOMPSON *v.* THOMPSON (1886), 57 L. T. 374.

4876. —— ——.]—On a wife's petition for a dissolution of her marriage on the ground of her husband's alleged cruelty & adultery, all the issues were found in favour of resp. An application was made at the trial that the wife might be allowed her full costs over & above the amounts paid into ct. or ordered to be secured:—*Held:* the costs of attempting to prove the charge of adultery & so much of the charges of cruelty as appeared to be founded on reasonable & probable cause must be allowed; but the costs of proving certain other charges of cruelty that had been made without sufficient reasonable & probable cause, & in respect of which resp. had been put to unnecessary expense & trouble, must be disallowed.—ASH *v.* ASH, [1893] P. 222; 62 L. J. P. 97; 68 L. T. 500; 1 R. 524.

Annotations:—**Consd.** Walker *v.* Walker & Lawson (1897), 76 L. T. 234; Kay *v.* Kay, [1904] P. 382; Beer *v.* Beer (1906), 91 L. T. 701; Huntly-Gordon *v.* Huntly-Gordon (Nicholson cited) (1908), 24 T. L. R. 806.

4877. —— ——.]—In a suit by a wife for judicial separation on the ground of cruelty, where no summons for discovery of documents had been applied for by the wife's solr., it transpired, & was conclusively proved at the hearing, that numbers of affectionate letters had passed between the parties during a period of more than a year after the husband had gone to China to resume his official duties, &, after the acts specified in the petition as cruelty & deposed to by petitioner, were alleged to have been committed. At the close of petitioner's case the petition was dismissed, & the ct. refused to make the "usual order" for the wife's costs.—HOUGH *v.* HOUGH (1894), 71 L. T. 703; 10 T. L. R. 587.

4878. -.]—KAY *v.* KAY, No. 2850, *ante*.

4879. -.]—BEER *v.* BEER, No. 2474, *ante*.

4880. Reasonably founded charges against husband.]—ASH *v.* ASH, No. 4876, *ante*.

4881. —— ——.]—KAY *v.* KAY, No. 2850, *ante*.

4882. —— ——.]—(1) If costs have been reasonably incurred on behalf of a wife in presenting a case of a reasonable character, where the charges she brings against her husband have substance in them, so that she is justified in going to a solr. & obtaining security for herself & indirectly for her solr., the wife is entitled to an order for payment by her husband of her costs, though she has failed to establish her case at the trial.

(2) Where a wife makes charges as petitioner against her husband, the case has to be more carefully scrutinised than where the wife merely makes allegations by way of defence to a petition presented against her.—HUNTLY-GORDON *v.* HUNTLY-GORDON (NICHOLSON CITED) (1908), 24 T. L. R. 806.

4883. Petition withdrawn—Nullity suit—Suit for separation pending.]—GARSTON *v.* GARSTON (*circa* 1869), cited 39 L. J. P. & M. 5.

Annotation:—**Consd.** Miller *v.* Miller (1869), 39 L. J. P. & M. 4.

4884. Rescission of decree nisi—Intervention of King's Proctor.]—A wife obtained a decree *nisi* for the dissolution of her marriage, with costs against resp. Before that decree was made absolute, the Queen's Proctor intervened, & filed affidavits proving that she had committed adultery whilst the suit was pending, & the decree was thereupon rescinded & petition dismissed:—*Held:* (1) the wife, having obtained an order for alimony *pendente lite*, was entitled to an attachment against resp. for non-payment of the arrears of alimony up to the date when she was found guilty of adultery; (2) she was entitled to enforce the payment by resp. of all costs which had been taxed, & ordered to be paid up to the same date, including the costs of the hearing, although they had not been taxed.—WHITMORE *v.* WHITMORE (1866), L. R. 1 P. & D. 96; 35 L. J. P. & M. 39, 52; 13 L. T. 723; 14 L. T. 171; 14 W. R. 352.

Annotation:—*As to* (2) **Consd.** Butler *v.* Butler (1890), 15 P. D. 126.

4885. Successive proceedings—Only later proceedings successful—Costs of former suit.]—A wife instituted a suit for nullity of marriage on the ground of the husband's impotence. She failed to establish the charge & the suit was dismissed, but the husband was ordered to pay & he paid a certain sum towards her costs. She afterwards instituted a suit for dissolution on the ground of his adultery coupled with cruelty, & she established those charges & obtained a decree. The husband was condemned in the wife's costs of the suit for dissolution, but he was allowed to deduct therefrom the amount which he had paid on account of her costs in the suit for nullity.—

4875 i. *Petition unsuccessful—Groundless allegations against husband.*] Where a wife petitions for divorce when she has no reasonable grounds for believing her husband guilty of misconduct, & no satisfactory evidence to prove it if she had, the ct. may express disapproval of her action by refusing her costs.—COUCH *v.* COUCH, [1924] 2 W. W. R. 1220.—**CAN.**

o. —— *In dissolution suit—Judicial separation granted—Reasonable grounds for instituting proceedings.*]—A wife, unsuccessful in obtaining divorce, but granted judicial separation, is entitled to costs, if, upon the facts submitted to her solr. & upon which he proceeded to trial, he had reasonable grounds to warrant him in instituting proceedings for divorce.—DAVEY *v.* DAVEY, [1923] 2 W. W. R. 686; 4 D. L. R. 1199; 32 B. C. R. 267.—**CAN.**

p. —— *Respondent successful in former suit for judicial separation.*]—Notwithstanding that two years before resp. husband had obtained on his opposed petition an order of judicial separation against his wife, petitioner, on the grounds of her desertion, she was nevertheless held entitled to an order for costs in her present divorce petition.—CHOLAWCZUK *v.* CHOLAWCZUK, [1924] 2 W. W. R. 948.—**CAN.**

q. —— *Wife without means—No security for wife's costs.*]—In a divorce suit, where it is shown that the wife has no money of her own, the mere fact that no deposit has been made or security given for payment of the wife's costs is no obstacle to the making of an order against the husband to pay her costs, although her petition is dismissed.—BOYLE *v.* BOYLE (1903), I. L. R. 30 Calc. 631; 7 C. W. N. 565.

r. —— *Wife guilty of adultery—Appeal costs.*]—Where the wife has been herself found guilty of adultery by the ct. of first instance & then actively brings the matter before the

DITCHFIELD *v.* DITCHFIELD (1869), L. R. 1 P. & D. 729 ; 38 L. J. P. & M. 51 ; 20 L. T. 1016.
Annotation :—**Consd.** Jones *v.* Jones (1872), L. R. 2 P. & D. 333.

4886. Cross petitions—Decree nisi on both petitions—Wife without means.]—G. *v.* G. (1912), No. 2345, *ante*.

Conduct of wife's solicitor.]—*See* Sub-sect. 3, D., *post*.

Part costs.]—*See* No. 4876, *ante*.

C. Petition by Husband.

(*a*) *In General.*

See Matrimonial Causes Rules, 1924, rr. 91–93.

4887. Successive proceedings—Failure of earlier proceedings.]—The answer of a wife to her husband's petition for dissolution of marriage, on the ground of her adultery, denied the adultery & alleged cruelty. At the trial the jury found for the husband on the first issue, & for the wife on the second. On a new trial being had, the jury found for resp. on the first issue, & were discharged as to the second. The ct., while declining to lay down any general rule, under the circumstances condemned the husband in all the costs of both trials, including those exceeding the amounts for which he had given security.—NICHOLSON *v.* NICHOLSON & RATCLIFFE (1864), 4 New Rep. 73; 33 L. J. P. M. & A. 114.
Annotation :—**Distd.** Wight *v.* Wight (1867), L. R. 1 P. & D. 368.

4888. —— ——.]—WAUDBY *v.* WAUDBY & BOWLAND, No. 4994, *post*.

4889. —— **New trial.**]—MORPHETT *v.* MORPHETT, No. 2633, *ante*.

4890. —— **Appeal.**]—OTWAY *v.* OTWAY, OTWAY *v.* OTWAY & HOFFER, No. 3539, *ante*.

Part costs.]—*See* Sub-sect. 3, F. (*a*), *post*.

(*b*) *Petition Successful.*

See Matrimonial Causes Rules, 1924, rr. 91–93.

4891. Liability of husband—If no contrary order made.]—Where dissolution of marriage, on the ground of the wife's adultery, is decreed, if no order to the contrary is made, the husband pays the wife's costs.—LING *v.* LING & CROKER (1858), 1 Sw. & Tr. 187 ; 27 L. J. P. & M. 58 ; 31 L. T. O. S. 268 ; 6 W. R. 736 ; 164 E. R. 685.
Annotation :—**Consd.** Evans *v.* Evans & Robinson (1859), 1 Sw. & Tr. 328.

4892. —— **Costs de die in diem.**]—WEBER *v.* WEBER & PYNE, No. 4093, *ante*.

4893. —— ——.]—HOLT *v.* HOLT & FLEEMING, No. 4296, *ante*.

4894. —— **Wife's defence groundless.**]—STOKES *v.* STOKES & CLAYBROOK (1897), 76 L. T. 236, n.

4895. —— ——.]—Upon a husband's petition for dissolution of marriage, the wife's answer alleged charges of cruelty & condonation on the part of the husband. A decree *nisi* having been pronounced, an application was made for the usual order for the wife's costs. The judge thereupon read the proofs of the wife's witnesses, & said that they disclosed no adequate reason for bringing the countercharges, & ordered a sum of money, which had been paid into ct. by the husband for the wife's defence, to be paid out to him.—MARKS *v.* MARKS & WALTON (1905), 21 T. L. R. 209.

4896. —— **Nullity suit—Respondent's knowledge of impediment.**]—D'ETCHEGOYEN *v.* D'ETCHEGOYEN, No. 5824, *post*.

Conduct of wife's solicitor.]—*See* Sub-sect. 3, D., *post*.

(*c*) *Petition Unsuccessful.*

See Matrimonial Causes Rules, 1924, rr. 91–93.

4897. General rule—Wife entitled to costs.]—GOODE *v.* GOODE & HAMSON, No. 3468, *ante*.

4898. Petitioner guilty of misconduct.]—Where in a suit for dissolution of marriage, on the ground of the wife's adultery, the adultery of the wife is proved, but the petition is dismissed under Matrimonial Causes Act, 1857 (c. 85), s. 31, on account of the husband's marital misconduct, the wife is entitled to all her costs, though they may exceed the sum paid into the registry, & co-resp. will not be condemned in costs.—STARKEY *v.* STARKEY & IRWINN (1861), 30 L. J. P. M. & A. 118.
Annotations :—**Refd.** Goode *v.* Goode & Hamson (1861), 30 L. J. P. M. & A. 105 ; Ellyatt *v.* Ellyatt, Taylor & Halse (1864), 3 Sw. & Tr. 503.

4899. ——.]—WATSON *v.* WATSON & WILKINSON (1862), 31 L. J. P. M. & A. 102, n.

4900. ——.]—SEDDON *v.* SEDDON & DOYLE, No. 4991, *post*.

4901. ——.]—Inconsistency in a verdict is not necessarily a ground for a new trial, unless it be such that the substantial opinion of the jury cannot be ascertained. Where the jury found that resp. had committed adultery with co-resp. ; that petitioner had connived at such adultery ; & assessed damages against co-resp. :—*Held :* (1) the inconsistency in the verdict was no ground for a new trial ; (2) co-resp. was entitled to be dismissed from the suit, but was not entitled to his costs ; (3) resp., having established a good defence, was entitled to all her costs.—ELLAYTT *v.* ELLAYTT, TAYLOR & HALSE (1864), 3 Sw. & Tr. 503 ; 164 E. R. 1370 ; *sub nom.* ELYETT *v.* ELYETT, TAYLOR & HALSE, 4 New Rep. 159 ; *sub nom.* ELLYATT *v.* ELLYATT, TAYLOR & HALSE, 33 L. J. P. M. & A. 137 ; 11 L. T. 44 ; 10 Jur. N. S. 1035.
Annotations :—*As to* (3) **Follod.** Barnes *v.* Barnes & Beaumont (1897), 16 N. Z. L. R. 4.—**N.Z.**

b. —— *No evidence adduced by wife.*]—A husband filed a petition for a divorce against his wife on the ground of adultery. The wife appeared, & filed an answer denying the adultery. At the hearing counsel for the wife appeared, but did not adduce evidence. No application had been made before trial for payment of or security for the wife's costs :—*Held :* the wife was not entitled to wife's costs.—MCKINLAY *v.* MCKINLAY & MCKINLAY (1905), 24 N. Z. L. R. 981.—**N.Z.**

PART XIII. SECT. 18, SUB-SECT. 3.—C. (b).

t. *Liability of husband—Wife's defence bonâ fide.*]—Where a wife who is sued for divorce has taxed her costs under Divorce Rule 42, & there is nothing to show that she has separate property & her defence appears to be *bonâ fide*, the husband should be required to pay or secure the sum so taxed, even though he has no property, & the fact that the wife has a small separate estate is not conclusive against her.—WARD *v.* WARD, [1921] 1 W. W. R. 161.—**CAN.**

a. —— *Wife in receipt of allowance—Husband's means small.*]—A wife resp., against whom a decree for dissolution of marriage had been made on the ground of her adultery, allowed her costs against her husband, petitioner, to the extent of the amount for which the husband had been previously ordered to give security, but not in full, it appearing that the wife was in receipt of an allowance, & that the husband was not a person of large means, & a good deal of time having been occupied at the hearing in unfounded inquiries as to the conduct of the husband & the manner of getting up the evidence.—SOLER *v.* SOLER (1917), 41 Calc. 35.—**IND.**

s. —— *Judicial separation—Appeal costs.*]—Where a married woman fails in supporting upon appeal a decree of separation *a mensâ et thoro*, she cannot have the costs of the appeal ; but the reversal of the decree will not be extended to that part of it which gave her the expenses in the ct. below.—PATERSON *v.* RUSSELL (1850), 7 Bell, Sc. App. 337 ; 22 Sc. Jur. 628 ; *revsg.* 11 Dunl. (Ct. of Sess.) 421 ; 21 Sc. Jur. 116.—**SCOT.**

PART XIII. SECT. 18, SUB-SECT. 3.—C. (c).

4897 i. *General rule—Wife entitled to costs.*]—Where the wife is successful in her defence to an action of divorce the rule of the law of Scotland is to give the wife her costs as between agent & client.—GRANT *v.* GRANT, [1905] A. C. 466.—**SCOT.**

Sect. 18.—*Order for costs: Sub-sect.* 3, *C.* (*c*), *D.* & *E.* (*a*) & (*b*).]

(1868), 38 L. J. P. & M. 10. *Generally*, **Refd.** Yowell *v.* Yowell, Serrash & Burleigh (1875), 24 W. R. 59; Bernstein *v.* Bernstein (1893), 69 L. T. 513; Gilroy *v.* Gilroy, [1914] P. 122.

4902. ——.]—Where on a husband's petition for a dissolution of marriage on the ground of the wife's adultery, resp. proved that he also had been guilty of adultery, the ct. granted an order for her full costs; but allowed the petition to remain on the file for a month, to enable petitioner, if he thought fit, to move in the meantime for a new trial.—BRIDGES *v.* BRIDGES & BARNETT (1867), 16 L. T. 34.

4903. ——.]—BARNES *v.* BARNES & BEAUMONT, No. 3450, *ante*.

4904. ——.]—In a husband's suit for dissolution on the ground of adultery, the wife charged her husband with adultery, & with conduct conducing to her adultery. The jury found both parties guilty, & the petition was dismissed:—*Held:* that resp. had succeeded in her litigation, & ordertd her all the costs of her defence beyond the sum for which security had been given in the registry.—CHALDECOTT *v.* CHALDECOTT & CARTWRIGHT (1873), 29 L. T. 699.

4905. Petitioner guilty of neglect & conduct conducing to adultery.]—BROWN *v.* BROWN & ROBEY, No. 3080, *ante*.

4906. Abortive trial.]—At the trial of a petition by a husband for divorce the jury disagreed, & were discharged without giving a verdict. The ct. upon the application of the wife, made an order that her costs of the hearing should be taxed & paid in full, & refused to limit such costs to the amount deposited in ct.—HURLEY *v.* HURLEY & MENZIES, [1891] P. 367; 61 L. J. P. 14; 65 L. T. 353; 8 T. L. R. 416.

Annotations:—**Folld.** Delaforce *v.* Delaforce & Driscoll, [1892] W. N. 68. **Distd.** Waudby *v.* Waudby & Bowland (1901), 84 L. T. 571. **Consd.** Kemp-Welch *v.* Kemp-Welch & Crymes, [1910] P. 233.

4907. ——.]—DELAFORCE *v.* DELAFORCE & DRISCOLL, [1892] W. N. 68.

Annotation:—**Distd.** Waudby *v.* Waudby & Bowland (1901), 84 L. T. 571.

D. Conduct of Wife's Solicitor.

4908. Duty of wife's solicitor—To bring forward any defence — Unless clearly unfounded.]—A husband promoted a suit in the Consistory Ct. of London against his wife for a divorce *a mensâ et thoro* by reason of her adultery. A libel was brought in by the husband charging the adultery, & a responsive allegation by the wife denying it; witnesses were examined on the libel, & allegation, & after publication of their evidence the wife brought in additional articles, verified, according to the practice of the Ecclesiastical Cts., by the wife's affidavit, pleading condonation during the progress of the suit. Witnesses were examined on the additional articles, but at the hearing the plea of condonation set up by them was abandoned by the counsel for the wife on the ground that the evidence in support of it failed. Upon an application by the proctor for the wife for an order on the husband to pay the costs incurred by him in respect of the additional articles:—*Held:* in the Ecclesiastical Ct. the proctor of a wife defending a suit for divorce was entitled to receive from the husband the reasonable costs for conducting her defence. A proctor refusing to bring before the ct. any defence set up by the wife not plainly unfounded would incur a very grave responsibility, & the wife's proctor was therefore, in the present case, entitled to have his costs from the husband.—WELLS *v.* WELLS (1858), 1 Sw. & Tr. 308; 27 L. J. P. & M. 95; 164 E. R. 742.

Annotation:—**Refd.** Jones *v.* Jones (1872), L. R. 2 P. & D. 333.

4909. —— Investigation of defence—Satisfaction as to reasonableness.]—In a suit by a husband for divorce on the ground of his wife's adultery, the wife in her answer denied the adultery, & made countercharges that petitioner had been guilty of great unkindness towards her, & had kept her without food, & had deserted her; & further, that he had committed adultery with a woman unknown. Particulars of this last plea were asked for & given. Petitioner, in his reply, denied the countercharges. At the hearing, the wife did not go into the witness-box, & the ct. found for petitioner upon all the issues & pronounced a decree *nisi*. Upon application by counsel for resp. that she should be allowed the usual order for her costs, the judge expressed the opinion that, as the case was undefended, no such costs ought to be allowed without an explanation from the solr. as to how he came to put an answer upon the record, & to contest the case at all. Counsel for resp. thereupon called the country solr. who had acted as solr. for resp. & he stated, in effect, that resp. brought him the petition & citation with which she had been served, & asked him to act for her; that she instructed him that the charge made against her in the petition was untrue, but that she had been requested to leave the house where she had been staying. The solr. saw resp.'s sister, in reference to the countercharges of unkindness & desertion, & both she & resp. asserted that no misconduct had taken place prior to the alleged desertion. He did not make inquiries of the people of the house where resp. had resided apart from her husband, as he gathered that the latter had received his information from those people, & that as they were hostile to resp. & one or more of them would probably be called at the hearing in support of petitioner's case, anything that they might be able to say in regard to resp. had better be left to be dealt with in cross-examination. The solr. further stated that this was the first divorce case in which he had been retained, & that he had acted throughout with *bona fides*:—*Held:* (1) to warrant a petitioner husband in opposing, & the ct. in refusing, the usual order for a wife's costs, it is not necessary to show "misconduct" on the part of the wife's solr; (2) a solr. acting for the wife in a matrimonial case, is not entitled to rely upon his client's instructions, but, in order to entitle him to look to the husband for payment of the wife's costs, he must fairly investigate for himself the various points put forward by the wife as a defence, & must satisfy himself in regard to their reasonableness; upon the authorities of *Robertson* v. *Robertson*, & *Favagrossa*, No. 4960, *post*; & *Ash* v. *Ash*, No. 4876, *ante*, the usual order for wife's costs be refused, & the amount in ct. be paid out to petitioner.—WALKER *v.* WALKER & LAWSON (1897), 76 L. T. 234.

Annotations:—*As to* (2) **Apld.** Stokes *v.* Stokes & Claybrook (1897), 76 L. T. 236, n. **Dbtd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

PART XIII. SECT. 18, SUB-SECT. 3.—D.

c. Wife's defence discredited—Reasonable belief in bona fides.]—Petitioner sought a divorce from his wife on the ground of her alleged misconduct with co-resp. Resp. & co-resp. gave evidence denying the allegations made against them, but the jury discredited their denials & found for petitioner. There was nothing to

4910. Disallowance of wife's costs—Misconduct of solicitor.]—The ct. has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, although security for such costs has been deposited in the registry by the husband, but it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground.

Husband & wife agreed to live separate & apart, & a deed was executed by which the husband covenanted to allow the wife £60 a year for her maintenance. A year afterwards the wife filed a petition for judicial separation on the ground of cruelty, but failed to support the charge, & the petition was dismissed. The ct., being of opinion that the wife's attorney had acted in the belief of the genuineness of her case, allowed the wife's costs up to the amount for which security had been given.—FLOWER *v.* FLOWER (1873), L. R. 3 P. & D. 132; 42 L. J. P. & M. 45; 29 L. T. 253; 21 W. R. 776.

Annotations :—**Consd.** Butler *v.* Butler (1890), 15 P. D. 126; Ash *v.* Ash, [1893] P. 222; Hough *v.* Hough (1894), 10 T. L. R. 587. **Refd.** Robertson *v.* Robertson (1881), 6 P. D. 119; Smith *v.* Smith (1882), 7 P. D. 81; Haddon *v.* Haddon (1887), 56 L. J. M. C. 69; Hall *v.* Hall, [1891] P. 302; Russell *v.* Russell, [1892] P. 152; Beer *v.* Beer (1906), 94 L. T. 704; Abrahams *v.* Buckley, [1924] 1 K. B. 903.

4911. —— ——.]—The ct. will not refuse the "usual order" for a wife's costs, unless her solr. has been guilty of improper conduct in the institution or prosecution of the suit. A wife petitioned for a judicial separation upon the ground of cruelty, & the ct., in dismissing her petition, expressed a very strong opinion that the charges she had made against her husband were trumpery. It was shown that she had separate estate producing an annual income of £29, the husband's income being £135, & was supporting her two young children without any assistance from her husband. The ct. declined to condemn her in the costs of the suit, &, being of opinion that no suggestion of improper conduct in bringing the case before the ct. could be made against her solr., upon the wife's application, made the "usual order" for her costs.—AIRES *v.* AIRES (1891), 65 L. T. 859.

4912. —— ——.]—WALKER *v.* WALKER & LAWSON, No. 4909, *ante*.

4913. —— **Reasonable belief in bona fides of wife's defence.**]—FLOWER *v.* FLOWER, No. 4910, *ante*.

4914. —— ——.]—Where a wife had made a confession in the presence of several persons, & there was some evidence that the fact of such confession had come to the knowledge of her solr.: —*Held:* (1) the money paid into ct. to secure the wife's costs should be paid out to petitioner, unless the wife's solr. should within fourteen days satisfy the ct. he had reason to believe the wife had a *bonâ fide* defence; (2) the wife's costs should in any event be taxed against co-resp., &, if recovered, paid to the wife's solr., unless he had already received the amount from petitioner.—TOWNSON *v.* TOWNSON & BUCKNALL (1898), 67 L. J. P. 68; 78 L. T. 54.

Annotation :—*As to* (1) **Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

4915. —— —— **Speculation as to strength of husband's case.**]—Security for the costs of the wife's defence to a suit for dissolution of marriage is only ordered upon the basis that the wife has a *bonâ fide* defence. In order that the solr. for the wife, who is unsuccessful in the suit, should obtain an order for the wife's costs there must have been reasonable grounds for defending. It is not enough that the solr. thought that the husband would not be able to establish his case.—KERSHAW *v.* KERSHAW & BERRY (1907), 23 T. L. R. 296.

4916. —— ——.]—FRANKLIN *v.* FRANKLIN & MINSHALL, No. 4305, *ante*.

4917. —— ——.]—Where a wife's claim to restitution of conjugal rights was found to be groundless, & the husband entitled to a decree of judicial separation on the ground of her having deserted him for two years or upwards, & an order for security for the wife's costs of the trial, & payment of her costs to setting down had been conditional on an undertaking by her solrs. to refund any sum paid under it, if required by the ct. to do so:—*Held:* without thereby intending any reflection on the wife's solrs., the case was not one in which the husband should be required to pay any part of her costs.—USHER *v.* USHER (1922), 128 L. T. 26.

E. Where Wife has Separate Property.

(a) Discretion of Court.

See Sub-sect. 2, *ante*.

(b) Wife's Liability for Costs.

See Matrimonial Causes Rules, 1924, rr. 91–93.

4918. Possession of separate property entails liability.]—The general rule is that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since marriage gives all the property to the husband. The rule, however, is not universal; the exception is where the reason fails, where the wife has separate property of her own (SIR JOHN NICHOLL).—BEEVOR *v.* BEEVOR (1809), 3 Phillim. 261; 161 E. R. 1319.

Annotation :—**Refd.** Belcher *v.* Belcher (1836), 1 Curt. 444.

4919. ——.]—Where the wife is pltf. & fails in her suit, if her income is large enough in proportion to the income of the husband, the ct. will not order her costs to be taxed as against the husband, but will leave her to pay those costs herself.

The general presumption is that the wife has no means, & then the husband must bear the burden; but to this there are exceptions, as where the wife has a large income in comparison with the husband.

When the wife has no income whatever, however great her demerits, whether she be pltf. or deft., the husband must pay the whole costs, even the costs of vexatious appeals (DR. LUSHINGTON).—FYLER *v.* FYLER (1856), Dea. & Sw. 175; 5 W. R. 9; 164 E. R. 540.

4920. ——.]—MILNE *v.* MILNE & FOWLER, No. 4926, *post*.

4921. Liability for own costs—Wife unsuccessful petitioner.]—POMFRET *v.* POMFRET (1796), cited in 3 Phillim. p. 262; 161 E. R. 1320.

Annotations :—**Consd.** Beevor *v.* Beevor (1809), 3 Phillim. 261. **Mentd.** Cooke *v.* Cooke (1812), 2 Phillim. 40; Otway *v.* Otway (1813), 2 Phillim. 109; Smith *v.* Smith (1814), 2 Phillim. 235; Chetwynd *v.* Chetwynd (1865), 35 L. J. P. & M. 21; Dean *v.* Dean, [1923] P. 172.

4922. —— ——.]—FYLER *v.* FYLER, No. 4919, *ante*.

4923. —— —— **Suit improperly instituted.**]—A wife having failed to establish a charge of cruelty, her petition for judicial separation was dismissed. As she had a larger separate income than the income of the husband, & as the ct. was of opinion that the suit had been improperly

show that resp.'s solrs. had any reason for doubting the *bonâ fide* nature of her defence:—*Held:* resp.'s solrs. were entitled to their costs.—BURKARDT *v.* BURKARDT (1907), 26 N. Z. L. R. 940.—**N.Z.**

Sect. 18.—*Order for costs: Sub-sect.* 3, *E.* (*b*) & (*c*), *F.* (*a*) & (*b*).]

instituted, an order for the payment of her costs of the hearing, under Rule 159, was refused, although they had been taxed, & security for the amount had been deposited in the registry.—HEAL *v.* HEAL (1867), L. R. 1 P. & D. 300; 36 L. J. P. & M. 62.

Annotation:—**Refd.** Russell *v.* Russell, [1892] P. 152.

4924. —— Wife guilty of adultery.]—Whenever a wife, who has had a decree *nisi* pronounced against her, on the ground of her adultery, is proved to be absolutely possessed of separate property, the ct. will not only refuse her the usual order for wife's costs, but will, upon petitioner's application, make an order against her that she pay the costs of the suit.—MILLWARD *v.* MILLWARD & ANDREWS (1887), 57 L. T. 569; 51 J. P. 616.

4925. Liability for costs of proceedings—Petition by husband—Groundless countercharges by wife.]—The husband having sued for restitution of conjugal rights, the wife in her answer made charges of serious misconduct against him, which, however, were abandoned at the hearing. The ct. made a decree in favour of the husband; but the wife evaded service of such decree by remaining out of the jurisdiction of the ct. On being satisfied that the wife had a sufficient separate income, the ct. condemned her in the costs of the proceedings.—MILLER *v.* MILLER (1869), L. R. 2 P. & D. 13; 39 L. J. P. & M. 4; 21 L. T. 471; 18 W. R. 152; *subsequent proceedings* (1870), L. R. 2 P. & D. 54.

Annotation:—**Apld.** Hyde *v.* Hyde, Fellgate, etc. (1888), 59 L. T. 523.

4926. —— —— ——.]—In a suit for dissolution of marriage by reason of adultery, both resp. & co-resp. appeared & pleaded. At the trial no evidence was offered in support of any of their pleas, & a verdict having been returned in favour of petitioner, with damages, a decree *nisi* was made. Resp. had a large separate income. The ct. ordered her to pay the costs of the proceedings, & co-resp. to pay such costs as had been incurred by the issues he had raised on his answer.—MILNE *v.* MILNE & FOWLER (1871), L. R. 2 P. & D. 202; 40 L. J. P. & M. 13; 23 L. T. 877; 19 W. R. 423.

Annotation:—**Apld.** Hyde *v.* Hyde, Fellgate, etc. (1888), 59 L. T. 523.

4927. —— —— Wife guilty of adultery.]—MILLWARD *v.* MILLWARD & ANDREWS, No. 4924, *ante*.

4928. —— —— ——.]—HYDE *v.* HYDE & FELLGATE, No. 4845, *ante*.

4929. —— —— ——.]—Where there is evidence that the wife, resp., is possessed of separate estate, over which there is no restraint on anticipation, the ct. has power, under Matrimonial Causes Act, 1857 (c. 85), s. 51, to order the costs of the suit to be paid out of the wife's separate estate.—CHALDECOTT *v.* CHALDECOTT & CARPENTER (1920), 64 Sol. Jo. 242.

4930. —— Unsuccessful petition by wife.]—CUNO *v.* CUNO, No. 3338, *ante*.

4931. What property liable—Allowance under separation deed.]—Upon a decree *nisi* for divorce, granted upon a husband's petition, the ct. made an order for costs against resp. whose separate estate consisted of an allowance payable under a separation deed; but, there being no evidence that resp. was living in adultery at the time of the making of the order, directed that execution should not be enforced beyond one-half of the amount of the allowance.—CLARK *v.* CLARK & SALDJI, [1906] P. 331; 76 L. J. P. 16; 95 L. T. 550; 22 T. L. R. 796.

Annotation:—**Mentd.** Paquine *v.* Snary, [1909] 1 K. B. 688.

4932. —— Property unrestrained from anticipation.]—CHALDECOTT *v.* CHALDECOTT & CARPENTER, No. 4929, *ante*.

(*c*) *Wife's Right to Costs.*

See Matrimonial Causes Rules, 1924, rr. 91–93.

4933. Wife's petition successful.]—D'AGUILAR *v.* D'AGUILAR, No. 4064, *ante*.

4934. ——.]—As to her [the wife] having an independent income & he [the husband] being destitute, that is no reason why she having applied for redress to the ct. & having established her case, should not be entitled to her costs. The insufficiency of the fortune of the husband must be left to his own consideration, as it is his own misconduct that has made him liable to this judgment. I shall therefore condemn him in costs (SIR WILLIAM SCOTT).—SOILLEUX *v.* SOILLEUX (1802), 1 Hag. Con. 373; 161 E. R. 586.

Annotations:—**Mentd.** Durant *v.* Durant (1825), 1 Hag. Ecc. 733; Taylor *v.* Taylor (1818), 6 Notes of Cases, 558.

4935. No application by husband for relief—Partial failure of petition.]—Where the wife succeeds in a cause, & the husband makes no application during the progress of the suit to be relieved against her costs; though she has a sufficient independent income, & fails in one part of her case, he will be liable to the whole costs.—BARROW *v.* BARROW (1853), 17 Jur. 240.

4936. —— No appearance by husband.]—WILCOCKS *v.* WILCOCKS (1859), 32 L. J. P. M. & A. 205.

4937. Wife's property restrained from anticipation.]—On a husband's petition for divorce it appeared that resp. had separate estate, but she was restrained from anticipation under the marriage settlement, & the solr. to the trustees was called to prove that some of resp.'s income passed through his hands to her, but he had not received the trustees' consent that he should give evidence:—*Held:* the witness could not give evidence on the matter without the leave of the trustees, & as there was no evidence that resp. possessed any property free from restraint on anticipation resp. could not be condemned in costs.—HUMPHERY *v.* HUMPHERY & WAKE (1917), 33 T. L. R. 433.

—— Removal of restraint for payment of costs.]—*See* Part VI., Sect. 2, sub-sect. 2, *ante*.

F. What Costs Allowable.

(*a*) *In General.*

4938. Costs of special jury—Discretion of court.]—When, upon the application of a wife, a cause is tried by a special jury, the ct. may in its discretion refuse to allow the wife the costs of the special jury.—SCOTT *v.* SCOTT (1862), 32 L. J. P. M. & A. 40.

4939. —— ——.]—TAYLOR *v.* TAYLOR, No. 4640, *ante*.

4940. Part costs—Groundless allegations against husband—Husband's petition.]—BURROUGHS *v.* BURROUGHS, BURROUGHS *v.* BURROUGHS & SILCOCK, No. 4039, *ante*.

4941. —— —— ——.]—Where a wife, in her answer to a petition for dissolution, traversed the

---

PART XIII. SECT. 18, SUB-SECT. 3.—F. (a).

d. *Fees of counsel.*]—BELL *v.* BELL, 20 C. L. T. 20.—CAN.

e. —— *Solicitor acting as counsel.*]—The parties to an alimony suit consented to a decree, whereby deft. was ordered forthwith to pay pltf. all disbursements in the suit as between solr. & client:—*Held:* the master had

adultery charged, & brought several counter-charges against petitioner, which appeared at the hearing to be entirely without foundation, the ct. made the following order as to her costs of the hearing: her costs to be taxed as if she had only traversed the adultery & had gone to trial on that issue alone, all costs of & occasioned by the rest of her answer being disallowed: from her costs thus taxed, any costs to be deducted which petitioner had reasonably incurred for the purpose of meeting the charges made against him in the answer; & the residue, if any, to be paid to resp. out of the sum deposited in the registry by petitioner to meet her costs of the hearing.—CLARK *v.* CLARK, PERRIN & CUMINS (1865), 4 Sw. & Tr. 111; 34 L. J. P. M. & A. 71; 12 L. T. 148; 13 W. R. 549; 164 E. R. 1458.

Annotation:—**Consd.** Wilson *v.* Wilson (1872), 41 L. J. P. & M. 74.

4942. ——— ———.]—MORGAN *v.* MORGAN & PORTER, No. 3288, *ante*.

4943. ——— ———.]—After the commencement of the suit the wife, though she had no reason for suspecting her husband, employed detectives to search for evidence of adultery against him. Evidence was procured, but was not believed at the trial. The ct. directed that the wife's costs on this part of the case should be disallowed.—WILSON *v.* WILSON (1872), L. R. 2 P. & D. 435; 41 L. J. P. & M. 74; 27 L. T. 351; 20 W. R. 891.

Annotations:—**Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139; Niboyet *v.* Niboyet (1878), 4 P. D. 1; Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; Armytage *v.* Armytage, [1898] P. 178; Bater *v.* Bater, [1906] P. 209; Ogden *v.* Ogden (otherwise Philip), [1908] P. 46; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271; De Montaigu *v.* De Montaigu, [1913] P. 154; Keyes *v.* Keyes & Gray, [1921] P. 204.

4944. Wife's petition—Costs in respect thereof disallowed.]—ASH *v.* ASH, No. 4876, *ante*.

4945. Husband's costs of wife's appeal—Appeal frivolous—Payment from fund in court—Lien of wife's solicitor.]—The Ct. of Appeal has jurisdiction to order the husband's costs of an unsuccessful appeal by the wife in divorce proceedings to be paid out of money which he has paid into ct. to defray the wife's costs of the hearing; but the ct. will not make such order to the prejudice of the lien of the wife's solr. unless he has so conducted himself as to justify so strong a measure. A husband obtained a decree *nisi* for dissolution of marriage & the usual order was made for payment of the costs of the wife. The wife appealed, & the appeal was dismissed with costs as frivolous. The wife thereupon applied to have money which had been paid into ct. by the husband as security for her costs paid out to her solr., whose taxed costs under the decree *nisi* exceeded that amount, & the husband made a cross application that his costs of the appeal might be paid out of the money in ct.:—*Held:* though the wife's appeal was a hopeless one, there was no ground for affirming that her solr. acted vexatiously or oppressively in conducting it & he ought not to be deprived of his lien on the fund for the costs of the wife's defence.—HALL *v.* HALL & KAY, [1891] P. 302; 60 L. J. P. 73; 65 L. T. 206; 7 T. L. R. 590, C. A.

Annotations:—**Consd.** Russell *v.* Russell, [1892] P. 152. **Mentd.** Cramp *v.* Cramp & Freeman, [1920] P. 158; Crocker *v.* Crocker, [1921] P. 25.

4946. Costs of Official Solicitor—Acting as guardian ad litem to respondent husband.]—JACKSON (OTHERWISE MACFARLANE) *v.* JACKSON, No. 5045, *post*.

(b) When Limited to Security in Court.

4947. Wife unsuccessful.]—WHITE *v.* WHITE (1859), as reported in Sea. & Sm. 77.

Annotations:—**Apld.** Sopwith *v.* Sopwith (1860), 6 Jur. N. S. 404. **Mentd.** Hall *v.* Hall (1864), 3 Sw. & Tr. 347; Goodden *v.* Goodden, [1892] P. 1.

4948. ———.]—On application to the full ct. for a decree of dissolution on the verdict of a jury, the marriage must be proved if it was not put in evidence at the trial before the jury. Generally, where the husband's petition is opposed, & the verdict & decree are in his favour, co-resp. will be condemned in the whole costs of the proceeding.

The money paid into ct. by a husband petitioning for dissolution of marriage to meet his wife's costs of the hearing, is primarily liable to the payment of those costs when taxed, although co-resp. may have been condemned in all the costs, including those of the wife, & the husband may be unable to obtain them from him.

Where the wife's taxed costs up to the trial, & a sum of money to meet her further expenses had been paid into ct. by the husband before the trial was allowed to proceed, the ct., after decreeing dissolution, & on motion that such sum should be at once paid out to the husband, directed such sum to remain in ct. till the whole costs should be taxed; & on subsequent application for payment of the wife's taxed costs, directed such costs to be satisfied out of the sum of money to be paid into ct.—EVANS *v.* EVANS & ROBINSON (1859), 1 Sw. & Tr. 328; 28 L. J. P. & M. 136; 32 L. T. O. S. 244; 23 J. P. 407; 5 Jur. N. S. 606; 7 W. R. 181; 164 E. R. 751.

Annotations:—**Consd.** Smith *v.* Smith (1882), 7 P. D. 84. **Apld.** Irwin *v.* Irwin & Layard (1890), 59 L. J. P. 53. **Refd.** Keats *v.* Keats & Montezuma (1859), 1 Sw. & Tr. 334; Russell *v.* Russell, [1892] P. 152.

4949. ———.]—GLENNIE *v.* GLENNIE & BOWLES, No. 4832, *ante*.

4950. ———.]—In a husband's suit for dissolution of marriage petitioner was ordered by the registrar to pay into ct., or give security for, a certain sum for resp.'s costs. No appeal was brought by resp. on the ground of the insufficiency of the sum named, for which security was afterwards given. At the trial a decree *nisi* was granted, & the three co-resps. were condemned in costs. The ct. made the usual order as to the wife's costs; no application for the allowance of additional costs being made on her behalf. After the decree had been made absolute the ct. refused to order payment by petitioner of resp.'s taxed costs beyond the amount secured.—SMITH *v.* SMITH, MAJOR, CHILD & RABETT (1882), 7 P. D. 84; 51 L. J. P. 31; 46 L. T. 696; 30 W. R. 688.

Annotations:—**Consd.** Russell *v.* Russell, [1892] P. 152; Palmer *v.* Palmer & Stockley, [1914] P. 116. **Refd.** Nairne *v.* Nairne (1901), 71 L. J. P. 37; Waudby *v.* Waudby & Bowland (1901), 84 L. T. 571; Jinks *v.* Jinks (1911), 104 L. T. 355; Betton-Bright *v.* Betton-Bright, [1920] P. 338 Franklin *v.* Franklin & Minshall, [1921] P. 407.

4951. ———.]—Where the registrar has directed a sum of money to be paid into ct. to meet the expenses of the wife's petition at the hearing, & her suit fails, the husband will not be liable to a greater amount than the sum so paid in, though the wife's costs as ascertained on taxation exceed that sum.—SOPWITH *v.* SOPWITH (1860), 2 Sw. & Tr. 105; 29 L. J. P. M. & A. 132; 2 L. T. 472; 6 Jur. N. S. 404; 8 W. R. 552; 164 E. R. 932.

Annotation:—**Refd.** Ellyatt *v.* Ellyatt, Taylor & Halse (1864), 3 Sw. & Tr. 503.

4952. "Usual order for wife's costs"—No appeal from order to give security—No order for

properly allowed to pltf. a sum paid by pltf. to her solrs., they being also counsel, for counsel fees on the examination & hearing of the cause.—BUCKE *v.* BUCKE (1874), 21 Gr 77.—**CAN.**

Sect. 18.—*Order for costs: Sub-sect.* 3, *F.* (*b*) & (*c*); *sub-sect.* 4, *A.*, *B.* & *C.*

further security.]—(1) On a wife's petition for divorce, where the husband has been ordered to pay petitioner's costs up to a certain date & to lodge in ct. or give security for a fixed sum to cover the costs & expenses of petitioner of & incidental to the hearing of the suit, & there has been no appeal from the registrar as to amount & no order for further security, the wife is not entitled under the "usual order for wife's costs" to a larger sum than that lodged in ct. or for which security has been given.

(2) It appears to me desirable in drawing up the decree that the order for costs should be written at large, & not merely expressed in the form of "the usual order" (ATKIN, L.J.).—BETTON-BRIGHT *v.* BETTON-BRIGHT, [1920] P. 338; 89 L. J. P. 243; 123 L. T. 797; 36 T. L. R. 777, C. A.

Annotation:—*As to* (1) **Refd.** Rutter *v.* Rutter (1920), 90 L. J. P. 129.

(c) When not Limited to Security in Court.

4953. Petition by husband—Wife proved innocent.]—BURROUGHS *v.* BURROUGHS, BURROUGHS *v.* BURROUGHS & SILCOCK, No. 4039, *ante*.

4954. —— ——.]—Where the husband's petition is dismissed, & the wife's costs of the hearing exceeds the sum secured or paid into the registry to meet them, the husband is liable to pay the balance.

Application for the balance should be made on summons, & not on motion.—COOKE *v.* COOKE & ALLEN (1864), 3 Sw. & Tr. 603; 34 L. J. P. M. & A. 15; 164 E. R. 1409.

4955. —— ——.]—When in a divorce suit the wife has been acquitted of adultery it is the practice, except in very special circumstances, to allow her full costs.—WELLBORNE *v.* WELLBORNE & EVERED (1890), 7 T. L. R. 170.

4956. —— ——.]—NICHOLSON *v.* NICHOLSON & RATCLIFFE, No. 4887, *ante*.

4957. —— **Wife proved guilty—Successful cross-charge by wife.**]—STARKEY *v.* STARKEY & IRWINN, No. 4898, *ante*.

4958. —— —— ——.]—WATSON *v.* WATSON & WILKINSON (1862), 31 L. J. P. M. & A. 102, n.

4959. —— —— ——.]—CHALDECOTT *v.* CHALDECOTT & CARTWRIGHT, No. 4904, *ante*.

4960. —— ——.]—Where a decree *nisi* is made upon a husband's petition for divorce, he must nevertheless pay all the costs properly incurred by the wife in defending herself against the charges brought against her.—ROBERTSON *v.* ROBERTSON & FAVAGROSSA (1881), 6 P. D. 119; 51 L. J. P. 5; 45 L. T. 237; 29 W. R. 880, C. A.

Annotations:—**Consd.** Smith *v.* Smith (1882), 7 P. D. 84. **Apld.** Otway *v.* Otway (1888), 13 P. D. 141. **Consd.** Russell *v.* Russell, [1892] P. 152; Ash *v.* Ash, [1893] P. 222. **Apld.** Kemp-Welch *v.* Kemp-Welch & Crymes, [1910] P. 233. **Folld.** Palmer *v.* Palmer & Stockley, [1914] P. 116. **Consd.** Franklin *v.* Franklin & Minshall, [1921] P. 407; Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Thompson *v.* Thompson (1886), 57 L. T. 374; Campbell *v.* Campbell (1887), 3 T. L. R. 558; Haddon *v.* Haddon (1887), 56 L. T. 716; Butler *v.* Butler (1890), 15 P. D. 126; Hall *v.* Hall, [1891] P. 302; Walker *v.* Walker & Lawson (1897), 76 L. T. 234; Waudby *v.* Waudby & Bowland (1901), 84 L. T. 571; Beer *v.* Beer (1906), 94 L. T. 704; Sanders *v.* Sanders, [1911] P. 101; Betton-Bright *v.* Betton-Bright, [1920] P. 338; Silver *v.* Silver & Grenfell, [1924] P. 163. **Mentd.** Young *v.* Thomas, [1892] 2 Ch. 134; Leekhampton Quarries Co. *v.* Ballinger & Cheltenham R. D. C. (1905), 93 L. T. 93.

4961. —— ——.]—At the trial of a husband's petition for divorce it appeared that a sum, estimated by one of the registrars, had been secured to meet the wife's costs of the hearing. Application was made at the end of the first day that further security should be given, in view of the hearing lasting more than one day. This application was acceded to by the presiding judge. At the conclusion of the case, which resulted in the husband's favour, the "usual order" for wife's costs was made; & the wife's solrs. thereupon carried in a full party & party bill of costs & proceeded to taxation. Objection was then taken by the husband's solr. to all items down to the adjournment of the ct. at the end of the first day of the hearing, including all items subsequent thereto & which would form part of the costs had the hearing terminated on the first day, in so far as the total allowed in respect of these items exceeded the amount actually secured before the hearing:—*Held:* the objection could not be sustained & the registrar was right in taxing the bill as between party & party, in accordance with the principle laid down in *Robertson* v. *Robertson & Favagrossa*, No. 4960, *ante*.

There was, however, nothing in that case or in the present decision which was to be taken as limiting in any degree the discretion as to costs vested in & exercisable by the judge presiding at the hearing or trial of a matrimonial suit, by statute, & by the Divorce Rules.—PALMER *v.* PALMER & STOCKLEY, [1914] P. 116; 83 L. J. P. 58; 110 L. T. 752; 30 T. L. R. 409; 58 Sol. Jo. 416.

Annotation:—**Refd.** Betton-Bright *v.* Betton-Bright, [1920] P. 338.

4962. —— **Trial abortive.**]—HURLEY *v.* HURLEY & MENZIES, No. 4906, *ante*.

4963. Petition by wife—New trial pending.]—After a wife had obtained a verdict, & a decree *nisi* had been pronounced, an order was made for the payment by the husband of her surplus costs of the hearing beyond the sum deposited in the registry, although a motion for a new trial & a bill of exceptions were pending.—CHETWYND *v.* CHETWYND (1865), 4 Sw. & Tr. 108; 34 L. J. P. M. & A. 65; 13 W. R. 528; 164 E. R. 1457.

SUB-SECT. 4.—BETWEEN PETITIONER AND CO-RESPONDENT.

A. Discretion of Court.

See Sub-sect. 2, *ante*.

B. Liability of Petitioner.

4964. Insufficient evidence against co-respondent—Conduct suspicious.]—In a suit for dissolution of marriage the jury found that resp. had been guilty of adultery, but that there was not sufficient evidence against co-resp. Co-resp.'s conduct having been such as to lead to a reasonable suspicion in the mind of petitioner that he had been guilty of adultery, the ct. refused to allow him his costs.—ROBINSON *v.* ROBINSON & GAMBLE (1860), 32 L. J. P. M. & A. 210.

4965. Husband's petition dismissed—As against co-respondent.]—POTTS *v.* POTTS & BATEMAN, No. 4581, *ante*.

4966. —— ——.]—SMITH *v.* SMITH & MILLET, No. 4610, *ante*.

PART XIII. SECT. 18, SUB-SECT. 4.—B.

f. *Insufficient evidence against co-respondent—Conduct suspicious—Costs not allowed.*]—Resp. was the servant of co-resp. as a shop assistant or clerk. They were in the habit of meeting in co-resp.'s shop or office on Saturday evenings. On one occasion the office or shop was in darkness for some time. The jury found co-resp.

4967. —— Jury discharged without verdict.]—The ct. will not always order petitioner to pay co-resp.'s costs when the petition is dismissed. In a case where the jury were discharged without giving a verdict, & petitioner did not proceed to a second trial, but allowed his petition to be dismissed, the ct., in the peculiar circumstances of the case, declined to order him to pay co-resp.'s costs.—BANCROFT *v.* BANCROFT & RUMNEY (1865), 34 L. J. P. M. & A. 144.

Annotation :—**Distd.** Whitmore *v.* Whitmore (1865), L. R. 1 P. & D. 25.

4968. —— ——.]—In a suit by a husband for dissolution the jury were discharged without giving a verdict : petitioner did not go to a second trial, & the petition was dismissed. There was no evidence connecting co-resp. with resp., except that of two witnesses, who swore to acts of adultery, but whose evidence did not satisfy the jury that adultery had been committed. The ct. condemned petitioner in co-resp.'s costs.—WHITMORE *v.* WHITMORE & BRETTELL (1865), L. R. 1 P. & D. 25 ; 35 L. J. P. & M. 32 ; 13 L. T. 610.

4969. Successive trials—First trial abortive—Through action of co-respondent—Costs of first trial.]—On the trial of the issues in a husband's suit for dissolution of marriage, no witnesses were called by resp. or co-resp. ; & the jury, being unable to agree, were discharged without giving a verdict. The issues came on for trial a second time, when witnesses were called by co-resp., & the jury found a verdict of not guilty. The ct. refused to condemn petitioner in co-resp.'s costs of the first trial.—WIGHT *v.* WIGHT & FIELD (1867), L. R. 1 P. & D. 368 ; 36 L. J. P. & M. 129 ; 16 L. T. 300.

4970. —— —— ——.]—WEST *v.* WEST & PARKER, WEST *v.* WEST, No. 4838, *ante*.

4971. Co-respondent dismissed—Foreign domicil.]—GRANGE *v.* GRANGE & ARENDT, No. 3950, *ante*.

4972. —— ——.]—Upon a husband's petition for dissolution of marriage, the alleged adulterer, who was served abroad, entered an absolute appearance, filed an affidavit stating that he was a French subject domiciled in France, & moved the ct. to dismiss him from the suit. The ct. held that it had no jurisdiction over appet. & dismissed him from the suit, but refused to give him his costs, inasmuch as he had entered an absolute appearance to the citation.—LEVY *v.* LEVY & DE ROMANCE, [1908] P. 256 ; 77 L. J. P. 95 ; 99 L. T. 312 ; 24 T. L. R. 466 ; 52 Sol. Jo. 379.

Annotation :—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

4973. —— ——.]—BAKER *v.* BAKER, BAKER *v.* BAKER & DWYER, No. 3829, *ante*.

4974. —— ——.]—Co-resp. in a divorce suit, who is resident & domiciled abroad, is entitled upon his own application to be dismissed from the suit on the ground that he is not subject to the jurisdiction of the ct., but he is not entitled to any costs which have been incurred by reason of his being cited as co-resp.—FAIRFAX *v.* FAIRFAX & DE LA CRUZ (1909), 99 L. T. 892 ; 25 T. L. R. 213.

Annotations :—**Refd.** Walter *v.* Walter & Bergmann (1909), 25 T. L. R. 473 ; Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

4975. —— ——.]—Co-resp. in a divorce suit, a domiciled Austrian, was served with the citation & petition in Paris. He entered an appearance under protest, & then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the ct. The ct. made an order dismissing co-resp. from the suit, but without costs.—WALTER *v.* WALTER & BERGMANN (1909), 25 T. L. R. 473.

Annotation :—**Refd.** Rayment *v.* Rayment & Stuart, Chapman *v.* Chapman & Buist, [1910] P. 271.

Effect of petitioner's conduct.]—*See* Sub-sect. 4, C. *(b)*, *post*.

C. Liability of Co-Respondent.

(a) In General.

4976. General rule—Husband's petition opposed—Decree in husband's favour.]—EVANS *v.* EVANS & ROBINSON, No. 4948, *ante*.

4977. Right to be heard as to costs—No answer filed.]—TOURLE *v.* TOURLE & RENSHAW, No. 4361, *ante*.

4978. Agreement between petitioner & co-respondent—That husband be liable for costs—Failure of co-respondent to fulfil all conditions.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 3368, *ante*.

4979. Liability although no dissolution pronounced.]—On a petition to the Divorce Ct. for the dissolution of marriage the ct., if the adultery is proved, has power to order all the costs of the proceedings to be paid by co-resp. although it does not decree dissolution of the marriage.—*Re* FORSTER *v.* FORSTER & BERRIDGE (1863), 4 B. & S. 187 ; 2 New Rep. 353 ; 32 L. J. Q. B. 312 ; 8 L. T. 661 ; 11 W. R. 799 ; 122 E. R. 430.

Annotations :—**Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239 ; R. *v.* Twiss (1869), L. R. 4 Q. B. 407 ; R. *v.* Surrey JJ. (1870), L. R. 5 Q. B. 466 ; Chambers *v.* Green (1875), L. R. 20 Eq. 552 ; Worthington *v.* Jeffries (1875), L. R. 10 C. P. 379 ; R. *v.* Richmond Confirming Authority, *Ex p.* Howitt, [1921] 1 K. B. 248.

4980. No prayer for costs—By successful petitioner.]—The ct. may order the costs of the proceedings to be paid by co-resp. where the adultery is established, although petitioner may not have prayed for such costs.—FINLAY *v.* FINLAY & RUDALL (1861), 30 L. J. P. M. & A. 104.

4981. Unproved charges against husband.]—HOWE *v.* HOWE, No. 5012, *post*.

4982. Where wife possessed of separate property—Wife & co-respondent liable.]—MILNE *v.* MILNE & FOWLER, No. 4926, *ante*.

4983. Wife not guilty—Adultery against her will—Petition dismissed.]—LONG *v.* LONG & JOHNSON, No. 2704, *ante*.

4984. No defence open to wife.]—TOWNSON *v.* TOWNSON & BUCKNALL, No. 4914, *ante*.

4985. Cross petitions—Consolidation—Costs of wife's suit.]—The power to order payment of costs conferred on the ct. by Jud. Act, 1890 (c. 44), s. 5, must be confined to parties to the proceedings. The co-resp. to a petition presented by the husband does not become a party to a cross-petition presented by the wife on the making of an order for the consolidation of the two suits, as such an order is only an arrangement for the convenience of trying the two suits together & involves nothing analogous to "consolidation" at common law. A co-resp., therefore, in such a case not being a "party to the proceedings" within Matrimonial Causes Act, 1857 (c. 85), there is no jurisdiction

not guilty of adultery :—*Held :* co-resp. having by his own actions brought suspicion on himself that he was in the

entitled to costs.—MARLIN *v.* , [1921] N. Z. L. R. 761.—**N.Z.**

PART XIII. SECT. 18, SUB-SECT. 4.—C. (a).

g. *In solicitor & client costs of petitioner—In addition to party & party costs.*]—In a suit for dissolution of marriage on the ground of adultery, & damages against co-resp., petitioner obtained a decree & recovered £100 damages, which sum was paid into ct. : —*Held :* petitioner was entitled out of the sum of £100 to his costs of the suit as between solr. & client over & above

Sect. 18.—*Order for costs: Sub-sect.* 4, *C.* (*a*), (*b*) & (*c*) *i.*]

to make him pay the costs of the wife's petition. An order directing payment of costs is not an interlocutory order working out the final judgment, but is part of the final judgment though separated from it by an interval of some days.

A suit for judicial separation was brought by the wife, & a suit for divorce was brought by the husband, to which A. was made a co-resp. These suits were consolidated by an order of the ct., & at the trial the wife's suit was withdrawn & a decree *nisi*, which was afterwards made absolute, was pronounced in the husband's suit with costs against the co-resp. On taxation of the costs the question was raised whether the husband's costs of the wife's suit ought to be taxed against the co-resp., & the registrar referred the question to the judge, who decided that they ought, holding that by virtue of the consolidation order the two suits became one, & that he therefore had jurisdiction to order the co-resp. to pay the husband's costs of the wife's suit under Matrimonial Causes Act, 1857 (c. 85), s. 34. The co-resp. appealed from this decision without obtaining leave to appeal:—*Held:* (1) the appeal lay without leave, the order not being an interlocutory order within Jud. Act, 1894 (c. 16), s. 1 (1) (*b*); (2) the order consolidating the two suits was not a consolidation within the strict meaning of the term so as to make the two suits one proceeding, & the ct. had no jurisdiction either under Matrimonial Causes Act, 1857 (c. 85), s. 34, or under Jud. Act, 1890 (c. 44), s. 5, to order the co-resp. to pay any part of the costs of the wife's suit to which he was not a party.—FORBES-SMITH *v.* FORBES-SMITH & CHADWICK, [1901] P. 258; 70 L. J. P. 61; 84 L. T. 789; 50 W. R. 6; 17 T. L. R. 587; 45 Sol. Jo. 595, C. A.

4986. Co-respondent an infant.]—Where a petitioner obtained a decree of divorce against resp. & co-resp., held that the fact that co-resp. was an infant & had not appeared was no reason for not making an order against him for costs.—BROCKELBANK *v.* BROCKELBANK & BORLASE (1911), 27 T. L. R. 569; 55 Sol. Jo. 717.

4987. Liability of executor of co-respondent.]—BRYDGES *v.* BRYDGES & WOOD, No. 5904, *post.*

Intervention of King's Proctor—Costs of intervention.]—*See* Sect. 20, sub-sect. 4, A. (*g*), *post.*

(b) Effect of Conduct of Petitioner.

4988. Petitioner guilty of adultery.] — GOODE *v.* GOODE & HAMSON, No. 3468, *ante.*

4989. ——.]—STARKEY *v.* STARKEY & IRWINN, No. 4898, *ante.*

4990. ——.]—WATSON *v.* WATSON & WILKINSON (1862), 31 L. J. P. M. & A. 102, n.

4991. ——.]—A jury found resp. guilty of adultery; petitioner guilty of conducing to his wife's adultery & of adultery, & assessed the damages at a farthing. The ct. dismissed all parties, condemned petitioner in resp.'s costs, made no order as to costs between petitioner & co-resp., & refused, even if it had the power in such circumstances, to make an order giving resp. the custody of or access to the children.—SEDDON *v.* SEDDON & DOYLE (1862), 2 Sw. & Tr. 640; 31 L. J. P. M. & A. 101; 7 L. T. 253; 164 E. R. 1146.

Annotations:—**Consd.** Bremner *v.* Bremner & Brett (1864), 3 Sw. & Tr. 378. **Folld.** Hick *v.* Hick & Kitchin (1864), 34 L. J. P. M. & A. 11; Barnes *v.* Barnes & Beaumont (1868), 38 L. J. P. & M. 10. **Consd.** Ravenscroft *v.* Ravenscroft (1872), L. R. 2 P. & D. 376; Bernstein *v.* Bernstein, [1893] P. 292. **Refd.** Yowell *v.* Yowell, Serrash & Burleigh (1875), 24 W. R. 59.

4992. ——.]—(1) Where there was a balance due from petitioner, the husband, for alimony & costs, & there had been an arrangement between the parties that the balance should be paid by monthly instalments of £20, & that an attachment should be granted against him to remain in the registry until he made default in payment of one of the instalments, the ct. dismissed the petition, & decreed an attachment on the terms arranged. The ct. has power to enforce an attachment after the suit has been dismissed.

(2) Where co-resp. is found to have been guilty of adultery he is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the ct. to dismiss the petition.—BREMNER *v.* BREMNER & BRETT (1864), 3 Sw. & Tr. 378; 33 L. J. P. M. & A. 202; 10 L. T. 99; 12 W. R. 444; 164 E. R. 1321.

Annotations:—*As to* (2) **Folld.** Baker *v.* Baker & Grigg (1867), 36 L. J. P. & M. 119. **Apld.** Quartermaine *v.* Quartermaine & Glenister (1911), 105 L. T. 80. **Refd.** Yowell *v.* Yowell, Serrash & Burleigh (1875), 24 W. R. 59; Waudby *v.* Waudby & Bowland, [1902] P. 85.

4993. ——.]—CONRADI *v.* CONRADI & FLASHMAN, No. 5057, *post.*

4994. ——.]—Upon a husband's petition for dissolution of marriage, no verdict was recorded upon the first trial, the jury being unable to agree upon some of the issues. On the second trial the jury found that resp. & co-resp. had committed adultery, & that petitioner had also committed adultery, but that resp. had condoned it. The ct. refused to grant petitioner a decree & dismissed his petition; but, upon the question raised as to costs:—*Held:* (1) the wife was entitled to be paid by petitioner her full costs of both trials; (2) petitioner was entitled to costs against co-resp. in respect of the issue found against the latter, & that the order must cover the costs of that issue on both the trials.—WAUDBY *v.* WAUDBY & BOWLAND, [1902] P. 85; 71 L. J. P. 43; 86 L. T. 123; 66 J. P. 280; 50 W. R. 176; 18 T. L. R. 150; 46 Sol. Jo. 124.

Annotation:—*As to* (1) **Refd.** Silver *v.* Silver & Grenfell, [1924] P. 163.

4995. Remiss conduct.]—Costs given against co-resp., who knew that resp. was a married woman, though the husband's conduct towards his wife was remiss.—BADCOCK *v.* BADCOCK & CHAMBERLAIN (1858), 1 Sw. & Tr. 189; 31 L. T. O. S. 268; 6 W. R. 737; 164 E. R. 686.

4996. —— **Conducing to wife's adultery.**]—SEDDON *v.* SEDDON & DOYLE, No. 4991, *ante.*

4997. Wife's profligate conduct known to husband.]—(1) Where the wife's conduct has been profligate & that to the husband's knowledge, before the adultery committed with the co-resp. the latter will not be liable to costs.

(2) On pronouncing a decree of dissolution of marriage, the ct. will make an order that a child in the custody of resp. be given up to petitioner, even when the child is of an age that entitles petitioner to the custody by common law right.—BOYD *v.* BOYD & COLLINS (1859), 1 Sw. & Tr. 562; 29 L. J. P. M. & A. 79; 8 W. R. 160; 1 L. T. 244; 164 E. R. 860.

the party-&-party costs already recovered from co-resp.—PACEY *v.* PACEY (1907), 26 N. Z. L. R. 1087.—**N.Z.**

h. *Whether liable for costs of abortive trial.*]—A suit for dissolution of marriage was tried twice. On the second occasion petitioner, whose case was strengthened by additional evidence, succeeded:—*Held:* in the circumstances petitioner was not entitled as against co-resp. to his costs of the abortive trial.—EVANS *v.* EVANS (No. 3) (1910), 30 N. Z. L. R. 347.—**N.Z.**

4998. ——.]—Where damages were claimed from a co-resp., & it appeared that resp. was leading an abandoned life when co-resp. made her acquaintance, & there was evidence raising a strong suspicion that petitioner must have been aware of that fact:—*Held:* co-resp. ought not to be condemned in costs, on the ground that the claim for damages was, under the circumstances, improper.—MANTON *v.* MANTON & STEVENS (1865), 4 Sw. & Tr. 159; 34 L. J. P. M. & A. 121; 11 Jur. N. S. 863; 164 E. R. 1477.

4999. Gross misconduct.]—Where in a suit for dissolution of marriage by a husband the adultery was proved, but the petition was dismissed on the ground of the gross misconduct of petitioner, the ct. refused to make any order as to the costs of petitioner or co-resp.—HICK *v.* HICK & KITCHEN (1864), 34 L. J. P. M. & A. 11.

5000. Connivance by petitioner.]—ELLAYTT *v.* ELLAYTT, TAYLOR & HALSE, No. 4901, *ante*.

5001. ——.]—A petition by a husband, & claiming damages from co-resp., was dismissed on the grounds of the connivance of petitioner & condonation, & petitioner was ordered to pay co-resp. his costs, although the adultery of resp. & co-resp. was proved.—ADAMS *v.* ADAMS & COLTER (1867), L. R. 1 P. & D. 333; 36 L. J. P. & M. 62; 16 L. T. 69.

Annotation:—**Consd.** Bernstein *v.* Bernstein, [1893] P. 292.

5002. ——.]—WILLIAMS *v.* WILLIAMS & GAZZARD (1897), *Times*, Nov. 4.

5003. Condonation of wife's adultery.]—NORRIS *v.* NORRIS, LAWSON & MASON, No. 3270, *ante*.

5004. ——.]—ADAMS *v.* ADAMS & COLTER, No. 5001, *ante*.

5005. ——.]—BERNSTEIN *v.* BERNSTEIN, TURNER & SAMPSON, No. 3213, *ante*.

5006. ——.]—WILLIAMS *v.* WILLIAMS & GAZZARD (1897), *Times*, Nov. 4.

5007. ——.]—HYMAN *v.* HYMAN & GOLDMAN, No. 3227, *ante*.

5008. Petitioner's conduct such as to invite challenge.]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 4837, *ante*.

(c) *Knowledge of Co-Respondent that Respondent Married.*

i. *In General.*

5009. Necessity for knowledge—Before liable for costs.]—(1) On proof of a petition for dissolution of marriage, by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards her previously to the adultery.

(2) Where there was no evidence that co-resp. when he committed the adultery knew that resp. was married, the ct. refused to order him to pay the costs.—BODDINGTON *v.* BODDINGTON & NOSSITER (1858), 27 L. J. P. & M. 53.

5010. —— ——.]—Costs refused against co-resp., there being no proof before the ct. that he was aware that resp. was a married woman, or of any of the circumstances under which the cohabitation with the husband was broken off.—TEAGLE *v.* TEAGLE & NOTTINGHAM (1858), 1 Sw. & Tr. 188; 27 L. J. P. & M. 55; 31 L. T. O. S. 268; 6 W. R. 736; 164 E. R. 686.

Annotations:—**Folld.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Consd.** Taylor *v.* Taylor & Kraft (1920), 123 L. T. 112.

5011. —— ——.]—Where there was no evidence to show that co-resp. when he first formed the connection with resp., knew that she was a married woman, the ct. refused to condemn him in costs.—PRISKE *v.* PRISKE & GOLDBY (1860), 4 Sw. & Tr. 238; 29 L. J. P. M. & A. 195; 164 E. R. 1507.

Annotations:—**Dbtd.** Learmonth *v.* Learmonth & Austin (1889), 62 L. T. 608. **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Taylor *v.* Taylor & Kraft (1920), 123 L. T. 112.

5012. —.]—Co-resp. appeared & denied the charge of adultery, & alleged condonation & adultery, on the part of petitioner. There was evidence that resp. & co-resp. had on several occasions cohabited, & that she became pregnant in consequence; but there was no evidence that co-resp. had been aware that she was married. The evidence in support of co-resp.'s plea of condonation & the countercharge of adultery was very insufficient. The ct. granted a decree *nisi*, refusing to condemn co-resp. in the costs of the issue of his adultery with co-resp., but condemned him in the costs of the issues raised by his other pleas.—HOWE *v.* HOWE (1867), 15 W. R. 498.

5013. —— ——.]—NORRIS *v.* NORRIS & SMITH, No. 4835, *ante*.

5014. —— ——.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD, ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante*.

5015. —— ——.]—GIBBS *v.* GIBBS & HEATHCOTE, No. 5024, *post*.

5016. No absolute rule.]—(1) There is no absolute rule of practice that a co-resp. cannot be condemned in costs unless at the time of the first misconduct he knew that the resp. was a married woman. Costs are always in the discretion of the ct.

(2) *Semble:* though on the assessment of damages evidence as to the means of co-resp. cannot be received, yet the general position & obligations of the parties are material for consideration in order that an assessment may be arrived at which co-resp. can discharge, & which will not defeat its object, but bring a sum into ct. to be dealt with.—BURNE *v.* BURNE & HELVOET, [1920] P. 17; 89 L. J. P. 18; 122 L. T. 224; 64 Sol. Jo. 132.

Annotations:—*As to* (1) **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. *As to* (2) **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Langrick *v.* Langrick & Funnell (1920), 89 L. J. P. 114.

5017. —— —— ——.]—LANGRICK *v.* LANGRICK FUNNELL, No. 4684, *ante*.

5018. Discretion of court unfettered.]—SMITH *v.* SMITH & REED, No. 4848, *ante*.

5019. Effect of knowledge—Co-respondent's behaviour imprudent.]—CARSTAIRS *v.* CARSTAIRS & DICKENSON, No. 5566, *post*.

5020. —— **Liability of co-respondent for whole costs.**]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 4837, *ante*.

5021. —— **Profligate life of respondent—Prior to adultery.**]—Where petitioner had lived separate from resp. for several years in consequence of her intemperance, & during the separation & prior to the adultery proved, she had been leading an abandoned life, the ct., notwithstanding that co-resp. must have known that resp. when he committed the adultery was a married woman, refused

Sect. 18.—*Order for costs: Sub-sect.* 4, *C.* (*c*) *i., ii. & iii., & (d); sub-sects.* 5, 6 & 7.]

to condemn him in costs.—NELSON *v.* NELSON (1868), L. R. 1 P. & D. 510.

—— **Acquired after commencement of adultery.**]—*See* Sub-sect. 4, C. (*c*) iii., *post.*

5022. Right to cross-examine witnesses—As to knowledge—Appearance entered—No answer filed.]—LYNE *v.* LYNE & BLACKNEY, No. 3937, *ante.*

Conduct of petitioner.]—*See* Sub-sect. 4, C. (*b*),

ii. *Proof of Knowledge.*

5023. Onus of proof on petitioner.]—BUTTERWORTH *v.* BUTTERWORTH & ENGLEFIELD, COLLINS *v.* COLLINS & HARRISON, BARRATT *v.* BARRATT & FOX, HOWELL *v.* HOWELL & WALKER, ADAMS *v.* ADAMS & WARD. ELLWORTHY *v.* ELLWORTHY & LEDGARD, No. 4676, *ante.*

5024. Surrounding circumstances—From which co-respondent's knowledge inferred.]—The discretion of the ct. as to costs is a judicial one, & a long course of decisions only allows a co-resp. to be condemned in costs if it is either shown that he knew, or circumstances proved which enable the ct. to find that he ought to have known, that resp. was a married woman. But there is no special rule as to the nature of the evidence required to prove such knowledge, & it may, like other facts in issue, be inferred from proved facts.—GIBBS *v.* GIBBS & HEATHCOTE (1920), 123 L. T. 206: 36 T. L. R. 503.

5025. —— ——.]—Costs may be awarded against a co-resp. not proved to have known that resp. was married, if the facts warrant a finding that he ought to have known, but not otherwise.—TAYLOR *v.* TAYLOR & KRAFT (1920), 123 L. T. 112: 36 T. L. R. 329.

Annotation:—**Consd.** Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206.

5026. —— ——.]—LANGRICK *v.* LANGRICK & FUNNELL, No. 4684, *ante.*

5027. Confession.]—Where, upon an application to make a co-resp. liable for the costs of a petition, the only proof of *scienter* was an admission by him that within a fortnight after he first committed adultery with resp. he became aware that she was a married woman:—*Held:* petitioner was entitled to an order for costs against co-resp.

Where a co-resp. has found out when too late to repair the wrong done, that the woman with whom he has taken up is a married woman, he ought not, because he does not desert her, to be held liable for costs. (JEUNE, P.).—BILBY *v.* BILBY, [1902] P. 8; 71 L. J. P. 31; 86 L. T. 123.

Annotations:—**Consd.** Norris *v.* Norris & Smith, [1918] P. 129. **Expld.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Sweeting *v.* Sweeting & Rowlands (1919), 36 T. L. R. 15; Burne *v.* Burne & Helvoet, [1920] P. 17.

5028. ——.]—NORRIS *v.* NORRIS & SMITH, No. 4835, *ante.*

iii. *Knowledge Acquired after Commencement of Adultery.*

5029. Co-respondent continuing to live with respondent—Not thereby liable for costs.]—Where a wife, who had been a prostitute before marriage, left her husband in Australia without his consent & against his wishes, & on arriving in England commenced an adulterous intercourse with co-resp., with whom she had had an immoral intimacy previous to her marriage; and co-resp. did not know that resp. was a married woman, until a week after their second intimacy had commenced, but after he was made aware of her marriage continued to cohabit with her, his alleged reason for doing so being that she received no support from her husband, & unless he, co-resp., had supported her she would have been driven back to a life of prostitution, the judge, under the circumstances, refused to condemn co-resp. in costs, although petitioner had done his best to prevent his wife from coming home from Australia, & was not in a position to make her an allowance whilst living apart from him.—LEARMOUTH *v.* LEARMOUTH & AUSTIN (1889), 59 L. J. P. 14; 62 L. T. 608.

Annotations:—**Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126. **Refd.** Robinson *v.* Robinson & Wilson (1898), 78 L. T. 391.

5030. —— ——.]—NEWBY *v.* NEWBY & WHITE, No. 4691, *ante.*

5031. —— ——.]—ROBINSON *v.* ROBINSON & WILSON, No. 4846, *ante.*

5032. —— ——.]—BILBY *v.* BILBY, No. 5027, *ante.*

5033. —— ——.]—(1) Where co-resp. did not know of resp. being a married woman at the time when he first entered upon an adulterous connection with her, but, having afterwards discovered that she was married, still continues to live with her, he should not be held liable for costs because he did not desert resp. as soon as he discovered that she was married.

(2) Want of knowledge that resp. was a married woman is no bar to a claim [against co-resp.] for damages.—SWEETING *v.* SWEETING & ROWLANDS (1919), 36 T. L. R. 15.

Annotation:—*As to* (1) **Consd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

5034. Adultery continued after knowledge—Discretion of the court.]—NORRIS *v.* NORRIS & SMITH, No. 4835, *ante.*

(*d*) *Rescission of Decree nisi.*

5035. Intervention of King's Proctor—Decree as to costs unrescinded.]—Where the Queen's Proctor intervened after a decree *nisi*, & established a charge of adultery against petitioner, the ct. reversed only that part of the decree which disclosed the marriage, & left standing that part which condemned the co-resp. in costs.—HOLT *v.* HOLT & DAVIS (1869), 21 L. T. 401.

5036. —— ——.]—A husband obtained a decree *nisi* for dissolution of marriage on the ground of his wife's adultery with co-resp., & the ct. condemned co-resp. in the costs of the suit. The Queen's Proctor afterwards intervened, & filed pleas alleging collusion & petitioner's adultery between the commencement of the suit & the date of the decree *nisi*. Petitioner filed no answer to the Queen's Proctor's pleas, & the decree *nisi* was rescinded. The ct. rescinded that part of the decree which condemned co-resp. in costs.—HECHLER *v.* HECHLER & BENNETT (1888), 58 L. J. P. 27.

5037. —— ——.]—HYMAN *v.* HYMAN & GOLDMAN, No. 3227, *ante.*

5038. —— ——.]—HOPE *v.* HOPE & JOHNSON, No. 5162, *post.*

5039. —— **Decree as to costs rescinded.**]—RAVENSCROFT *v.* RAVENSCROFT & SMITH, No. 4833, *ante.*

5040. —— ——.]—Petitioner in a dissolution suit had obtained a decree *nisi*, with costs. On an

intervention of the Queen's Proctor he was proved to have been guilty of profligate adultery, & the ct. reversed the decree *nisi*, including that portion which condemned co-resp. in costs.—YOUELL *v.* YOUELL, TERRASS & BURLEIGH (1875), 33 L. T. 578; *sub nom.* YOWELL *v.* YOWELL, SERRASH & BURLEIGH, 24 W. R. 59.

5041. —— ——.]—BALDWIN *v.* BALDWIN & STOWELL, No. 4818, *ante*.

—— Costs of intervention.]—*See* Sect. 20, subsect. 4, A. (*g*).

5042. Reconciliation of parties—Decree as to costs unrescinded.]—Petitioner & resp. in a suit for divorce having become reconciled after the decree *nisi* & before decree absolute, petitioner moved to rescind the decree & dismiss the petition. The ct. directed that the order rescinding the decree *nisi* & dismissing the petition should contain a provision condemning co-resp. in the costs of the petition, as taxed.—QUARTERMAINE *v.* QUARTERMAINE & GLENISTER, [1911] P. 180; 80 L. J. P. 89; 105 L. T. 80; 27 T. L. R. 458; 55 Sol. Jo. 522.

Annotation :—**Refd.** Hope *v.* Hope & Johnson (1924), 130 L. T. 761.

SUB-SECT. 5.—BETWEEN OTHER PARTIES.

5043. Guardian—Petitioner for infant wife—Liability for husband's costs—Case conducted without discretion.]—(1) A guardian, in instituting or carrying on a matrimonial suit on behalf of a minor wife against her husband, must exercise sound judgment & discretion; if he carry on such suit without a just foundation, he will be condemned in the costs of the husband.

(2) Under no circumstance can a wife in a matrimonial suit be condemned in costs.—BROWN *v.* BROWN (1850), 2 Rob. Eccl. 302; 7 Notes of Cases, 391; 14 Jur. 768; 163 E. R. 1325.

Annotations :—As to (1) **Consd.** Rutter *v.* Rutter, [1921] P. 136. **Refd.** Zycklinski *v.* Zycklinski (1861), 2 Sw. & Tr. 420. *As to* (2) **Consd.** Rutter *v.* Rutter, [1921] P. 136.

5044. Guardian ad litem—Petitioner for infant husband—Costs of unsuccessful petition—Misconduct immaterial.]—The guardian *ad litem* of an infant husband who is a petitioner in the Divorce Div. is in the same position as a next friend in the Chancery & K. B. Divs. as to costs, & is liable to be ordered to pay the costs of an unsuccessful petition apart from any question of misconduct.—RUTTER *v.* RUTTER, [1921] P. 136; 90 L. J. P. 129; 124 L. T. 796; 37 T. L. R. 264; *subsequent proceedings*, [1921] P. 421.

5045. —— Official Solicitor acting as—On behalf of lunatic husband—Right to own costs from wife.]—(1) The costs of the Official Solicitor as the guardian *ad litem* of resp., a person of unsound mind not so found by inquisition, were ordered to be paid by petitioner, who was given leave to add the same to her own costs of suit as against resp.

(2) In pronouncing a decree of nullity the ct. ordered that the child of the union should be given to petitioner.—JACKSON (OTHERWISE MACFARLANE) *v.* JACKSON, [1908] P. 308; 77 L. J. P. 147; 24 T. L. R. 674; 52 Sol. Jo. 535.

5046. Nullity suit—By father of husband—Against husband & wife—Liability for wife's costs.]—WELLS *v.* WELLS & COTTAM, No. 4865, *ante*.

5047. —— By next of kin—Delay in instituting suit.]—The next of kin having delayed three years in instituting the suit, & resp. having been put to much expense in the meantime in maintaining the alleged lunatic, the ct. refused to make any order as to costs.—HANCOCK *v.* PEATY (1867), L. R. 1 P. & D. 335; 36 L. J. P. & M. 57; 16 L. T. 182; 15 W. R. 719.

Annotations :—**Consd.** Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374. **Refd.** Jackson (otherwise Macfarlane) *v.* Jackson (1908), 52 Sol. Jo. 535.

5048. Intervener — Successful intervention — Liability of petitioner & respondent.]—Upon a wife's petition for dissolution of marriage, the husband filed an answer denying all the charges made against him in the petition, but, when the case was in the paper for hearing, upon an application being made on behalf of petitioner for a short adjournment, counsel for the husband stated that he was not in a position to defend the suit so far as the charges of desertion & adultery were concerned. An application was thereupon made on behalf of a person named in the petition that she might have leave to intervene & defend herself in respect of the particular charge of adultery with which her name was associated, & the ct. gave leave accordingly. Upon the case coming on for hearing, the charge of adultery was disproved, but the wife was granted a judicial separation on the ground of resp.'s desertion. Upon the question arising as to costs :—*Held :* under the circumstances, the ct. ought to place the intervener in the best possible position to obtain the costs of her successful intervention, & an order should be made in her favour against both petitioner & resp.—WADE *v.* WADE, [1903] P. 16; 72 L. J. P. 1; 87 L. T. 751; 51 W. R. 464.

5049. —— —— Liability of wife—Separate property restrained from anticipation.]—STUDLEY *v.* STUDLEY, No. 3836, *ante*.

SUB-SECT. 6.—PARTIES SUING IN FORMÂ PAUPERIS.

See R. S. C., Ord. 16, rr. 31E–31H.

5050. Petition by wife—Petition successful—Entitled to costs.]—A wife suing *in formâ pauperis* for a dissolution of marriage, if she obtains a decree is entitled to costs.—AFFORD *v.* AFFORD (1861), 2 Sw. & Tr. 387; 30 L. J. P. M. & A. 174; 5 L. T. 138; 164 E. R. 1046.

5051. Petition by husband—Costs against co-respondent—Costs out of pocket only.]—RICHARDSON *v.* RICHARDSON & PLOWMAN, No. 4289, *ante*.

5052. —— Leave to sue as poor person after suit commenced—Usual order for wife's costs—Up to date of such leave.]—A husband petitioned for divorce on the ground of his wife's adultery with co-resp. & the usual order was made that the husband should pay his wife's costs up to setting down & give security for her costs. On the husband's failure to comply with the order the cause was stayed & the husband then obtained an order allowing him to sue as a poor person. The jury found in favour of the husband on all the issues & the ct. pronounced a decree *nisi* with costs against co-resp. & made the usual order for the wife's costs up to the date of the order allowing the husband to sue as a poor person, the husband to recover them from co-resp.—WEST *v.* WEST & MAXTED (1917), 34 T. L. R. 169; 62 Sol. Jo. 213.

SUB-SECT. 7.—APPLICATION FOR COSTS.

5053. Time for application—Application after hearing—Whether out of time.]—BRITTAIN *v.* BRITTAIN & CAMP, No. 4010, *ante*.

Sect. 18.—*Order for costs: Sub-sects.* 7, 8 9. *Sect.* 19: *Sub-sects.* 1 & 2, *A.*]

5054. Wife unsuccessful.]—KEATS *v.* KEATS & MONTEZUMA, No. 3166, *ante.*

5055. —— —— —— ——.]—In a suit for dissolution of marriage, the wife before the hearing, obtained the usual order for the taxation of her costs. The registrar made an appointment, & found that her taxed costs, up to the date of the order, amounted to £9 11*s.* 6*d.*, & that £90 would be a reasonable sum to be paid into the registry to cover the wife's cost of the hearing, but he declined to make his report to that effect, as petitioner's solr. was not present, & he made a second appointment. In the interim the cause was heard, & the wife failed in the suit:—*Held:* she was not entitled to the costs incurred before the date of the order, nor to the costs of the hearing.—GOUGH *v.* GOUGH & BAYNTON (1864), 33 L. J. P. M. & A. 136.

Annotation:—**Refd.** Franklin *v.* Franklin & Minshall, [1921] P. 407.

5056. —— —— —— ——.]—(1) Where there were cross suits, & the marriage was dissolved on the ground of the wife's adultery, the ct. held that the husband was not liable for the costs of the wife in her suit, inasmuch as she had not taken the ordinary steps to get them taxed previous to the final determination that she had been guilty of adultery.

(2) The decree pronouncing her guilty of adultery should be pleaded to entitle the ct. to take notice of it.—ROLT *v.* ROLT (1864), 3 Sw. & Tr. 604; 34 L. J. P. M. & A. 51; 164 E. R. 1409.

Annotations:—*As to* (1) **Refd.** Whitmore *v.* Whitmore (1866), 35 L. J. P. & M. 39; Otway *v.* Otway (1888), 59 L. T.

5057. Discretion of court.]—(1) Where petitioner established adultery against co-resp., but the co-resp. established a countercharge of adultery against petitioner, & the petition was dismissed; the ct. held that co-resp. was liable for the costs of proving the wife's adultery, & that petitioner was liable for costs incurred by the co-resp. in establishing the countercharge of adultery.

(2) Rule 159 directing that the wife's costs of the hearing, when the decision of the ct. or jury is against her, shall not be allowed against the husband unless applied for & ordered to be allowed at the time of hearing, is not imperative on the ct., but the ct. may dispense with it, & entertain an application for the wife's costs subsequently to the hearing in a meritorious case.—CONRADI *v.* CONRADI & FLASHMAN (1866), L. R. 1 P. & D. 163; 35 L. J. P. & M. 49; 14 L. T. 170; 14 W. R. 589.

Annotation:—*As to* (2) **Refd.** Somerville *v.* Somerville & Webb (1867), 36 L. J. P. & M. 87.

5058. —— —— —— ——.]—In a suit in which material circumstances were proved on the part of the wife resp., although the verdict established her adultery, the ct. after the lapse of three months from the date of the decree *nisi*, & notwithstanding Rule 159, allowed her costs to be taxed against the husband.—SOMERVILLE *v.* SOMERVILLE & WEBB (1867), 36 L. J. P. & M. 87; 16 L. T. 466.

Annotation:—**Refd.** Smith *v.* Smith (1882), 7 P. D. 84.

5059. —— After decree absolute.]—After a decree had been made absolute in a suit for dissolution of marriage the ct. cannot condemn a party in the costs of the proceedings.—WAIT *v.* WAIT (1871), L. R. 2 P. & D. 228; 40 L. J. P. & M. 30; 24 L. T. 847; 19 W. R. 760.

Annotation:—**Consd.** Beeton *v.* Beeton & Robertson, [1921] P. 417.

5060. —— —— Intervention of King's Proctor.]—In cross-petitions by the husband & wife for dissolution of the marriage a decree *nisi* was pronounced on the wife's petition, the husband was condemned in costs. Subsequently the Queen's Proctor intervened, & charged the wife with adultery, collusion, & suppression of material facts. The husband, in compliance with an order of the registrar, had paid money into ct. to meet the wife's costs in both suits:—*Held:* the wife was not entitled to have the money in ct. paid out until the decree *nisi* had been made absolute.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM, (1889), 14 P. D. 160; 58 L. J. P. 71; 38 W. R. 272; *subsequent proceedings* (1890), 15 P. D. 32, 126, 161.

5061. —— Before claim for damages decided.]—STOCKER *v.* STOCKER, BRICE & PATTERSON, No. 3228, *ante.*

5062. How made—Balance of costs beyond security lodged — Summons, not motion.]—COOKE *v.* COOKE & ALLEN, No. 4954, *ante.*

5063. Application for personal payment by solicitor.]—An appeal [as to costs] by a married woman having been dismissed with costs, resp. asked that appellant's solr. might be ordered to pay the costs [of the appeal] personally:—*Held:* if the ct. had jurisdiction to make the order it must be on a substantive application.—TATUM *v.* TATUM (1886), 2 T. L. R. 423, C. A.

5064. Application to condemn wife in costs—Necessity for notice to wife.]—Where, on a husband's petition for divorce, application was made to condemn the wife, who had not appeared to defend the suit, in costs, the ct. declined to entertain the application until she had received notice of it.—FIELD *v.* FIELD & DENTON (1887), 13 P. D. 23; 58 L. T. 90; 52 J. P. 56; 36 W. R. 720.

Annotation:—**Refd.** Mason *v.* Mason (1889), 61 L. T. 304.

5065. No previous application for security.]—A wife filed a petition for judicial separation, & the case was in due course set down for trial. Subsequently she wrote to her solrs. saying that she had returned to her husband. On May 29 her solrs. wrote to her expressing a wish to withdraw from the case, & they did not afterwards act for her. Up to that date they took no steps, under the prevailing practice of the Divorce Div. to obtain security for the wife's costs from the husband. On July 3 they carried their costs into the registry for taxation against the husband. On a summons adjourned into ct. for further argument:—*Held:* as the solrs. had not applied for security in the ordinary way, they must be left to their remedy at common law; the application was not in accord with the practice of the ct.; it was out of time; it was not made by the wife's solrs., but merely by a firm that had at one time acted for her; the ct. had no jurisdiction to deal with it; & it must be dismissed with costs against the applicants personally.—NAIRNE *v.* NAIRNE (1901), 71 L. J. P. 37; 85 L. T. 649; 65 J. P. 777; 18 T. L. R. 16; 46 Sol. Jo. 31.

Annotation:—**Expld. & Distd.** Jinks *v.* Jinks, [1911] P. 120.

5066. Who may apply—Previous solicitors of wife—Withdrawal during conduct of case.]—NAIRNE *v.* NAIRNE, No. 5065, *ante.*

SUB-SECT. 8.—ENFORCEMENT OF ORDER.

Stay of proceedings.]—*See* Sect. 14, sub-sect. 2, B., *ante.*

Action in King's Bench.]—*See* No. 5441, *post.*

Attachment & committal.]—*See* Nos. 5911–5930, *post.*

Process of execution.]—*See* No. 5906, *post.*
—— **Writ of elegit.**]—*See* No. 5968, *post.*
—— **Writ of fieri facias.**]—*See* Nos. 4288, 4815, *ante*, No. 5961, *post.*
—— **Garnishee.**]—*See* No. 5972, *post.*
—— **Receiver.**]—*See* Nos. 5972–5981, *post.*
—— **Sequestration.**]—*See* Nos. 5956, 5957, *post.*
Injunction restraining dealings with property.]—*See* No. 4306, *ante*, Nos. 6011, 6012, *post.*

SUB-SECT. 9.—APPEAL FROM ORDER.

See Sect. 21, sub-sect. 1, D., *post.*

SECT. 19.—FUNCTIONS OF KING'S PROCTOR.

SUB-SECT. 1.—INTERVENTION AT INSTANCE OF COURT.

See Matrimonial Causes Act, 1860 (c. 144), s. 7; Matrimonial Causes Act, 1866 (c. 32), s. 3; Matrimonial Causes Act, 1873 (c. 31), s. 1.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 181 (1); Matrimonial Causes Rules, 1925, r. 51.

5067. Power of court to direct.]—In a suit for dissolution the ct. having reason to suspect the husband of connivance or conduct conducing to adultery, suspended the decree, & directed the Queen's Proctor to make inquiries into the *bona fides* of petitioner's case.—RICHARDS *v.* RICHARDS & COOK (1869), 21 L. T. 598; 18 W. R. 152.

5068. ——.]—HARRIMAN *v.* HARRIMAN, [1909] P. 123; 78 L. J. P. 62; 100 L. T. 557; 73 J. P. 193; 25 T. L. R. 291; 53 Sol. Jo. 265, C. A.

Annotations:—**Mentd.** Eastbourne Grdns. *v.* Croydon Grdns., [1910] 2 K. B. 16; Stevenson *v.* Stevenson, [1911] P. 191; Churner *v.* Churner (1912), 106 L. T. 769; Robinson *v.* Robinson, [1919] P. 352; Timmins *v.* Timmins, [1919] P. 75; Rutherford *v.* Rutherford, [1922] P. 144.

5069. Power of Court of Appeal to direct.]—LE SUEUR *v.* LE SUEUR, No. 5071. *post.*

5070. Fiat of Attorney-General—Power of court to compel issue.]—At the hearing of a petition by the wife for dissolution of marriage, her counsel, in opening, & petitioner, in the witnesses-box, stated that she had committed adultery, but asked the ct. to exercise its discretion in her favour; but the ct., having a very strong suspicion that petitioner's case was in material respects untrue, adjourned the further hearing, at the same time directing that all necessary papers in the matter should be sent to the King's Proctor, in order that, under the directions of the A.-G., the Proctor should instruct counsel to argue before the ct. all questions in relation to the cause which the ct. might deem it expedient to have fully argued, &, for that purpose, to take such steps as might be deemed necessary or expedient. Upon motion by the King's Proctor for directions:—*Held:* as the ct. could not compel the A.-G. to issue his fiat, the case would have to remain in the reserve list until that list should be called over & dealt with in the ordinary course.—JACKSON *v.* JACKSON, [1910] P. 230; 79 L. J. P. 82; 103 L. T. 79; 26 T. L. R. 476.

5071. Costs of appearance—Power of Court of Appeal to allow—Appeal withdrawn by appellant.]—Under Jud. Act, 1873 (c. 66), s. 19 the Ct. of Appeal has power to direct the papers in a divorce matter to be sent to the Queen's Proctor, under Matrimonial Causes Act, 1860 (c. 144), s. 5, for the purpose of instructing counsel to argue the case on appeal.

But where counsel in accordance with such direction appeared for the Queen's Proctor, & the appeal was withdrawn by applt.:—*Held:* the Ct. of Appeal had no power to allow the Queen's Proctor his costs.—LE SUEUR *v.* LE SUEUR (1877), 2 P. D. 79; 36 L. T. 276; 25 W. R. 402, C. A.

Annotations:—**Mentd.** Niboyet *v.* Niboyet (1878), 3 P. D. 52; Lord Advocate *v.* Jaffrey, [1921] 1 A. C. 146.

Costs of showing cause against decree.]—*See* Sect. 20, sub-sect. 4, A. (*g*), *post.*

SUB-SECT. 2.—INTERVENTION BEFORE DECREE NISI.

A. On What Grounds.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 181 (2).

5072. Whether confined to collusion—Adultery of petitioner.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante.*

5073. —— **Suppression of material facts.**]—If information be given to the Queen's Proctor of material facts necessary to the due decision of a case before the ct. during the progress of the cause, he cannot at that time take any steps except to watch the case & see whether such material facts are brought to the notice of the ct. If not, he will be entitled, as one of the public, but acting under the direction of the A.-G., to show cause against the decree being made absolute, in which case he will follow the ordinary practice prescribed by the rules. It is only when he has evidence of collusion that it is necessary that he should apply to the ct. for leave to intervene under the latter part of Matrimonial Causes Act, 1860 (c. 144), s. 7.—HUDSON *v.* HUDSON (1875), 1 P. D. 65; 45 L. J. P. 39; 33 L. T. 788; 24 W. R. 282.

Annotation:—**Refd.** Jackson *v.* Jackson (1910), 26 T. L. R. 476.

5074. Right to set up other defences.]—The Queen's Proctor, when intervening before decree *nisi*, is not precluded from setting up other defences in addition to that of collusion.—SOTTOMAYER *v.* DE BARROS (1879), 5 P. D. 94; 49 L. J. P. 1; 41 L. T. 281; 27 W. R. 917.

Annotations:—**Mentd.** Moss *v.* Moss, [1897] P. 263; Viditz *v.* O'Hagan (1899), 68 L. J. Ch. 553; Ogden *v.* Odgen, [1908] P. 46; Chetti *v.* Chetti, [1909] P. 67; R. *v.* Hammersmith Superintendent Registrar of Marriages, *Ex p.* Mir-Anwaruddin, [1917] 1 K. B. 634.

5075. —— **Amended petition.**]—CARTER *v.* CARTER (1909), *Times*, May 4; *subsequent proceedings, sub nom.* HIGGINS *v.* KING'S PROCTOR, KING'S PROCTOR *v.* CARTER, [1910] P. 151, C. A.

5076. —— **Inquiry likely to show falsity of petitioner's case.**]—In the absence of materials establishing collusion, there is no statutory authority for the intervention of the King's Proctor before decree *nisi*, even although inquiry would be likely to show that the case, presented by a petitioner who has been guilty of misconduct & seeks the exercise of the discretion of the ct. is a false one. The assistance which the King's Proctor can render to the ct. before decree *nisi* is, in the absence of suggested collusion, confined to matters of argument. In the absence of suggested collusion, he cannot call evidence or ask for dismissal of the petition at that stage of the proceedings.—JACKSON *v.* JACKSON, [1910] P. 230; 79 L. J. P. 82; 103 L. T. 79; 26 T. L. R. 476.

Sect. 19.—*Functions of King's Proctor: Sub-sect.* 2, *B. & C.; sub-sect.* 3. *Sect.* 20: *Sub-sects.* 1, 2 & 3, *A. & B.* (*a*).]

B. Effect of Intervention.

5077. Amendment of prayer—From dissolution to judicial separation—Petitioner's adultery proved.]—DRUMMOND *v.* DRUMMOND, No. 3158, *ante.*

5078. Whether order for dismissal made—At instance of petitioner—King's Proctor entitled to costs on establishing collusion.]—The Queen's Proctor intervened in a suit for dissolution of marriage & pleaded, charging petitioner with adultery & collusion. Petitioner traversed both charges, but before the issues were tried moved the ct. to dismiss the petition. The Queen's Proctor not consenting, the ct. rejected the motion on the ground that the Queen's Proctor would be entitled to his costs if he established collusion.—JOYCE *v.* JOYCE (1864), 33 L. J. P. M. & A. 200.

C. Procedure.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 181 (1).

5079. Application for leave to intervene—Affidavit in support of motion—Not essential.]—The Queen's Proctor, under direction of the A.-G., may move the ct. by counsel, without affidavit, for leave to intervene in a divorce suit. But if he moves to have the hearing of the petition postponed that he may have time to plead, that part of the motion must be founded on affidavit, & notice given to the other parties.—ANON. (1861), 2 Sw. & Tr. 249; 30 L. J. P. M. & A. 88; 3 L. T. 823; 164 E. R. 990.

Annotation:—**Refd.** Hudson *v.* Hudson (1875), 1 P. D. 65.

5080. Postponement of hearing—Affidavit in support of motion—Notice to other side.]—ANON. (1861), No. 5079, *ante.*

5081. Suit conducted by Attorney-General—Whether privilege as in Crown cases applicable.]—MARRIS *v.* MARRIS & BURKE, No. 3066, *ante.*

See, generally, CONSTITUTIONAL LAW, Vol. XI., p. 528, Nos. 325 *et seq.*; CROWN PRACTICE, Vol. XVI., p. 483, Nos. 3647 *et seq.*

5082. No evidence tendered at hearing—Petition dismissed.]—The Queen's Proctor intervened in a suit for dissolution, & alleged collusion & petitioner's adultery. Resp. did not appear. No evidence being tendered in support of the petition when the case came on for hearing, the ct. dismissed the petition, without requiring evidence to be produced in support of the Queen's Proctor's pleas.—SHELDON *v.* SHELDON (1865), 4 Sw. & Tr. 75; 34 L. J. P. M. & A. 80; 13 W. R. 507; 164 E. R. 1444.

5083. Right to cross-examine petitioner's & respondent's witnesses—Allegation of collusion—Adultery of petitioner.]—BOARDMAN *v.* BOARDMAN, No. 2631, *ante.*

5084. Right of reply—When petitioner has begun.]—CONRADI *v.* CONRADI, WORRALL & WAY, No. 2764, *ante.*

SUB-SECT. 3.—SHOWING CAUSE AGAINST A DECREE.

See Sect. 20, *post.*

SECT. 20.—**SHOWING CAUSE AGAINST A DECREE.**

SUB-SECT. 1.—WHO MAY SHOW CAUSE.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (2).

5085. Party to suit—Respondent.]—Resp. against whom a decree *nisi* for dissolution of marriage has been pronounced, cannot show cause against the decree being made absolute under Matrimonial Causes Act, 1860 (c. 144), s. 7.—STOATE *v.* STOATE (1861), 2 Sw. & Tr. 384; 30 L. J. P. M. & A. 173; 5 L. T. 138; 164 E. R. 1045.

Annotations:—**Consd.** Clements *v.* Clements & Thomas (1864), 3 Sw. & Tr. 394; Harries *v.* Harries & Gregory (1901), 86 L. T. 262. **Refd.** Ousey *v.* Ousey (1875), 1 P. D. 56.

5086. —— —— Acting through member of public.]—CLEMENTS *v.* CLEMENTS & THOMAS, No. 5100, *post.*

5087. —— —— After intervention by King's Proctor withdrawn.]—Where a decree *nisi* had been pronounced on the husband's petition, & the Queen's Proctor had intervened on information furnished by the wife, but had subsequently withdrawn his intervention, the ct. declined to suspend the decree absolute on the wife's application:—*Held:* if the wife were dissatisfied with the verdict, she should have procured its review, not by setting the Queen's Proctor in motion, but by moving for a new trial.—PATTENDEN *v.* PATTENDEN & HERZFIELD (1868), 19 L. T. 612.

5088. —— Petitioner.]—C., the wife, obtained a decree *nisi* for dissolution of her marriage, the husband not appearing, after which the Queen's Proctor intervened & pleaded collusion between petitioner & resp., & alleged that petitioner had herself been living in adultery, & prayed to dismiss the petition & condemn the parties, or one of them, in costs; whereupon the judge ordinary was moved on behalf of the petitioner to direct the petition to be taken off the file of the ct., which he refused to do:—*Held:* on appeal, the judge ordinary was right in such refusal.—GRAY *v.* GRAY (1861), 2 Sw. & Tr. 266; 4 L. T. 478; 7 Jur. N. S. 783; 164 E. R. 997.

Annotations:—**Refd.** Drummond *v.* Drummond (1861), 30 L. J. P. M. & A. 177; A. *v.* A., [1901] P. 284.

5089. —— —— Discretion of court.]—Husband's petition for divorce dismissed & decree *nisi* granted to wife on cross charges in her answer. Wife, a minor without guardian, filed a petition for maintenance. Husband took out a summons to dismiss the petition for maintenance, & that the costs already paid to wife might be paid into ct. until decree made absolute. The wife moved to rescind the decree *nisi*:—*Held:* the husband being the guilty party could have no relief. The wife's motion was dismissed, with an intimation that if renewed it must be by a guardian. The ct. has power in a proper case to rescind a decree *nisi* on application of the party who obtained it.—RUTTER *v.* RUTTER (No. 2), [1921] P. 421; 90 L. J. P. 366; 126 L. T. 120; 37 T. L. R. 967.

5090 —— Co-respondent.]—Co-resp. entered an appearance in a divorce suit, but did not defend the action. A decree *nisi* was obtained by petitioner:—*Held:* co-resp. could not afterwards intervene to show cause why the decree should

PART XIII. SECT. 20, SUB-SECT. 1.

5085 i. *Party to suit—Respondent.*]—A person against whom a decree *nisi* for dissolution of marriage has been made has no status to show cause against making the decree absolute. Such person, if absent at the trial, may on that ground apply to set aside the decree. Such remedy was refused when appct. failed to explain why not represented at the trial.—PURDY *v.* PURDY, [1920] 3 W. W. R. 550.—**CAN.**

k. —— —— *Power of court to inquire.*]—On an application by a wife that a decree *nisi* be made absolute, the husband appeared & tendered evidence to show that the wife had been guilty of adultery which disentitled her from obtaining a decree for divorce:—*Held:* though the husband could not technically show cause, the ct. had power, as there was no King's Proctor in India, to inquire into the truth of the allegations made by him.—CODD *v.* CODD (1923), I. L. R. 47 Bom. 664.—**IND.**

l. *Solicitor-General.*]—The Solr.-

not be made absolute.—HARRIES *v.* HARRIES & GREGORY (1901), 86 L. T. 262 ; 18 T. L. R. 219.

5091. —— —— Acting through member of public.]—CLEMENTS *v.* CLEMENTS & THOMAS, No. 5100, *post*.

5092. —— Intervener.]—EDWARDS *v.* EDWARDS & WILSON (1899), *Times*, June 20.

5093. King's Proctor—As member of public—If collusion not alleged.]—Any person, & the Queen's Proctor, as one of the public, may enter an appearance & file affidavits in opposition to a decree *nisi* being made absolute, at any time before it is made absolute.

Where the Queen's Proctor does not intervene in his official capacity, but appears as one of the public, the ct. has no authority to award him his costs.—BOWEN *v.* BOWEN & EVANS (1864), 3 Sw. & Tr. 530 ; 33 L. J. P. M. & A. 129 ; 13 W. R. 109 ; 164 E. R. 1381.

Annotation :—**Consd.** Poole *v.* Poole & Charlton (1896), 12 T. L. R. 509.

5094. —— —— ——.]—MASTERS *v.* MASTERS, No. 4636, *ante*.

5095. —— —— . .]—LAUTOUR *v.* QUEEN'S PROCTOR, No. 3533, *ante*.

5096. .]—HUDSON *v.* HUDSON, No. 5073, *ante*.

5097. Member of public—Petitioner guilty of misconduct after decree nisi.]—By Matrimonial Causes Act, 1860 (c. 144), s. 7 any one may show cause why a decree *nisi* for a dissolution of marriage should not be made absolute by reason of material facts not brought before the ct. :—*Held :* the ct. is bound before making a decree absolute to take notice of any material facts not previously brought before it, even although they occurred subsequently to the decree *nisi*, & consequently of adultery subsequent to the decree *nisi*, for adultery before the decree absolute is adultery during the marriage, one of the grounds on which the ct. may refuse to dissolve a marriage.

If, indeed, the argument could have been sustained, that the decree *nisi* puts an end to the marriage, there could be no adultery during the marriage after it. But there is no warrant, I think, for that proposition ; as the marriage remains undissolved until the decree absolute is pronounced, the obligations of marriage in respect of adultery equally remain, & no reasonable ground can be assigned why the breach of those obligations should be fatal before the decree *nisi*, but innocent after it (*per* CUR.).—HULSE *v.* HULSE & TAVERNOR (1871), L. R. 2 P. & D. 259 ; 40 L. J. P. & M. 51 ; 24 L. T. 817 ; 19 W. R. 880 ; *subsequent proceedings*, L. R. 2 P. & D. 357.

Annotations :—**Consd.** Rogers *v.* Rogers, [1894] P. 161 ; Constantinidi *v.* Constantinidi, [1903] P. 246 ; Sinclair *v.* Fell, [1913] 1 Ch. 155. **Refd.** Ousey *v.* Ousey (1875), 1 P. D. 56 ; Norman *v.* Villars (1877), 2 Ex. D. 359 ; Lewis *v.* Lewis, [1892] P. 212 ; Symons *v.* Symons, [1897] P. 167.

5098. .]—HOWARTH *v.* HOWARTH, No. 5250, *post*.

SUB-SECT. 2.—WHEN CAUSE MUST BE SHOWN.

5099. Any time before decree absolute.] —BOWEN *v.* BOWEN & EVANS, No. 5093, *ante*.

5100. —.]—At any time before a decree *nisi* for dissolution of marriage is made absolute, it is competent for one of the public to intervene, although three months may have elapsed since the decree was pronounced.

Semble : the ct. will not act upon an intervention, when satisfied that it is made at the instance of resp. or co-resp.—CLEMENTS *v.* CLEMENTS & THOMAS (1864), 3 Sw. & Tr. 394 ; 33 L. J. P. M. & A. 74 ; 10 L. T. 352 ; 13 W. R. 110 ; 164 E. R. 1327.

5101. —.]—LAUTOUR *v.* QUEEN'S PROCTOR, No. 3533, *ante*.

5102. .]—The Queen's Proctor can intervene at any time before a decree *nisi* is made absolute.—POOLE *v.* POOLE & CHARLTON (1896), 12 T. L. R. 509.

SUB-SECT. 3.—ON WHAT GROUNDS.

A. Collusion.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (2).

Agreement to withhold material facts as amounting to collusion.]—*See* Sect. 7, sub-sect. 3, C. (*b*), iv., *ante*.

5103. Collusion distinguished from suppression of material facts.]—Concealment of material facts as a bar to a divorce is on a different footing to collusion unless the concealment is the result of collusion, collusion being an absolute bar ; while concealment of facts is not a bar, either absolute or discretionary, unless the facts, if before the ct., would have caused the ct. to withhold a decree. Where on a disclosure of all the facts a decree would in the first instance, in the exercise of the discretion of the ct., have properly been pronounced, mere non-disclosure is no ground for rescinding a decree already pronounced. If a petitioner for dissolution of marriage withholds from the ct. the fact that he or she has committed adultery, & a decree *nisi* is pronounced, the ct. will not discharge the decree *nisi* merely because that fact has been withheld ; but it will inquire whether if that fact had been disclosed at the trial the ct., in the exercise of its discretion, would have pronounced a decree *nisi*, & if it would, it will make the decree absolute.—HUNTER *v.* HUNTER, [1905] P. 217 ; 74 L. J. P. 157 ; 93 L. T. 451 ; 53 W. R. 666 ; 21 T. L. R. 602.

Annotations :—**Consd.** Brooke *v.* Brooke, [1912] P. 136. **Refd.** Westcott *v.* Westcott, [1908] P. 250 ; Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

B. Suppression of Material Facts.

(*a*) *In General.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (2).

5104. General rule—Duty to make full disclosure.]—WILKINSON *v.* WILKINSON & SEYMOUR, No. 3449, *ante*.

5105. Effect of non-disclosure—Where petitioner entitled to decree if facts disclosed.]—ALEXANDRE *v.* ALEXANDRE, No. 3019, *ante*.

5106. —— ——.]—HARRADEN *v.* HARRADEN & BOHAN (1904), *Times*, June 3.

Annotation :—**Consd.** Hunter *v.* Hunter, [1905] P. 217.

5107. —— ——.]—ROCHE *v.* ROCHE, No. 5118, *post*.

5108. —— ——.]—HUNTER *v.* HUNTER, No. 5103, *ante*.

5109. ——.]—Circumstances in which the ct. will exercise its discretion by refusing to rescind a decree *nisi* on the ground that material facts

General may, under Divorce Act, 1908, s. 33, intervene at any time before the decree *nisi* is made absolute, even after the time limited after which the decree *nisi* may be made absolute has expired ; & he may intervene either under sub-sect. 3 or under sub-sect. 1 as one of the public ; but in the latter case he is not entitled to costs.—JOBSON *v.* JOBSON (1910), 30 N. Z. L. R. 48.—**N Z.**

Sect. 20.—*Showing cause against a decree: Sub-sect.* 3, *B.* (*a*) *&* (*b*)*; sub-sect.* 4, *A.* (*a*).]

have been withheld from the knowledge of the ct.—BARRETT *v.* BARRETT & VAUGHAN (1913), 30 T. L. R. 63.

5110. —— Adultery admitted at hearing—Decree nisi granted in discretion of court.]—On the intervention of the King's Proctor the ct., on the ground that the petitioning wife had concealed material facts, rescinded the decree *nisi*, which although the wife had committed adultery the ct. had granted in its discretion.—KING *v.* KING (1915), 32 T. L. R. 78.

5111. —— Though innocent.]—BROOKE *v.* BROOKE, No. 5115, *post.*

5112. Effect of abandonment of charges at trial.]—(1) It is not competent for a person who has intervened in a suit for dissolution of marriage for the purpose of showing cause against the decree *nisi* being made absolute, to object that the ct. had no jurisdiction over the parties to the suit; nor to rely on, as material facts, charges which had been pleaded in answer to the petition but were abandoned at the trial.

(2) Where an appearance had been entered by a friend of the co-resp., against whom £5,000 damages had been awarded, for the purpose of showing cause against a decree *nisi* being made absolute, on the ground that there were material facts in the case which were not brought to the notice of the ct. & most of the material facts had been put on record by the parties, & were not established at the trial, & the intervener had not established by affidavit a single fact of importance, the ct. declined to suspend its decree, & condemned the intervener in the costs occasioned by the intervention.—FORSTER *v.* FORSTER & BERRIDGE (1863), 3 Sw. & Tr. 151; 32 L. J. P. M. & A. 206; 9 L. T. 148; 164 E. R. 1231; *subsequent proceedings*, 4 B. & S. 187.

5113. After decree nisi.]—HULSE *v.* HULSE & TAVERNOR, No. 5097, *ante.*

5114. On decree of nullity.]—In a suit by a husband for nullity of marriage upon the ground of his wife's incapacity to consummate the marriage, the wife did not defend, & the husband gave evidence that the wife was *haud apta viro* & that the marriage had not been consummated. A decree *nisi* having been pronounced, the King's Proctor intervened upon the ground that material facts had been withheld from the ct., namely, that the wife was *apta viro* & that the marriage had been consummated. The ct. being satisfied upon the evidence of the wife & doctors that the wife was *apta viro* & that the marriage had been consummated, rescinded the decree *nisi*.—T. *v.* T. (OTHERWISE T.) (1908), 24 T. L. R. 580.

Agreement to withhold material facts as amounting to collusion.]—*See* Sect. 7, sub-sect. 3, C. (*b*) iv., *ante.*

Adultery not admitted by petitioner.] - *See* Sub-sect. 3, B. (*b*), *post.*

Conduct conducing to adultery.]—*See* Sect. 7, sub-sect. 4, C., *ante.*

Connivance.]—*See* Sect. 7, sub-sect. 3, B., *ante.*

Condonation.]—*See* Sect. 7, sub-sect. 3, D., *ante.*

(*b*) *Adultery not admitted by Petitioner.*

Agreement between parties to suppress material facts — Amounting to collusion.] — *See* Sect. 7, sub-sect. 3, C. (*b*) iv., *ante.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 178 (3); s. 183 (2).

5115. General rule.]—(1) Even where it appears that material facts were deliberately withheld or wilfully suppressed at the hearing of a petition for dissolution of marriage, the ct. must, upon an intervention by the King's Proctor, take into consideration all the facts proved in evidence under the King's Proctor's plea or the answer thereto filed by petitioner, before deciding whether the decree *nisi* should be rescinded; or whether the discretion conferred by Matrimonial Causes Act, 1857 (c. 85), s. 31, should be exercised in favour of petitioner with a view to the decree being made absolute; or whether a middle course should be adopted with a view to further inquiry & elucidation of the facts.

The suppression of material facts is of grave importance & even when innocent may bring about the rescission of a decree *nisi*.

(2) The circumstances of each particular case must be dealt with as justice may require, regard being had, not merely to the parties themselves, & to others who may be interested in, or affected by, the decision of the ct., but to public decency & morality & the welfare & interests of society & the State.

(3) The ct. may, if thought fit, suspend its decision, & may direct that notice of any fresh allegations, raised for the first time in petitioner's answer to the King's Proctor's plea, shall be served upon resp.—BROOKE *v.* BROOKE, [1912] P. 136; 81 L. J. P. 75 106 L. T. 766; 28 T. L. R. 314; 56 Sol. Jo. 2; *subsequent proceedings*, [1912] P. 205, n.

Annotation:—*As to* (2) **Consd.** Wickins *v.* Wickins, [1918] P. 265.

5116. Time for admission — In petition.] — HAMPSON *v.* HAMPSON, No. 3463, *ante.*

5117. —— ——.]—A petitioner who intends to ask the ct. to exercise the discretion conferred by Matrimonial Causes Act, 1857 (c. 85), s. 31 by granting a decree dissolving the marriage, although petitioner has during the marriage been guilty of adultery, must set out in the body of the petition the misconduct which the ct. is requested to excuse, & must, in the prayer at the conclusion of the petition, specifically ask that the discretion may be exercised.—KING *v.* KING, [1915] P. 88; 84 L. J. P. 80; 112 L. T. 1047; 31 T. L. R. 240; 59 Sol. Jo. 334; *subsequent proceedings*, 32 T. L. R. 78.

Annotation:—**Distd.** Goddard *v.* Goddard (1915), 31 T. L. R. 616.

5118. Whether mere concealment ground for rescinding decree.]—If a petitioner withholds from the ct., on the hearing of a petition for dissolution of marriage, the fact that she has committed adultery, such withholding of a fact is of itself a ground for refusing to make the decree absolute, even though the adultery is found, on a full investigation of all the facts of the case, to be such as would warrant the ct. in granting petitioner relief, & though, had the facts been fully disclosed to the ct. in the first instance, it would, in the exercise of its discretion, have granted relief.—ROCHE *v.* ROCHE, [1905] P. 142; 74 L. J. P. 50; 92 L. T. 668; 21 T. L. R. 332.

Annotations:—**N.F.** Hunter *v.* Hunter, [1905] P. 217. **Dbtd.** Brooke *v.* Brooke, [1912] P. 136.

5119. ——.]—HUNTER *v.* HUNTER, No. 5103, *ante.*

PART XIII. SECT. 20, SUB-SECT. 3.—B. (b).

m. *Conduct conducing to wife's adultery — Husband's adultery.*] — A decree *nisi* having been granted in an action brought by a husband for divorce, & the A.-G. having intervened & opposed pltf.'s right of action, the judge to whom the motion for the final order was made found that pltf. drove deft. away from his home without reasonable excuse, never properly sup-

5120. — .]—BROOKE *v.* BROOKE, No. 5115, *ante.*

5121. — .]—Petitioner, who had herself committed adultery, obtained a decree *nisi* for a divorce from her husband without revealing to the ct. the fact that she had committed adultery. On the intervention of the King's Proctor the ct. rescinded the decree *nisi* & declined to exercise its discretion in favour of petitioner.—DAWES *v.* DAWES (1916), 32 T. L. R. 247.

5122. Concealment on advice of counsel.]—PRETTY *v.* PRETTY, No. 3458, *ante.*

5123. Concealment due to ignorance of law.]—In exercising the discretion conferred upon the ct. by Matrimonial Causes Act, 1857 (c. 85), s. 31, each case must be considered in the light of its own circumstances & surroundings. Where petitioner, who had lived apart from his wife, did not know & was not told that his own adultery, committed long after his wife left him, was a material fact which he ought to disclose at or before the hearing of his petition, the ct. refused to rescind the decree *nisi*, but ordered petitioner to pay the costs of the King's Proctor.—HOOK *v.* HOOK & BROWN, [1917] P. 56; 86 L. J. P. 41; 116 L. T. 383; 33 T. L. R. 181; 61 Sol. Jo. 284.

5124. Concealment not wilful.]—The discretion conferred by Matrimonial Causes Act, 1857 (c. 85), s. 31, to grant a divorce to a party who has been guilty of adultery, is an unfettered discretion for the exercise of which no rigid rules can be laid down, but it is to be exercised cautiously & carefully, &, as far as possible consistently, not only in regard to the parties themselves, but also with reference to the interests of public morality. A wife, married in 1900, was deserted by her husband in 1911. In 1916 she obtained a decree *nisi* for the dissolution of her marriage. The King's Proctor intervened, & it was found that since 1911 she had been living with her mother & stepfather at their farm as one of the family, where she had committed adultery with the son of her stepfather, who, she said, was willing to marry her. The judge having found the wife had not wilfully concealed material facts, & the husband had not conduced to the adultery, & in the exercise of his discretion under s. 31 rescinded the decree *nisi*:—*Held:* the discretion had been judicially exercised, & the Ct. of Appeal could not interfere.—HOLLAND *v.* HOLLAND, [1918] P. 273; 87 L. J. P. 142; 119 L. T. 266; 34 T. L. R. 450.

Annotations:—**Consd.** Hines *v.* Hines & Burdett, [1918] P. 364. **Refd.** Wickins *v.* Wickins, [1918] 1 265 Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

5125. Deliberate perjury.]—Where the ct. had been misled into exercising its discretion in favour of a husband who had himself been guilty of adultery, through his wilful withholding of facts & perjury, the ct. not only rescinded the decree *nisi*, but further intimated that the case was one in which criminal proceedings should be taken by the Treasury.—ROSENZ *v.* ROSENZ, & JOSTEN (1909), 26 T. L. R. 14; 54 Sol. Jo. 13.

Annotation:—**Refd.** Wain *v.* Wain & Eve (1909), 101 L. T. 815.

5126. —.]—PRETTY *v.* PRETTY, No. 3458, *ante.*

5127. —.]—HAMPSON *v.* HAMPSON, No. 3463, *ante.*

5128. —.]—MUNZER *v.* MUNZER & SWAIN, No. 3477, *ante.*

5129. Admission at hearing.]—CLARKE *v.* CLARKE & CLARKE, No. 3446, *ante.*

5130. Admission on intervention by King's Proctor—Conduct conducing to adultery of respondent.]—Where after decree *nisi* in an undefended case the King's Proctor brings the adultery of petitioner to the notice of the ct., but it is clear that the adultery of petitioner has not in any way conduced to the adultery of resp. on which the decree *nisi* proceeded, the ct., in the exercise of its discretion, may reject the intervention of the King's Proctor & allow petitioner to retain the decree.—COOMBS *v.* COOMBS & HOPKINS (1903), 73 L. J. P. 23; 89 L. T. 343, n.

Annotation:—**Distd.** Hynes *v.* Hynes & Lake (1904), 20 T. L. R. 781.

5131. —.]—WALTON *v.* WALTON & HAZELL (1920), 36 T. L. R. 228.

5132. —.]—DEAN *v.* DEAN & HARGREAVES (1921), 37 T. L. R. 798.

5133. Aggravated adultery—Condoned by respondent.]—Petitioner having on the intervention of the King's Proctor after a decree *nisi* admitted adultery of a somewhat aggravated kind, which had been concealed from the ct., but had been condoned by the resp.:—*Held:* in view of decision in *Wilson* v. *Wilson*, No. 3448, *ante*, the limits to the exercise of the ct.'s discretion laid down in *Hines* v. *Hines & Burdett*, No. 3296, *ante*, might be relaxed, & the discretion exercised in petitioner's favour, the intervention of the King's Proctor being, however, allowed with costs.—BEBB *v.* BEBB & ROSS (1920), 123 L. T. 93; 36 T. L. R. 303; 64 Sol. Jo. 479.

Annotation:—**Distd.** Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

5134. Partial admission.]—A petitioning wife admitted that she had committed one act of adultery & the judge in the exercise of his discretion granted her a decree *nisi*. The King's Proctor intervened & petitioner then admitted that she had committed several acts of adultery with the same man:—*Held:* in the circumstances the ct. ought to exercise its discretion by making the decree absolute.—LONG *v.* LONG (1920), 36 T. L. R. 398.

Annotation:—**Distd.** Pullen *v.* Pullen & Holding (1920), 123 L. T. 203.

Effect of condonation of concealed adultery.]—*See* Nos. 3456, 5133, *ante.*

SUB-SECT. 4.—PLEADING AND PRACTICE.

A. Intervention by King's Proctor.

(a) No Opposition to Motion to Rescind.

See, now, Matrimonial Causes Rules, 1924, r. 51 B.

5135. Admissions on reply of petitioner—No evidence required.]—When the Queen's Proctor intervenes, & alleges matter which would be ground for reversing a decree *nisi* for dissolution of marriage, & such allegations are admitted by petitioner by his replication, the ct. will act on those admissions without requiring the proof of the facts admitted.

When, after a decree *nisi* for dissolution of marriage at the suit of the husband had been pronounced, the Queen's Proctor intervened, & pleaded that petitioner & resp. had been acting in collusion for the purpose of obtaining a divorce, contrary to the justice of the case, & with that intent kept from the knowledge of the ct., that petitioner had been guilty of bigamy & adultery,

ported her, & never contributed to her support or that of the child of the parties after they had separated:—*Held:* the divorce should be refused, & also on the ground that pltf. himself had committed adultery.—SAMAIL *v.* SAMAIL, [1922] 2 W. W. R. 490; 66 D. L. R. 93; 15 Sask. L. R. 393.—**CAN**

Sect. 20.—*Showing cause against a decree: Sub-sect.*

& had by such conduct conduced to his wife's adultery, & petitioner replied, admitting the charges of bigamy & adultery, but denying collusion, & that his conduct had conduced to the adultery of his wife, & pleaded that before the bigamy his wife had been guilty of adultery, the ct., upon the admissions in the replication, without requiring evidence of the facts therein stated, reversed the decree *nisi*, dismissed the petition, & condemned petitioner in the costs of the intervention.—BOULTON *v.* BOULTON & PAGE (1862), 2 Sw. & Tr. 638; 31 L. J. P. M. & A. 115; 7 L. T. 222; 164 E. R. 1146.

5136. Reconciliation of parties—No formal plea required.]—Petitioner had obtained a decree *nisi* dissolving his marriage on the ground of his wife's adultery. Subsequently his solrs. informed the Queen's Proctor that he had forgiven his wife & taken her back to live with him, & that he did not intend to take steps to have the decree made absolute. On affidavits from the husband & wife that they were living together again the ct. made the usual order rescinding the decree & dismissing the petition without requiring the Queen's Proctor to file a formal plea.—FLOWER *v.* FLOWER, [1893] P. 290; 63 L. J. P. 28; 42 W. R. 204; 1 R. 534.

5137. Denial by letter to court—Application by motion.] — LETCHFORD *v.* LETCHFORD (1905), *Times*, Nov. 1.

Annotation :—**Folld.** Crowden *v.* Crowden (1906), 23 T. L. R. 143.

5138. ——— ———.]—Petitioner having obtained a decree *nisi* for a divorce, the King's Proctor intervened & filed a plea alleging that petitioner had committed adultery. Petitioner's solrs. wrote to the King's Proctor that their client denied the allegations in the plea, but that she had not the means to contest the matter:—*Held:* the King's Proctor need not prove the allegations in the plea, but might proceed by motion.—CROWDEN *v.* CROWDEN (1906), 23 T. L. R. 143.

(*b*) *Particulars.*

5139. Whether necessary—Collusion.]—JESSOP *v.* JESSOP, No. 3145, *ante*.

5140. ——— ———.]—Where the Queen's Proctor has intervened after a decree *nisi*, & filed pleas alleging collusion, & that material facts were not brought to the knowledge of the ct., he will be ordered to give particulars of the matters so pleaded. Such particulars must state whether the facts relied upon are new or not, though such facts need not be given in detail. If any of the facts disclosed by the particulars have been already determined at the trial the ct. will order them to be struck out.—GLADSTONE *v.* GLADSTONE (1875), L. R. 3 P. & D. 260; 23 W. R. 519.

Annotations :—**Consd.** Crawford *v.* Crawford & Dilke (1886), 11 P. D. 150. **Refd.** Robinson *v.* Robinson (1877), 25 W. R. 376; Butler *v.* Butler (1890), 15 P. D. 126.

5141. ——— **Suppression of material facts.**]—BARNES *v.* BARNES & GRIMWADE, No. 3151, *ante*.

5142. ——— ———.]—GLADSTONE *v.* GLADSTONE, No. 5140, *ante*.

5143. Striking out—Matter already determined at hearing.]—GLADSTONE *v.* GLADSTONE, No. 5140, *ante*.

5144. ——— **Additional particulars alleging adultery with fresh party.**]—PIERCE *v.* PIERCE, No. 3993, *ante*.

(*c*) *Pleading.*

See, now, Matrimonial Causes Rules, 1924, r. 51.

Pleadings generally, *see* PLEADING.

5145. Form of plea.]—CRAWFORD *v.* CRAWFORD & DILKE, No. 3845, *ante*.

5146. Liberty to plead two grounds for rescission.]—(1) The Queen's Proctor intervening in a suit under Matrimonial Causes Act, 1860 (c. 144), s. 7, & alleging collusion, is at liberty in the same plea to allege the suppression of material facts or any other matters in opposition to the decree.

(2) The same issues being raised by the Queen's Proctor & by other interveners, the case was conducted by counsel for the Queen's Proctor, & the ct. refused to allow counsel for the other interveners to address the jury, although they were allowed to examine & cross-examine the witness.

(3) The misconduct conducing to adultery intended by Matrimonial Causes Act, 1857 (c. 85), s. 31, is not mere carelessness. Before a husband is found guilty of such misconduct, it must be proved that there was an intimacy between resp. & co-resp. of such a character as to be distinctly dangerous, that he actually knew so much of the intimacy as to perceive the danger, & that he either purposely or recklessly disregarded it, & forbore to interfere.

(4) After the trial by a jury of issues arising from an intervention, the ct. will not make a decree absolute immediately after a verdict in favour of petitioner, but will postpone it until the time has expired for an application for a new trial. The ct. made a decree absolute, notwithstanding a suggestion, supported by affidavits, that resp. & co-resp. were dead; the evidence before it not being sufficient to enable it to arrive at a conclusion whether they were dead or alive.

(5) *Semble:* any private intervener is liable to be condemned in costs whose intervention is unfounded & litigious.—DERING *v.* DERING & BLAKELEY (1868), L. R. 1 P. & D. 531; 37 L. J. P. & M. 52; 19 L. T. 48; 16 W. R. 1176.

Annotation :—*As to* (2) **Folld.** Sottomayer *v.* De Barros (1879), 5 P. D. 91.

5147. Amendment of plea—On terms.]—After a decree *nisi* for a dissolution of marriage, the Queen's Proctor intervened & charged collusion, suppression of material facts, & adultery. He subsequently applied for leave to amend certain erroneous dates in his charges. The ct. granted the application, but ordered the Queen's Proctor to pay the costs.—TOMKINS *v.* TOMKINS (1872), 20 W. R. 497.

5148. Striking out answer—Silence of petitioner.]—In a matrimonial suit where the King's Proctor showed cause against the decree being made absolute, petitioner's solrs. were directed to communicate with their client with a view to ascertaining whether he still defended the proceedings, & whether he would agree to certain evidence being taken on affidavit. For several months communications passed between petitioner & his solrs., but the solrs. were left without instructions. On a summons being taken out, the ct. directed petitioner's answer to the King's Proctor's plea to be struck out & subsequently on motion rescinded the decree.—FORSTER *v.* FORSTER & NANNI (1912), 29 T. L. R. 22.

(*d*) *Discovery.*

Discovery generally, *see* DISCOVERY, Vol. XVIII., pp. 42 *et seq.*

5149. Discovery of documents—Not ordered.]—D. *v.* D. (1909), No. 4309, *ante*.

In matrimonial causes generally.]—*See* Sect. 10, sub-sect. 1, A., *ante*.

(*e*) *Hearing.*

See Matrimonial Causes Rules, 1924, r. 51.

5150. Issues of fact—Decided by jury.]—MASTERS *v.* MASTERS, No. 4636, *ante.*

5151. —— ——.]—STUDHOLME *v.* STUDHOLME & CULLUM, No. 4637, *ante.*

5152. Right of King's Proctor to conduct intervention—Where member of public also intervening.]—DERING *v.* DERING & BLAKELEY, No. 5146, *ante.*

5153. Right to begin—Admissions of adultery by petitioner.]—Where the answer of a petitioner to the plea of the King's Proctor showing cause why a decree *nisi* should not be made absolute contains substantial admissions of adultery, but puts forward grounds for asking the ct. to exercise its discretion in favour of petitioner, the right course is that petitioner begin.—OSTICK *v.* OSTICK, [1917] P. 20; 86 L. J. P. 6; 115 L. T. 789; 33 T. L. R. 28; 61 Sol. Jo. 100.

—— **On hearing of petition.**]—*See* Sect. 16, sub-sect. 4, B., *ante.*

5154. Service of plea.]—PALMER *v.* PALMER & BEAUFORT (1902), 47 Sol. Jo. 13.

5155. Right of King's Proctor to prove charge—Though petitioner withdraws.]—Where the Queen's Proctor objected, the ct. refused to dismiss the petition on consent, & held that he was entitled to prove the adultery charged by him against petitioner.—CLAPHAM *v.* CLAPHAM & GUEST (1868), 17 L. T. 584.

Right of party charged to intervene.]—*See* Sect. 8, sub-sect. 4, F. (*c*), *ante.*

(*f*) *Evidence.*

5156. Power to order attendance of petitioner for examination.]—Under Matrimonial Causes Act, 1857 (c. 85), s. 43, the ct. has only power to order that petitioner attend on the hearing of the petition. It cannot, therefore, order his attendance at the hearing of the case of the Queen's Proctor, if the intervention was after a decree *nisi* had been pronounced. *Semble:* though the ct. has no power in such a case to order attendance of petitioner it may stay proceedings in the suit till he appear.—POLLACK *v.* POLLACK & DEANE & M'NAMARA (1862), 2 Sw. & Tr. 648; 1 New Rep. 35; 32 L. J. P. M. & A. 28; 7 L. T. 395; 8 Jur. N. S. 1230; 11 W. R. 85; 164 E. R. 1149.

5157. Charges of adultery & collusion—Charge of adultery the same as that charged on petition—Right to prove adultery before collusion.]—(1) H. petitioned for dissolution of marriage; resp. answered, & made countercharges; some evidence in support of those charges was offered at the trial, but a verdict was found for petitioner on all issues, & a decree *nisi* made. The Queen's Proctor intervened, & alleged the same charges of adultery as had been in issue on resp.'s answer, & collusion:—*Held:* the intervener was not bound to prove the collusion before he went into the question of the adultery.

(2) Petitioner is not a competent witness in a proceeding by an intervener showing cause against a decree *nisi*, nor will the ct. examine him under Matrimonial Causes Act, 1857 (c. 85), s. 43, in support of his own petition.—HARDING *v.* HARDING & LANCE (1865), 4 Sw. & Tr. 145; 34 L. J. P. M. & A. 108; 13 L. T. 195; 11 Jur. N. S. 814; 13 W. R. 999; 164 E. R. 1471.

5158. Onus of proof—Primâ facie proof.]—(1) Upon the trial of an issue of adultery raised by the Queen's Proctor, intervening to show cause against a decree *nisi* being made absolute, the ct. does not require such strict proof of the identity of the person charged with adultery as upon the trial of such an issue in a suit between husband & wife. Petitioner having had notice of the time when, the place where, & the person with whom he was alleged to have committed adultery, & evidence being given that a person passing by petitioner's name, & giving a card with petitioner's name printed upon it, had been guilty of the alleged acts of adultery at the time & place & with the person specified, the ct. held that there was *primâ facie* evidence of identity, & in the absence of evidence to rebut it, found petitioner guilty, & dismissed his petition. (2) A decree *nisi* having been pronounced with costs against co-resp., the decree was rescinded on the ground of petitioner's adultery committed subsequent to the date of the decree; but the order condemning the co-resp. in costs was not rescinded.—HULSE *v.* HULSE & TAVERNOR (1871), L. R. 2 P. & D. 357; 41 L. J. P. & M. 19; 25 L. T. 764; 20 W. R. 447.

5159. Plea of privilege—Not available.]—The plea of privilege cannot be relied upon to keep back material facts from the ct. in a divorce suit; nor by a client who has attacked the character of her solrs. in order to prevent them from vindicating it.—LAMBART *v.* LAMBART (1907), 51 Sol. Jo. 345.

(*g*) *Costs.*

i. *Successful Intervention.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 182.

5160. Against whom order made—Co-respondent.]—The ct. refused to condemn a co-resp. who had not been dismissed from the suit in the costs of an unsuccessful intervention by the Queen's Proctor under Matrimonial Causes Act, 1860 (c. 144), s. 7.—BLACKHALL *v.* BLACKHALL & CLARKE (1888), 13 P. D. 94; 57 L. J. P. 60; 59 L. T. 151; 36 W. R. 926; 4 T. L. R. 525.

Annotations:—**Distd.** Taplen *v.* Taplen, [1891] P. 283. **Consd.** Hope *v.* Hope & Johnson (1924), 130 L. T. 761.

—.]—A husband having obtained a decree *nisi* in a petition for divorce, on the ground of his wife's adultery, the Queen's Proctor intervened, & charged that the decree had been procured by the collusion of petitioner & co-resp. Co-resp. was cited, but did not appear. At the hearing the ct. having found the issues in favour of the Queen's Proctor, condemned co-resp. in costs.—TAPLEN *v.* TAPLEN & COWEN, [1891] P. 283; 60 L. J. P. 88; 64 L. T. 870; 7 T. L. R. 508.

Annotation:—**Consd.** Hope *v.* Hope & Johnson (1924), 130 L. T. 761.

5162. —— ——.]—The King's Proctor having intervened on the ground of condonation subsequent to decree *nisi*, petitioner submitted to his decree *nisi* being rescinded, save that he asked that it should be kept alive as regards the costs awarded to him against co-resp., & that co-resp. should also be ordered to pay the costs of the intervention. Co-resp.'s liability for the costs of the original suit was not disputed, but it was contended on his behalf that the ct. had no jurisdiction to condemn him in the costs of the intervention, & if it had jurisdiction to do so, should not do so:—*Held:* on the question of jurisdiction the authorities were conflicting, but, assuming there was jurisdiction, it should not be exercised in the manner desired

n. *Attorney-General Whether entitled to costs.*]—The A.-G. intervening is not entitled to receive costs.—A.-G. OF QUEENSLAND *v.* HOLLAND (1912), 15 C. L. R. 46. **-AUS.**

Sect. 20.—*Showing cause against a decree: Sub-sect.* 4, *A.* (*g*) *i. & ii., & B. Sect.* 21: *Sub-sect.* 1, *A. & B.*

by petitioner. Co-resp.'s conduct was the cause of the decree *nisi*, but was in no degree the cause of the King's Proctor's intervention. Co-resp. would, therefore, only be required to pay the costs of the original suit, & as he had been brought there to answer an application which had failed, he must have his costs of the motion.—HOPE *v.* HOPE & JOHNSON (1924), 130 L. T. 761; 40 T. L. R. 282.

5163. —— Wife—Money paid into court by husband to cover wife's costs.]—At the trial of two cross-petitions for dissolution by the husband & wife, the wife, by arrangement between the parties, obtained a decree *nisi*, & the husband was condemned in costs. The Queen's Proctor intervened, charging both parties with collusion, & the wife with adultery. At the trial of these issues the jury found that the parties had been guilty of collusion, but disagreed as to the adultery, & the decree *nisi* was rescinded. The husband had paid into ct. sums amounting to £140 to meet the wife's costs. The ct. had refused, & the Ct. of Appeal had confirmed this decision, to allow any part of the sum to be paid out to the wife or her solrs. The ct. now, on application by the Queen's Proctor, ordered the whole sum of £140 to be paid out to him in part payment of his costs for procuring the reversal of the decree *nisi*.—BUTLER *v.* BUTLER, BUTLER *v.* BUTLER & BURNHAM (1890), 15 P. D. 161; 59 L. J. P. 86; 63 L. T. 260; 6 T. L. R. 390.

5164. —— —— No separate estate.]—The discretion as to costs, given to the ct. by Matrimonial Causes Act, 1878 (c. 19), s. 2, is an absolute discretion, to be exercised according to the facts & circumstances of each particular case; & where the petition is by the wife, she may be condemned in the costs of the King's Proctor, who has intervened under that section & successfully shown cause against the decree *nisi* being made absolute, notwithstanding the fact that there is no evidence that petitioner has or ever had separate estate.—KENNARD *v.* KENNARD, MORRIS *v.* MORRIS, [1915] P. 194; 84 L. J. P. 172; 113 L. T. 928; 31 T. L. R. 534; 59 Sol. Jo. 630.

5165. —— Pauper.]—A pauper petitioner, who is unsuccessful upon the intervention of the Queen's Proctor, is liable to be condemned in the full costs of the intervention.—WHITE *v.* WHITE, [1898] P. 124; 67 L. J. P. 63.

Annotation:—**Folld.** Guy *v.* Guy & Foster (1900), 17 T. L. R. 4.

5166. —— ——.]—A pauper petitioner for divorce, when the decree *nisi* is rescinded on the intervention of the Queen's Proctor, is liable to be condemned in the costs of the intervention.—GUY *v.* GUY & FOSTER (1900), 17 T. L. R. 4.

5167. —— ——.]—Petitioner, as a poor person, obtained a decree *nisi* for the dissolution of his marriage, but did not apply for leave to defend as a poor person the subsequent proceedings upon the appearance & plea of the King's Proctor, who successfully showed cause against the decree being made absolute:—*Held:* the King's Proctor was entitled to an order for costs against petitioner.—ROBERTS *v.* ROBERTS & LANG, [1916] P. 187; 85 L. J. P. 168; 114 L. T. 565; 32 T. L. R. 330; 60 Sol. Jo. 322.

5168. Petitioner.]—HYMAN *v.* HYMAN & GOLDMAN, No. 3227, *ante*.

5169. —— Party intervening on King's Proctor's plea.]—Where a person, charged by the King's Proctor with having committed adultery with petitioner, intervened & filed an answer to the King's Proctor's plea, such person, as well as petitioner, was, upon the dismissal of the petition, condemned in the costs of the King's Proctor.—DAVISON *v.* DAVISON, [1909] P. 308; 79 L. J. P. 9; 26 T. L. R. 28; 54 Sol. Jo. 13.

5170. King's Proctor successful on part of plea—No order as to costs.]—BARNES *v.* BARNES & GRIMWADE, No. 3151, *ante*.

5171. —— Costs of successful issues.]—HILBINGER *v.* HILBINGER (1908), cited in, [1910] P. at p. 164.

Annotation:—**Refd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

5172. No costs awarded—No moral fault on part of petitioner.]—A decree *nisi* was pronounced on the wife's petition. Subsequently the Queen's Proctor intervened & established first that petitioner had, subsequent to the decree *nisi*, condoned the adultery on account of which it had been pronounced; &, secondly, that petitioner & resp. had been guilty of collusion for the purpose of concealing such condonation. It was further established that resp. had been guilty of adultery subsequent to such condonation:—*Held:* (1) the parties having been found guilty of collusion, the decree *nisi* must be rescinded & the petition dismissed, & it was immaterial whether the condoned adultery had been revived by the subsequent adultery of resp. or not; (2) having regard to the decisions in *Dent* v. *Dent* & *Moore* v. *Moore*, Nos. 3183, 3517, *ante*, petitioner might nevertheless succeed in obtaining a dissolution on filing a fresh petition alleging such adultery.

(3) The Queen's Proctor brings cases like this before the ct. upon public grounds, & I think that, unless some moral fault on the part of petitioner is established, the order rescinding the decree may well be made, without costs. In this case, therefore, I make no order as to the costs of the intervention (JEUNE, P.).—ROGERS *v.* ROGERS, [1894] P. 161; 63 L. J. P. 97; 70 L. T. 699; 6 R. 650.

Annotation:—*As to* (1) **Refd.** Churchward *v.* Churchward & Holliday, [1895] P. 7.

5173. Waiver of costs by King's Proctor.]—Upon petitioner's application, the King's Proctor, who had intervened & filed his plea, assenting, the ct. rescinded a decree *nisi* for nullity of marriage & dismissed the petition. No order for the King's Proctor's costs was made, he having waived his right to ask for same.—A. (OTHERWISE B.) *v.* A., [1901] P. 284; 70 L. J. P. 90; 85 L. T. 171; 17 T. L. R. 564.

5174. Enforcement of costs—Case placed in reserved list.]—When a decree *nisi* is pronounced, & upon the intervention of the Queen's Proctor the decree absolute is abandoned, & also the suit, & there is no answer by petitioner to the Queen's Proctor's plea, or payment of the costs of the suit, the ct. will order it to be placed in the reserved list until payment of the Queen's Proctor's costs.—COLLINS *v.* COLLINS & SMITH (1881), 44 L. T. 31.

Enforcement of orders generally.]—*See* Sect. 23, *post*.

ii. *Unsuccessful Intervention.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 182.

PART XIII. SECT. 20, SUB-SECT. 4.—A. (g) ii.

o. *Attorney-General—Whether liable to pay.*]—The A.-G. intervening is not liable to pay costs.—A.-G. OF QUEENSLAND *v.* HOLLAND (1912), 15 C. L. R. 46.—**AUS.**

5175. Power of court to condemn in costs—When acting reasonably.]—HOWARD *v.* HOWARD & DREW (1903), *Times*, Feb. 4.

Annotation :—**Dbtd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

5176. ——.]—The ct. possesses full power, in the exercise of its judicial discretion, to condemn the King's Proctor in the costs incurred by petitioner in resisting an intervention by the King's Proctor. The mere fact that an intervention by the King's Proctor is reasonable will not debar a successful petitioner from applying for costs. Each application for costs is to be considered by the light of the particular case before the ct., but the general principle is that a successful petitioner, like any other litigant who succeeds, is entitled to costs unless his or her own conduct has really brought about the intervention.—WESTCOTT *v.* WESTCOTT, [1908] P. 250; 77 L. J. P. 102; 99 L. T. 310; *sub nom.* WESCOTT *v.* WESCOTT, 24 T. L. R. 425.

Annotations :—**Apprvd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151. **Refd.** Kennard *v.* Kennard, Morris *v.* Morris, [1915] P. 194.

5177. ——.]—Where the ct. was of opinion that an intervention by the King's Proctor was not justified, it condemned the intervener in costs.—HOWE *v.* HOWE & HOWE (1910), 54 Sol. Jo. 252.

Annotation :—**Refd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

5178. ——.]—Matrimonial Causes Act, 1878 (c. 19), s. 2, confers upon the ct. a discretion as to the costs of an intervention, whether by the King's Proctor or a member of the public, & the King's Proctor stands in precisely the same position as to costs as any other intervener, except that the Treasury may recoup him for any costs which he may pay to a successful petitioner under order of the ct. There is no practice not to order the King's Proctor to pay the costs of an unsuccessful intervention, unless he has acted unreasonably in intervening.—HIGGINS *v.* KING'S PROCTOR, KING'S PROCTOR *v.* CARTER, [1910] P. 151; *sub nom.* HIGGINS *v.* HIGGINS, CARTER *v.* CARTER, 79 L. J. P. 37; 102 L. T. 259; 26 T. L. R. 303; 54 Sol. Jo. 405, C. A.

Annotation :—**Consd.** Kennard *v.* Kennard, Morris *v.* Morris, [1915] P. 194.

5179. Misconduct of petitioner not amounting to cause for rescission—No order made against King's Proctor.]—(1) Where resp. denied the allegations of the petition, & these issues came on for trial at the same time as an issue raised on a plea of the Queen's Proctor, "that the petition had been filed by arrangement with resp. & others acting on his behalf" :—*Held :* the Queen's Proctor had nothing to do with the issues raised between the parties, & his counsel had no right to comment on the evidence relating to them.

(2) Though the Queen's Proctor may fail to establish a charge of collusion, the ct. will not order the costs to be paid by the Crown if petitioner's conduct has been such as to justify the intervention.—JESSOP *v.* JESSOP (1861), 30 L. J. P. M. & A. 193.

Annotation :—*Generally*, **Mentd.** Churchward *v.* Churchward & Holliday, [1895] P. 7.

5180. —— ——.]—FORRESTER *v.* FORRESTER (1884), *Times*, May 19.

Annotation :—**Refd.** Higgins *v.* King's Proctor, King's Proctor *v.* Carter, [1910] P. 151.

5181. Discretion exercised in favour of guilty petitioner—No order made against King's Proctor.]—SYMONS *v.* SYMONS, No. 3490, *ante*.

5182. -.]—BURDON *v.* BURDON, No. 3498, *ante*.

5183. — **King's Proctor allowed costs.**]-BEBB *v.* BEBB & ROSS, No. 5133, *ante*.

5184. —— —— **Pauper petitioner.**]—ELLIOTT *v.* ELLIOTT & BOWERS, No. 3289, *ante*.

B. Intervention by Member of Public.

See Matrimonial Causes Act, 1878 (c. 19), s. 2.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 182; Matrimonial Causes Rules, 1924, r. 52.

5185. Objection to jurisdiction of court over parties—By intervener—Whether maintainable.]—FORSTER *v.* FORSTER & BERRIDGE, No. 5112, *ante*.

5186. Onus of proof—Distinguished from intervention by King's Proctor.]—HULSE *v.* HULSE & TAVERNOR, No. 5158, *ante*.

5187. Costs as in intervention of King's Proctor.]—Where a member of the public intervenes under Matrimonial Causes Act, 1860 (c. 19), s. 7, to show cause why a decree *nisi* for a divorce should not be made absolute, the same rule as to costs applies as in a case where the King's Proctor intervenes, & the intervener who succeeds will not, as a general rule, be allowed costs as between solr. & client.—WOODHEAD *v.* WOODHEAD & JONES (1907), 23 T. L. R. 334.

5188. Withdrawal of intervention—Power of court to order costs.]—After a decree *nisi* for a dissolution of marriage, affidavits were filed by a private individual under Matrimonial Causes Act, 1860 (c. 144), s. 7, setting out facts to induce the ct. not to make the decree absolute. At the last moment the intervener withdrew his opposition, & the decree was made absolute :—*Held :* the ct. has no power to condemn an intervener in the costs of his intervention.—VIVIAN *v.* VIVIAN & WATERFORD (MARQUIS) (1870), L. R. 2 P. & D. 100; 39 L. J. P. & M. 54; 23 L. T. 267; 18 W. R. 936.

5189. Unsuccessful intervention—Power of court to order costs.]—FORSTER *v.* FORSTER & BERRIDGE, No. 5112, *ante*.

5190. —— ——.]—DERING *v.* DERING & BLAKELEY, No. 5146, *ante*.

5191. —— ——.]—EDWARDS *v.* EDWARDS & WILSON (1899), *Times*, June 17, 20.

5192. Successful intervention—Whether costs as between solicitor & client.]—WOODHEAD *v.* WOODHEAD & JONES, No. 5187, *ante*.

5193. Security for costs—Power of court to order intervener to give.]—GILROY *v.* GILROY, No. 4273, *ante*.

SECT. 21.—APPEALS, RE-HEARING, NEW TRIAL, ETC.

SUB-SECT. 1.—APPEALS.

A. Who may appeal.

5194. Not party not legally affected by judgment.—WRIGHT *v.* WRIGHT & PICO (1904), 49 Sol. Jo. 134, C. A.

B. Decrees Nisi and Absolute.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 27.

5195. Decree nisi — To Court of Appeal.]—CLEAVER *v.* CLEAVER, No. 5200, *post*.

See Jud. Act, 1873 (c. 66), s. 12; &, *now*,

PART XIII. SECT. 21, SUB-SECT. 1.—B.

p. *Right of appeal—How conferred.*] —A right of appeal is a matter of substance, & can be conferred only by express legislative authority.—BILSLAND *v.* BILSLAND, [1922] 1 W. W. R. 718; 63 D. L. R. 126; 31 Man. L. R. 422.—**CAN.**

Sect. 21.—*Appeals, re-hearing, new trial, etc.: Sub-sect.* 1, *B., C. & D.*]

Supreme Court of Judicature Act, 1925 (c. 49), s. 27.

—— **Orders incorporated in decree—Whether part of decree.**]—*See* No. 5207, *post.*

5196. —— Appeal by intervener—Judicature Act, 1881 (c. 68), s. 9.]—A wife petitioned for the dissolution of her marriage with resp., on the ground of cruelty & adultery with the intervener. Resp. did not defend the suit. The trial judge found both the cruelty & adultery proved & granted a decree *nisi*. Upon an appeal by the intervener, the Ct. of Appeal found that petitioner had failed to establish that adultery had been committed between resp. & the intervener &, after hearing the King's Proctor as to the legal effect of that finding, rescinded the decree *nisi* & substituted a decree for judicial separation. Upon an appeal by petitioner to the House of Lords, their Lordships having by a majority affirmed the finding of the Ct. of Appeal:—*Held:* upon this finding it was the duty of the Ct. of Appeal & of the House of Lords to rescind the decree *nisi* & to pronounce the decree of judicial separation which the trial judge, if he had determined the issue of adultery differently, might have pronounced.

A further point of law has been raised whether by reason of Jud. Act, 1881 (c. 68), s. 9, the decision of the Ct. of Appeal is final, in which case the present appeal does not lie, or whether the case falls within the exception, as being an appeal from a decision on a petition for dissolution of marriage. The appeal is from the order of the Ct. of Appeal, & that order is the decision refusing a decree on a petition for dissolution of marriage. In my opinion the case falls clearly within the exception, so that your Lordships have jurisdiction to deal with the case (LORD BIRKENHEAD).—RUTHERFORD *v.* RICHARDSON, [1923] A. C. 1; 92 L. J. P. 1; 128 L. T. 399; 39 T. L. R. 42; 67 Sol. Jo. 78, H. L.

Annotation:—**Refd.** Russell *v.* Russell, [1924] A. C. 687.

5197. Power to stay appeal—Pending security for costs.]—There is no precedent for the Ct. of Appeal ordering that the appeal of a husband against a decree *nisi* granted to a wife should be stayed until the husband had paid or given security for the further costs of the wife at the trial & also her costs of the appeal, & in the absence of such a precedent the ct. will not, in ordinary circumstances, make such order. The application to the Ct. of Appeal in the above circumstances should be made by being set down in the list as an original motion, & not upon an application *ex p.*—SHUFFLEBOTHAM *v.* SHUFFLEBOTHAM (1923), 128 L. T. 642; 67 Sol. Jo. 297; 39 T. L. T. 206, C. A.

5198. —— Rescission of decree—Decree of judicial separation substituted.]—RUTHERFORD *v.* RICHARDSON, No. 5196, *ante.*

5199. —— Failure to appeal in time—Effect on lis between parties.]—MADAN *v.* MADAN & DE THOREN, No. 4161, *ante.*

5200. Decree absolute—When appealable as of right.]—Since Jud. Act, 1881 (c. 68), an appeal to the House of Lords in a matrimonial cause, where an appeal lies, can only be from a decision of the Ct. of Appeal; & such an appeal must be brought within one month after the decision appealed against is pronounced by the Ct. of Appeal, if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits.

The [Judicature Act, 1881 (c. 68), s. 10] undoubtedly limits the right of appeal in a certain case, but it does not say that an appeal to the House of Lords can be direct from the Probate Division. The decree *nisi* is appealable, but is appealable to the Ct. of Appeal, & if the Ct. of Appeal affirm the decree *nisi*, you having appealed against it, have the right also to appeal against the decree absolute; & having the decision of the Ct. of Appeal against you, you can appeal here both against the decree *nisi* & against the decree absolute (LORD SELBORNE, L.C.).—CLEAVER *v.* CLEAVER (1884), 9 App. Cas. 631, H. L.

See, also, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31.

5201. —— Discretion of judge to refuse—Not appealable.]—HOLLAND *v.* HOLLAND, No. 5124, *ante.*

5202. Appeal to House of Lords—Only from Court of Appeal.]—CLEAVER *v.* CLEAVER, No. 5200, *ante.*

5203. —— Not from part of dissolution decree.]—Appeal lies to the House of Lords only from a decree for dissolution properly so called, not from a part of such decree relating to the dissolution.—SIDNEY *v.* SIDNEY (1867), 36 L. J. P. & M. 73; 15 W. R. 1094, H. L.; *affg.* (1866), L. R. 1 P. & D. 78; *subsequent proceedings* (1867), 17 L. T. 9.

Annotations:—**Refd.** Charles *v.* Charles (1866), L. R. 1 P. & D. 260; Bradley *v.* Bradley (1878), 3 P. D. 47. **Mentd.** Ousey *v.* Ousey (1875), 1 P. D. 56; Newton *v.* Newton (1885), 11 P. D. 11; Carter *v.* Carter (1895), 12 T. L. R. 37; Newton *v.* Newton, [1896] P. 36; Bullus *v.* Bullus (1910), 102 L. T. 399; Burmester *v.* Burmester, [1913] P. 76; Scott *v.* Scott, [1921] P. 107; Fox *v.* Fox, [1925] P. 157.

5204. —— Time for appeal.]—CLEAVER *v.* CLEAVER, No. 5200, *ante.*

5205. —— Supervening bankruptcy of appellant—Proceedings allowed to continue.]—G. *v.* M. (1885), No. 3339, *ante.*

5206. Decree of House of Lords—How recorded in registry.]—(1) A decree made by the House of Lords on appeal, will be recorded on the files of the ct. upon a copy of such decree, verified by affidavit, being deposited in the registry.

(2) A wife's petition for nullity was dismissed by the ct., & no order was made as to costs. On appeal the House of Lords pronounced a decree of nullity but made no order as to costs:—*Held:* the ct. had no power to make an order as to costs.—L. (FALSELY CALLED H.) *v.* H. (1866), L. R. 1 P. & D. 293; 36 L. J. P. & M. 76; 15 L. T. 299; 15 W. R. 319.

Appeals as to costs.]—*See* Sub-sect. 1, D., *post.*

Appeals as to orders for committal.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 81, Nos. 995, 996.

C. Interlocutory Orders.

See Matrimonial Causes Rules, 1924, r. 45.

5207. What is interlocutory order—Judgment on demurrer deciding issue.]—A demurrer to part of an answer to a petition for dissolution of marriage which put in issue the validity of the marriage, the other parts of the answer remaining to be determined, is not a final but an interlocutory matter, & one which under Matrimonial Causes Act, 1857 (c. 85), fell within the cognisance of the judge ordinary sitting alone, & his judgment on such demurrer is the subject of appeal to the full

q. *Appeal where discretion of court involved—Order for interim alimony.*]—In a suit against a wife for divorce in which she had obtained an order for *interim* alimony & payment of money for *interim* costs the ct., dealing with an appeal from such order

ct. & not to the House of Lords. Where the judgment on a demurrer from the state of the pleadings decides the whole suit, the appeal lies direct to the House of Lords.—PAGANI *v.* PAGANI & VINING (1866), L. R. 1 P. & D. 223; 35 L. J. P. & M. 87; 14 L. T. 706; 15 W. R. 23.

5208. —— Order condemning co-respondent in costs.]—FORBES-SMITH *v.* FORBES-SMITH & CHADWICK, No. 4985, *ante*.

5209. Leave to appeal—On terms—Payment of wife's costs.]—Petitioner (wife) brought a former suit against resp., but withdrew that petition upon the following terms: "Petitioner agrees to accept £130 *per annum* by way of permanent maintenance, this sum to include the maintenance of the child. The allowance to be paid by . . . resp. by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. . . . Petitioner is to have the custody of the child." Resp. subsequently committed adultery, & was also guilty of statutory desertion, &, upon these grounds, petitioner obtained a decree dissolving her marriage, & an order for the custody of the child. The husband continued to pay the allowance, which was, in fact, the amount allotted by way of alimony *pendente lite* in the first suit. Upon petition for permanent maintenance & for an allowance for the maintenance & education of the child, resp. set up the agreement, & the registrar held it to be a bar. The ct. reversed the decision of the registrar, & ordered the inquiry as to means to proceed. The ct., with considerable reluctance, gave resp. leave to appeal, but upon terms that petitioner's costs up to date should be actually paid & that security should be given for petitioner's costs upon the appeal.—BISHOP *v.* BISHOP (1897), 76 L. T. 28.

——.]—*See, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (*i*) (iv).

5210. Notice of appeal—Time.]—BEECHAM *v.* BEECHAM (1903), *Times*, Mar. 14.

5211. Hearing of appeal—Evidence receivable.]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 4246, *ante*.

5212. —— ——.]—SYKES *v.* SYKES, No. 4111, *ante*.

5213. Appeal where discretion of court involved—Onus on appellant—To prove wrongful exercise.]—THOMPSON *v.* THOMPSON & STURMFELLS, No. 4259, *ante*.

Appeals from grant or refusal of new trial.]—*See* Sub-sect. 3, C., *post*.

D. Appeal as to Costs.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (*h*).

5214. Whether right of appeal—Under Matrimonial Causes Act, 1857 (c. 85), s. 51.]—GLENNIE *v.* GLENNIE & BOWLES, No. 4832, *ante*.

5215. —— —— Necessity for leave—Judicature Act, 1873 (c. 66), s. 49.]—SMITH *v.* SMITH, [1882] W. N. 91, C. A.

Annotation :—**Refd.** Russell *v.* Russell, [1892] P. 152.

5216. —— ——.]—(1) Although in proceedings for divorce a wife as a general rule is allowed her costs, the allowance of such costs is under Matrimonial Causes Act, 1857 (c. 85), s. 51, in the discretion of the ct. & there is no appeal from the refusal of the ct. to order the wife's costs to be paid.

(2) The costs occasioned to a wife by the intervention of the Queen's Proctor are also within the jurisdiction of the ct. & there is no appeal from the refusal of the ct. to order the wife's costs to be paid.—BUTLER *v.* BUTLER (1890), 15 P. D. 126; 62 L. T. 477.

Annotations :—*As to* (1) **Consd.** Russell *v.* Russell, [1892] P. 152. **Refd.** Palmer *v.* Palmer & Stockley, [1914] P. 116.

5217. —— Effect of Appellate Jurisdiction Act, 1876 (c. 59), s. 20—& Judicature Act, 1873 (c. 66), s. 49.]—RUSSELL *v.* RUSSELL, No. 4307, *ante*.

5218. Appeal by co-respondent—Without leave—Costs of consolidated suit.]—FORBES-SMITH *v.* FORBES-SMITH & CHADWICK, No. 4985, *ante*.

5219. Costs against wife—Directed against restrained property—Right of wife to appeal—While in contempt.]—A decree *nisi* for the dissolution of a marriage on the ground of the wife's adultery directed that the child of the marriage should remain in the custody of the husband until further order, & should not be removed out of the jurisdiction of the ct. On the same day an order was made *ex p.* in chambers that the child should be forthwith delivered to the husband. At that time the wife was abroad with the child. After the decree *nisi* had been made absolute she returned to England with the child, & was for the first time served personally with the orders with reference to the custody of the child. She then took out a summons asking that the decree *nisi* & the *ex p.* order might be varied & the custody of the child given to her. During the hearing of the summons the wife gave an undertaking not to remove the child out of the jurisdiction of the ct. On Mar. 10, 1903, the summons was dismissed & the wife was ordered to pay the costs out of her separate property, notwithstanding that it was subject to a restraint on anticipation, & she was also ordered to deliver the child to the husband forthwith. It was then discovered that she had sent the child out of the jurisdiction two or three days before Mar. 10, & had since gone abroad herself, & she had remained abroad with the child ever since. On Mar. 12, an order was made for her committal for contempt of ct. & directing a writ of attachment should issue against her. The wife gave notive of appeal from so much of the order of Mar. 10 as directed the costs to be paid out of her separate estate, & it was contended that the ct. had no jurisdiction to make it:—*Held:* (1) the rule that a person who is in contempt cannot be heard, *primâ facie* applies to voluntary applications on his part, to cases where he is asking for something & not to cases in which all he seeks is to be heard in matters of defence; applt. objected to the order on the ground that there was no jurisdiction to make it; & its legality ought to be determined, & therefore the appeal must be heard; (2) the summons was not a "proceeding instituted" by the married woman within Married Women's Property Act, 1893 (c. 63), but an application in the divorce suit, & there was no jurisdiction to order her to pay the costs out of her separate estate which was subject to a restraint on anticipation.—GORDON *v.* GORDON, [1904] P. 163; 73 L. J. P. 41; 90 L. T. 597; 52 W. R. 389; 20 T. L. R. 272; 48 Sol. Jo. 297, C. A.

Annotations :—*As to* (2) **Refd.** Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612; *Re* Wingfield & Blew, [1904] 2 Ch. 665. *Generally*, **Mentd.** R. *v.* Wigand, *Re* Wigand (1913), 82 L. J. K. B. 735; Russell *v.* Russell, [1924] A. C. 687; Warren *v.* Warren, [1925] P. 107.

Compare No. 5234, *post*.

on the ground of the husband's poverty, expressed its opinion that the discretion of the judge who made the order should not be interfered with.—PERADSKY *v.* PERADSKY, [1921] 3 W. W. R. 532. CAN.

Sect. 21.—*Appeals, re-hearing, new trial, etc.: Sub-sects.* 2 & 3, *A.* & *B.* (*a*).]

SUB-SECT. 2.—RE-HEARING.

See, now, Matrimonial Causes Rules, 1924, r. 46.

5220. How application made—To Divisional Court of Divorce Division.]—HEYES *v.* HEYES & MASON, No. 3425, *ante.*

5221. —— ——.]—An application for rehearing of a divorce cause tried by a judge without a jury must be made to a Div. Ct. of the Probate, Divorce, & Admlty. Div. according to rule 62 of the Divorce Rules, & not to the Ct. of Appeal, Jud. Act, 1890 (c. 44), s. 1, applying only to causes or issues tried with a jury.—SMITH *v.* SMITH, [1897] P. 293; 66 L. J. P. 151; 77 L. T. 206; 46 W. R. 24; 41 Sol. Jo. 661, C. A.

Annotation :—**Refd.** Holden *v.* Holden & Pearson (1910), 26 T. L. R. 307.

5222. —— ——.]—An application for the rehearing of a suit for dissolution of marriage cannot be made except to a Div. Ct.—WATSON *v.* WATSON (1903), 89 L. T. 78; 19 T. L. R. 567.

5223. —— ——.]—HOLDEN *v.* HOLDEN & PEARSON, No. 5231, *post.*

5224. —— ——.]—An application for the rehearing of a divorce cause tried by a judge without a jury must be made to a Div. Ct. of the Probate, Divorce, & Admlty. Div. according to rule 62 of the Divorce Rules, & not to the Ct. of Appeal, as Jud. Act, 1890 (c. 44), s. 1, applies only to causes or issues tried with a jury.—GARNETT *v.* GARNETT & CALDERON (1919), 35 T. L. R. 521, D. C.

——.]—*See, now,* Matrimonial Causes Rules, 1924, r. 46.

5225. Stay of proceedings—Until payment of wife's costs—By husband.]—A husband obtained a decree *nisi* for a divorce from his wife on the ground of her adultery with unknown men, co-resp. being dismissed from the suit, & the husband was ordered to pay his wife's costs. The husband then gave notice of motion for a rehearing, & thereupon the wife's solrs. applied that the motion for a rehearing should be stayed until the husband had paid the wife's costs :—*Held :* the motion for a rehearing must be stayed until the husband had paid the wife's costs.—WAITE *v.* WAITE & MUIR (1916), 32 T. L. R. 432, D. C.

5226. When application granted—General rule.]—The grounds on which a rehearing can be allowed are those recognised in *Durant* v. *Durant*, No. 5227, *post*, which are substantially the same as those recognised by the cts. of common law. If it is alleged that new evidence can be given, it must be shown that this evidence could not, with due diligence, have been given before.—LESTER JONES *v.* LESTER JONES & STIRRETT (1920), 123 L. T. 584.

5227. —— **Fresh evidence—No laches by applicant.**]—In a matrimonial cause if the ct. is asked to allow fresh matter to be pleaded it must be satisfied that appct. is in no laches, that the permission asked for is essential to the ends of justice & that some special ground is shown for asking for it, such as that the fresh matter has newly come to the party's knowledge.—DURANT *v.* DURANT (1824), 2 Add. 267; 162 E. R. 292.

Annotation :—**Refd.** Lester Jones *v.* Lester Jones & Stirrett (1920), 123 L. T. 584.

5228. —— —— **Possibility of different verdict.**]—A husband's petition was heard before a judge alone & dismissed on the ground that the evidence was insufficient. Subsequently petitioner obtained fresh evidence, & applied for a rehearing :—*Held :* a rehearing ought to be granted on the ground that the fresh evidence was sufficient to warrant a reasonable probability of a different verdict in the first & second trials if the case were tried by a jury.—TAYLOR *v.* TAYLOR & DARG (1899), 68 L. J. P. 116; 81 L. T. 494, D. C.

5229. —— —— **If not previously discoverable by due diligence.**]—LESTER JONES *v.* LESTER JONES & STIRRETT, No. 5226, *ante.*

5230. —— **Non-appearance—No notice of motion—For hearing out of turn.**]—In a suit for restitution by a husband, resp. appeared but did not file an answer. After due notice to her the cause was set down for hearing. Subsequently, upon the motion of petitioner, the ct. ordered the cause to be heard out of its turn, & a decree was made, resp. having received no notice of the motion or the order. Upon the application of resp., the ct. reversed the decree, & ordered the cause to be reheard, giving resp., who had a defence on the merits, leave to file an answer.—KEANE *v.* KEANE (1871), 41 L. J. P. & M. 41; 25 L. T. 857; 20 W. R. 304.

5231. —— —— **Parties taken by surprise—Terms as to costs.**]—Where in a divorce suit which had been put in the list earlier than was anticipated by resp.'s country solr., who, in consequence had not instructed counsel or arranged for the attendance of resp., co-resp. & witnesses, a decree *nisi* was granted in the absence of those parties & witnesses, the ct. made an order for the rehearing of the suit on the terms that an affidavit should be filed by resp. & co-resp. swearing that they had not committed adultery; & that resp.'s country solr. should, as he had offered to do, pay petitioner's costs of the trial which had been thrown away, & also the costs of the application for the new trial.

The Div. Ct. of the Probate, Divorce, & Admlty. Div. is the proper ct. to which application should be made for a rehearing of a divorce case.—HOLDEN *v.* HOLDEN & PEARSON (1910), 102 L. T. 398; 26 T. L. R. 307; 54 Sol. Jo. 328, D. C.

5232. —— **Surprise as to some charges only—Rehearing on those charges.**]—A wife having charged her husband with cruelty by the communication of disease, & also by personal violence, the ct. found, on the evidence, that the charge of communication of disease was not proved, & that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute on the ground of surprise; but the rehearing was ordered to be confined to the charge of personal violence, & not to extend to the charge of infection.—LEE *v.* LEE (1872), L. R. 2 P. & D. 409; 41 L. J. P. & M. 85; 27 L. T. 324.

5233. —— **Inadequate investigation on first hearing.**]—FOSTER *v.* FOSTER, No. 2637, *ante.*

PART XIII. SECT. 21, SUB-SECT. 2.

r. *When application granted—Admission by witnesses that evidence false.*]—In an action of divorce at the instance of a husband against his wife pursuer sought to prove one specific act of adultery. Deft. denied adultery, & adduced three witnesses to prove an alibi. The Lord Ordinary, on the evidence of these witnesses, assoilzied defender. Pursuer reclaimed & thereafter lodged a minute in which he averred that these witnesses had admitted, in attested statements which he produced, that their evidence at the proof was false. The ct. allowed the minute to be received & answered.—AULD *v.* AULD, [1922] S. C. 317.—**SCOT.**

SUB-SECT. 3.—NEW TRIAL.

A. The Application.

See, generally, PRACTICE.

5234. Who may apply—Party in contempt—Contempt not purged.]—A resp., who is in contempt for non-compliance with an order of the ct. directing her to give up the custody of a child, cannot be heard to move for a new trial, or for any other purpose, until she has purged the contempt by obeying the order of the ct.—CAVENDISH *v.* CAVENDISH & ROCHEFOUCAULD (1866), 15 W. R. 182.

Compare No. 5219, *ante.*

5235. How made—By motion.]—An application for a new trial of a divorce action should be made upon notice of motion & not *ex p.*—SANDERS *v.* SANDERS (1885), 1 T. L. R. 375, C. A.

5236. —— —— To Court of Appeal—Application of R. S. C.]—By Jud. Act, 1890 (c. 44), which provides that from & after Oct. 20, 1890, every motion for a new trial, in any cause or matter in the High Ct. which has been tried with a jury, shall be heard & determined by the Ct. of Appeal, the practice with regard to a new trial of a divorce cause is regulated, not by the practice under the Matrimonial Causes Acts but, by the practice of the Ct. of Appeal, & consequently R. S. C., 1883, Ord. 64, r. 7 applies, & empowers the ct. to grant an enlargement of the time within which to move for a new trial of the cause, & as a condition of so doing to impose terms on the party who makes the application.

In 1892 a wife petitioned for a judicial separation on the ground of her husband's adultery. The husband by his answer denied the adultery, & also alleged that, at the time of his marriage with petitioner, she had a husband living. At the trial in Jan. 1895, the jury found on the evidence that the husband had committed adultery, & that at the time of the marriage the first husband was dead. A decree for judicial separation was made. In Sept. 1895, the first husband, who had not been heard of since 1858, returned to England. In Oct. 1895, the second husband presented a petition for declaration of nullity of marriage. The wife pleaded the verdict & decree in the former suit as an estoppel. At the trial the judge was satisfied of the identity of the man who had returned; but held that he could not make a decree of nullity while the verdict & decree in the first suit stood unimpeached. The second husband, with the leave of the Ct. of Appeal, moved in the first suit for an enlargement of the time within which to apply for a new trial:—*Held:* the application ought to be granted, but only on the terms of applt. undertaking to secure the payment to resp. during their joint lives of an allowance for her maintenance, the amount of which was fixed by the ct.—WILKINS *v.* WILKINS, [1896] P. 108; 65 L. J. P. 55; 74 L. T. 62; 44 W. R. 305; 12 T. L. R. 212; 40 Sol. Jo. 274, C. A.

Annotations:—**Expld.** Bateman *v.* Bateman (otherwise Harrison) (1898), 78 L. T. 472. **Refd.** Smith *v.* Smith (1897), 66 L. J. P. 151. **Mentd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53.

See, also, Supreme Court of Judicature (Consolidation) Act, 1925, (c. 49), s. 30 (1).

5237. Time for moving—Power of court to enlarge—Subject to terms.]—WILKINS *v.* WILKINS, No. 5236, *ante.*

5238. What notice must show—Where misdirection alleged.]—R. S. C., 1883, Ord. 39, r. 3, which requires that when a new trial is applied for on the ground of misdirection the particulars of the alleged misdirection should be specifically stated in the notice, is applicable to proceedings in a divorce suit.—TAPLIN *v.* TAPLIN & HOLLAND (1888), 13 P. D 100; 57 L. J. P. 79; 58 L. T. 925; 52 J. P. 406; 37 W. R. 256, D. C.

Annotation:—**Refd.** Rickaby *v.* Rickaby, McKenzie & Swift (1901), 84 L. T. 182.

B. When Granted.

(*a*) *In General.*

5239. Excessive damages against co-respondent.]—CHAMBERS *v.* CAULFIELD, No. 2818, *ante.*

5240. No appearance at hearing.]—Where deft. omitted to appear at the trial in an action for crim. con. with his sister-in-law, & the jury gave more damages than were laid in the declaration, deft. assigning no good reason for not appearing to defend, the ct. refused to grant a new trial on any terms.—MASTERS *v.* BARNWELL (1830), 7 Bing. 224, n., 131 E. R. 87.

Annotation:—**Refd.** Breach *v.* Casterton (1830), 7 Bing. 224.

5241. —— By solicitor.]—Pltf. in an action of crim. con. having been nonsuited in consequence of the accidental absence of his attorney, the ct. granted a new trial on payment of costs, as between attorney & client, it appearing that another action might be barred by Stat. Limitations, & pltf. be thereby precluded from taking ulterior proceedings.—AYLING *v.* GOLDRING (1845), 1 C. B. 635; 135 E. R. 690.

5242. —— Solicitor's negligence.]—(1) The solr. of petitioner for a divorce wrote to resp.'s solr. a letter, headed with the title of the cause, in which he said, "I have set this cause down for trial." No other notice was served:—*Held:* this letter was a sufficient notice, within Divorce Court Rules, r. 44, of the cause having been set down for trial.

(2) Resp.'s solr., in the belief that a more formal notice ought to be given, did not watch the cause list, & the cause came on for trial without his knowledge, & a decree for a divorce was made in the absence of resp. She applied for a new trial on the ground of surprise. The ct. ordered a new trial on the undertaking of the solr. personally to pay the costs thrown away.—FLUISTER *v.* FLUISTER & HUTTON, [1897] P. 22; 66 L. J. P. 33; 41 Sol. Jo. 126, C. A.

5243. Verdict against weight of evidence.]—GETHIN *v.* GETHIN, No. 5251, *post.*

5244. ——.]—(1) The ct. will not grant a new trial on the ground that the verdict is against the weight of evidence, unless it is dissatisfied with the verdict. That it might on the same evidence have come to a different conclusion itself is not sufficient.

(2) Statement on affidavit that other evidence could be produced to the jury on a new trial is not sufficient, if such evidence could with reasonable diligence have been obtained before.—MILLER *v.* MILLER & HICKS (1862), 2 Sw. & Tr. 427; 31 L. J. P. M. & A. 73; 5 L. T. 850; 164 E. R. 1062.

Annotation:—*As to* (1) **Refd.** Stone *v.* Stone & Appleton (1864), 34 L. J. P. M. & A. 33.

5245. —— Satisfaction of trial judge.]—(1) In an action for crim. con., evidence was offered on the part of deft. to show the affectionate terms upon which he lived with his own wife & family, which being unobjected to, was admitted, & was observed upon by the judge in his summing up as affording an inference in deft.'s favour:—*Held:* this was no misdirection.

(2) The jury having found for deft., & it appearing from the report of the learned judge who tried the cause that there was a manifest preponderance of evidence the other way, & that he himself was not satisfied with the verdict, the ct. granted a new trial, on payment of costs.—MELLIN *v.* TAYLOR

Sect. 21.—*Appeals, re-hearing, new trial, etc.: Subsect.* 3, *B.* (*a*) & (*b*).]

(1836), 3 Bing. N. C. 109; 2 Hodg. 125; 3 Scott, 513; 5 L. J. C. P. 346; 132 E. R. 351.

5246. —— ——.]—(1) Where a verdict, finding that resp. in a suit for dissolution of marriage has been guilty of adultery, is against the weight of evidence, a new trial may be granted, although the judge who tried the cause is not dissatisfied with the verdict.

(2) In a suit by a husband, for dissolution of marriage, claiming damages, resp. denied the adultery, & co-resp., who had not been personally served, did not appear. The jury found that resp. had committed adultery with co-resp., & assessed the damages against the latter at £2,000. Resp. having applied for a new trial, on the ground that the verdict was against the weight of evidence, the judge ordinary, who had tried the cause, refused a rule. On appeal, his decision was reversed by a majority of the Full Ct., who set aside the verdict as against resp. & co-resp., & made a rule absolute for a new trial as to both.

Subsequently, co-resp., who was resident in Canada, & who had not heard of the institution of the suit until just before the trial, when it was too late for him to come to England, applied for leave to appear & file an answer. The judge ordinary granted the application, upon condition that before the trial he should give security for costs; & on non-compliance with that condition, ordered the appearance & answer to be taken off the file.

(3) An application for a commission to examine witnesses may be refused on the ground of unreasonable delay.—STONE *v.* STONE & APPLETON (1864), 34 L. J. P. M. & A. 33; 13 W. R. 414; *subsequent proceedings*, 3 Sw. & Tr. 608.

5247. Consent to decree—On solicitor's advice—To avoid publicity.]—Wife petitioned against the husband for judicial separation by reason of his cruelty, & he took issue thereon. He signed a letter consenting to a decree on the suggestion of his solr., that if he did so, no evidence in support of the petition need be taken in ct. The issue came on for trial before the judge ordinary & a special jury, who found a verdict for petitioner on her evidence & that of other witnesses on her behalf. Resp.'s letter was also put in evidence. The ct. affirmed, on appeal, the refusal of the judge ordinary to grant a rule *nisi* for a new trial on the representation that the resp. was led by the mistaken suggestion of his then solr. to withhold evidence contradictory of petitioner's evidence, by which his character as a gentleman & man of honour was affected.—HILL *v.* HILL (1861), 2 Sw. & Tr. 407; 31 L. J. P. M. & A. 193; 5 L. T. 363; 7 Jur. N. S. 1206; 10 W. R. 194; 164 E. R. 1054.

5248. Discovery of fresh evidence—Not previously obtainable.]—MILLER *v.* MILLER & HICKS, No. 5244, *ante*.

5249. —— —— Corroborated evidence.]—(1) Where the issue of cruelty is submitted to a jury, the ct. will not grant a new trial unless it is satisfied that there was error or miscarriage on the part of the jury. That, on the evidence, the ct. might not with certainty have arrived at the same conclusion as the jury did, is not sufficient.

(2) That the party asking for a new trial, could produce corroborative evidence not produced, or not in his possession at the first trial, is no ground for granting a new trial.—SCOTT *v.* SCOTT (1863), 3 Sw. & Tr. 319; 33 L. J. P. M. & A. 1; 9 L. T. 454; 9 Jur. N. S. 1251; 12 W. R. 216; 164 E. R. 1298.

5250. —— —— To show petitioner's misconduct.]—A wife sued for dissolution of marriage on the ground of adultery & cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree *nisi* for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to show the wife's adultery before the decree *nisi*, & filed affidavits alleging facts not known at the trial which went to prove adultery. He obtained a rule *nisi*, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, & filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to show that he was acting on behald of or in collusion with resp. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the ct. to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by the President & refused. The wife appealed:—*Held:* (1) Matrimonial Causes Act, 1860 (c. 144), s. 7, authorises intervention by any person where material facts have not been brought before the ct., whether by intertion or through accident. *Qu.:* whether where petitioner, after the decree *nisi*, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor; (2) the words "not brought before the ct.," mean, not brought before the ct. at a time when the ct. can act upon them for the purpose of seeing whether a decree *nisi* ought to be made, & the bringing them before the ct. on an application for a new trial is not bringing them before the ct. within the meaning of this clause, so as to prevent an intervention. *Qu.:* whether the rules as to granting a new trial on the ground of fresh evidence discovered showing misconduct in petitioner are the same as in a case between ordinary litigants.

(3) Where resp. is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree *nisi* will not be allowed if the intervener is merely acting on behalf of & in collusion with resp.; but the fact that he is a near relative of resp. is no ground for rejecting the intervention:—*Held:* in the present case, the facts alleged being undoubtedly material, & the affidavits making a case which showed that there was ground for investigating them, the intervention had rightly been allowed.—HOWARTH *v.* HOWARTH (1884), 9 P. D. 218; 51 L. T. 872, C. A.

Annotations:—*As to* (1) **Refd.** Crawford *v.* Crawford & Dilke (1886), 55 L. J. P. 42; Rogers *v.* Rogers, [1894] P. 161.

5251. Suppression of material facts by witnesses—Whether sufficient.]—Where there is a conflict

PART XIII. SECT. 21, SUB-SECT. 3.—B. (a).

5248 i. *Discovery of fresh evidence—Not previously obtainable.*]—*Semble:* a new trial should be ordered in a divorce action where new & material evidence has been discovered which was not available at the time of the trial & which if substantiated will probably change the result of the case & where the party tendering it cannot be charged with lack of diligence in respect to its discovery.—L. *v.* L. & K., [1922] 1 W. W. R. 224; 62 D. L. R. 581.—**CAN.**

s. *No finding on facts.*]—In a suit for divorce *a vinculo matrimonii*, the libel alleged that pltf.'s wife had been guilty of the offence of adultery on three occasions, with different co-resps. The judge held that the facts proved raised a violent presumption of guilt, & that this presumption, as to one of the occasions alleged, had not been rebutted by the denials made

of evidence upon an issue of adultery, the Queen's Proctor intervening, the ct. will not grant a new trial on the ground that the verdict is contrary to the evidence, unless it is dissatisfied with the verdict. The ct. will not grant a new trial, on the ground that witnesses called upon the first trial have wilfully suppressed material facts.

On the wife's petition for dissolution of marriage, to which the husband had not answered, the Queen's Proctor intervened, & alleged the adultery of petitioner & collusion. Issues taken on these points were found in favour of petitioner by verdict of a jury. On motion for rule *nisi* for a new trial, the ct. read affidavits of the Queen's Proctor, & of witnesses who had been called by him at the trial; the affidavits of the latter were in substance that they had told the truth, but not the whole of what they knew, & it was argued that if the whole of what the witnesses knew had been laid before the jury, they would have found a different verdict. The ct. refused, on such affidavits, to make a rule *nisi*.—GETHIN *v.* GETHIN (1862), 2 Sw. & Tr. 560; 31 L. J. P. M. & A. 57; 5 L. T. 721; 10 W. R. 266; 164 E. R. 1114.

Annotation :—**Refd.** Stone *v.* Stone & Appleton (1864), 34 L. J. P. M. & A. 33.

5252. Admission of error by witness—Correction of evidence.]—On trial of issue of adultery, the jury found a verdict against petitioner. On affidavit by a witness called on his behalf, that she had made a mistake in an important date in giving her evidence, the ct. directed a new trial, the error, if there were one, being likely, in the opinion of the ct., to have disturbed the judgment & misled the minds of the jury.—JAGO *v.* JAGO & GRAHAM (1862), 3 Sw. & Tr. 103; 1 New Rep. 35; 32 L. J. P. M. & A. 10; 7 L. T. 645; 8 Jur. N. S. 1081; 11 W. R. 86; 164 E. R. 1211.

Annotation :—**Refd.** Wallace *v.* Wallace, Guiter & Macnamara (1862), 32 L. J. P. M. & A. 47.

5253. —— —— Confession of perjury.]—WORSLEY *v.* WORSLEY & WORSLEY (1904), 20 T. L. R. 171.

5254. Error by jury.]—SCOTT *v.* SCOTT, No. 5249, *ante*.

5255. Inconsistent verdict—Decision on substantial question obscure.]—ELLAYTT *v.* ELLAYTT, TAYLOR & HALSE, No. 4901, *ante*.

5256. Misdirection—Failure to emphasise parts of evidence.]—CODRINGTON *v.* CODRINGTON & ANDERSON, No. 4837, *ante*.

5257. Wrongful summing up—Inadmissible evidence—Refusal of right to cross-examine.]—An application was made by co-resp. in divorce proceedings instituted by a husband against his wife for judgment or a new trial of the suit as regarded himself. The suit was instituted by the husband on the ground of his wife's adultery with co-resp. & a person unknown. Co-resp. denied the charge against him. The jury found that resp. & co-resp. had been guilty of adultery, & that she had also committed adultery with a man unknown. The judge accordingly made a decree *nisi* for the dissolution of the marriage, with costs against co-resp. There was no appeal by resp. It appeared that the judge, in the course of the trial, had refused to allow any cross-examination of resp. by the counsel for co-resp., holding on the authority of *Glennie* v. *Glennie & Bowles*, No. 4832, *ante*, that there was no such right; & in his summing up the learned President, in a marked way, contrasted the evidence of resp. with that of co-resp., observing that there was a complete discrepancy between the story told by resp. & the story told by co-resp. in two most important points. On appeal:—*Held:* (1) it was not right to deal with the evidence of resp. as admissible against co-resp., & the evidence of co-resp. as admissible against resp., without an opportunity being afforded of testing its truthfulness by cross-examination; & the learned President was wrong in contrasting the evidence as he did after refusing liberty to cross-examine resp.; (2) there must be a new trial, the costs thereof to abide the event.

Semble: co-resp. has a right to cross-examine resp., as to any evidence tending to incriminate him.—ALLEN *v.* ALLEN & BELL, [1894] P. 248; 63 L. J. P. 120; 70 L. T. 783; 42 W. R. 459; 10 T. L. R. 456; 38 Sol. Jo. 456; 6 R. 597, C. A.

Annotations :—*As to* (1) **Refd.** R. *v.* Hadwen, [1902] 1 K. B. 882; Brown *v.* Brown, [1915] P. 83; Hensley *v.* Hensley & Nevin (1920), 122 L. T. 814; Mourilyan *v.* Mourilyan, Mourilyan *v.* Mourilyan & Fazil (1922), 127 L. T. 403. *Generally*, **Mentd.** De Gasquet James *v.* Mecklenburg-Schwerin, [1914] P. 53.

5258. Wrongful withdrawal of case from jury.]—RANDS *v.* RANDS & RANDS (1887), 4 T. L. R. 45, D. C.

5259. Intimation by jury to judge—That petitioner's case proved—Before case for co-respondent presented—Consequent withdrawal of co-respondent's case.]—DRUMMOND *v.* DRUMMOND (1893), 9 T. L. R. 403; 37 Sol. Jo. 439, C. A.

(b) Whole Verdict not Attacked.

5260. Verdict against two co-respondents—Unsatisfactory verdict against one—New trial as to both.]—Where there is a verdict against two co-resps., & the ct. is dissatisfied with the verdict against only one of the two co-resps., it will grant a new trial as to both.

Semble: if petitioner will allow a verdict to be entered for co-resp. applying for a new trial, the ct. may grant the decree.—WALKER *v.* WALKER, NICOLL & CRAIG (1861), 4 Sw. & Tr. 264; 31 L. J. P. M. & A. 26; 164 E. R. 1517.

5261. Verdict on part issues unsatisfactory.]—*Qu.:* whether, in matrimonial suits, if the verdict on one only of two issues is unsatisfactory, a new trial ought to be granted as to both.

Semble: where in a suit by a wife for dissolution of marriage, on the ground of adultery & cruelty, petitioner obtains a verdict upon both issues, & a new trial as to one of them is afterwards applied for, petitioner may abandon that issue & ask for a judicial separation upon the ground of the other charge.—CARTLIDGE *v.* CARTLIDGE (1863), 3 Sw. & Tr. 406; 32 L. J. P. M. & A. 126; 8 L. T. 334; 9 Jur. N. S. 552; 11 W. R. 750; 164 E. R. 1333.

5262. ——.]—FITZGERALD *v.* FITZGERALD, No. 4527, *ante*.

5263. Disagreement on part of issues.]—NARRACOTT *v.* NARRACOTT & HESKETH, No. 4749, *ante*.

5264. Evidence applicable to respondent only—Influencing jury against co-respondent—Severance of issues—Separate trial.]—Where there was a reason to suppose that, on the trial of the husband's petition, evidence applicable to resp. alone affected the minds of the jury against the co-resp., the ct., in making absolute the rule for a new trial, ordered

by deft. & her witnesses, & granted the divorce asked for, without making any finding on the evidence of the facts in respect to the other offences charged:—*Held:* the judge was in error in finding that the circumstances of the charge upon which deft. was found guilty did not afford any reasonable solution other than that of guilt, & the parties interested were entitled to a finding on the facts pertaining to the other offences charged, & a new trial was granted.—F. *v.* F. (1918), 45 N. B. R. 505; 41 D. L. R. 739.—**CAN.**

Sect. 21.—*Appeals, re-hearing, new trial, etc.: Sub-sect.* 3, *B.* (*b*) *& C.; sub-sects.* 4 *&* 5. *Sect.* 22: *Sub-sect.* 1, *A., B., C. & D.* (*a*).]

that the issues should be severed, so that the charges against the co-resp. might be tried separately from those against the resp.—BARNES *v.* BARNES & BEAUMONT (1868), 38 L. J. P. & M. 9; 19 L. T. 526; 17 W. R. 75.

See, also, Matrimonial Causes Rules, 1925, r. 40.

C. Appeal from Grant or Refusal.

5265. Right of appeal to House of Lords—From decision of Court of Appeal—Granting new trial.]—Where the Divorce Ct. has granted a decree *nisi* after a trial before a jury, & the Ct. of Appeal has ordered a new trial, an appeal lies to the House of Lords against the order granting a new trial.—BUTCHART *v.* BUTCHART & HILL, [1901] A. C. 266; 70 L. J. P. 29; 84 L. T. 209, H. L.

5266. Time for appealing—Power of court to enlarge—Matrimonial Causes Act, 1860 (c. 144), s. 2.]—The ct. has the power to extend the time (fourteen days) limited by above sect. for appealing against a decision of the judge ordinary granting or refusing a rule for a new trial.—BOULTING *v.* BOULTING (1864), 33 L. J. P. M. & A. 81.

5267. —— —— ——.]—An appeal from a refusal of the judge of the Divorce Ct. to grant a new trial under Matrimonial Causes Act, 1860 (c. 144), s. 2, must, notwithstanding that by Jud. Act, 1873 (c. 66), s. 16, the jurisdiction of the Divorce Ct. is vested in the High Ct. of Justice, & that by Jud. Act, 1881 (c. 68), s. 9, the Ct. of Appeal is substituted for the full Ct. of Divorce, be brought within the time limited by Matrimonial Causes Act, 1860 (c. 144), namely, fourteen days. The ct. has no power to extend the time for appealing limited by statute.—AHIER *v.* AHIER (1885), 10 P. D. 110; 54 L. J. P. 70; 52 L. T. 744; 33 W. R. 770, C. A.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (*b*).

SUB-SECT. 4.—REVERSAL OF DECREES OF JUDICIAL SEPARATION.

See, now, Matrimonial Causes Rules, 1924, rr. 47–50.

5268. Contents of petition—Cause of non-appearance—Where decree granted—Decree wrong on merits.]—A petition for the reversal of a decree of judicial separation under Matrimonial Causes Act, 1857 (c. 85), s. 23, on the ground that it was obtained in petitioner's "absence," is good on demurrer, although it alleges personal service on petitioner of the citation in the judicial separation suit: for the word "absence" means non-appearance in the suit, & not absence without knowledge or notice of the suit. It is not sufficient in such a petition to allege merely the non-appearance of petitioner but the petition must further set out the cause of his non-appearance, & must also state circumstances tending to show that the decree was wrong on the merits.—PHILLIPS *v.* PHILLIPS (1866), L. R. 1 P. & D. 169; 35 L. J. P. & M. 70; 14 L. T. 604; 14 W. R. 902.

See, now, Matrimonial Causes Rules, 1924, Appendix 8.

5269. "Absence" when decree granted—What constitutes.]—PHILLIPS *v.* PHILLIPS, No. 5268, *ante*.

5270. When court will rescind decree—Petitioner guilty of adultery.]—GROSSI *v.* GROSSI, No. 3542, *ante*.

5271. —— **Resumption of cohabitation.**]—The ct. has power to rescind a decree of judicial separation where the parties have resumed cohabitation.—ORAM *v.* ORAM (1923), 129 L. T. 159; 39 T. L. R. 332.

SUB-SECT. 5.—DISCHARGE OF PROTECTION ORDERS.

See Sect. 27, sub-sect. 6, D. (*c*), *post*.

SECT. 22.—PROCEEDINGS AFTER DECREE.

SUB-SECT. 1.—PERMANENT ALIMONY.

A. In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49) s. 190; Matrimonial Causes Rules, 1924, rr. 57–64.

5272. Principles on which allotment made—Same as of ecclesiastical courts.]—The ct. is bound by the practice of the Ecclesiastical Cts. in allotting permanent alimony after a decree of judicial separation. According to the practice of the Ecclesiastical Cts., the ct. is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement.—HAIGH *v.* HAIGH (1869), L. R. 1 P. & D. 709; 38 L. J. P. & M. 37; 20 L. T. 281.

Annotation:—**Refd.** Cobb *v.* Cobb, [1900] P. 294.

5273. —— ——.]—LESLIE *v.* LESLIE, No. 5516, *post*.

5274. Nature of wife's right—Right to be supported by husband.]—(1) The fact that a husband's safety is not endangered by the wife's cruelty, including acts of personal violence, is no bar to his obtaining relief in judicial separation. In such a case the ct. will look, in the interest of the wife herself as well as the husband, to the danger of his being provoked to retaliate, & will not, by refusing to interfere, drive the husband, to the necessity of meeting force by force.

(2) Where the husband & wife had ceased to cohabit, but continued to live & board together in the same house, the ct. decreed judicial separation at the instance of the husband, he having no power to expel his wife from the house, & circumstances requiring that he should reside in it.

(3) I have already pointed out in *Prichard* v. *Prichard*, No. 2652, *ante*, that in my opinion, although the ct. by a decree of judicial separation gives a legal warranty to a wife & husband to live apart, still that they remain husband & wife, & that while they remain so, the obligation also remains on the husband of contributing to the support of the wife (*per* CUR.).—FORTH *v.* FORTH (1867), 36 L. J. P. & M. 122; 16 L. T. 574; 15 W. R. 1091.

Annotation:—**Refd.** Russell *v.* Russell, [1897] A. C. 395.

5275. —— —— **Not creation of statute.**]—The normal rule of fixing the amount of permanent alimony at one-third of the joint incomes of the spouses free of tax is not a hard & fast one. The allocation of alimony is a matter for the discretion of the ct. or judge, who can take exceptional

PART XIII. SECT. 21, SUB-SECT. 4.

t. *Whether subject to recall—At instance of husband.*]—A decree of separation in ordinary form ordaining a husband to separate himself from his wife *a mensâ et thoro* in all time coming is not subject to recall at the husband's instance.—STRAIN *v.* STRAIN (1890), 17 R. (Ct. of Sess.) 297; 27 Sc. L. R. 239.—SCOT.

PART XIII. SECT. 22, SUB-SECT. 1.—A.

a. *On decree of nullity—For in*

circumstances into consideration. The registrars ought not to exercise this discretion. The fact that the husband's income is a large one & the fact that the wife during part of the married life lived apart from the husband & acquiesced in receiving a smaller income than the husband could have afforded are not grounds for departing from the general rule, but the fact that the husband's income is fluctuating & to some extent precarious is an exceptional circumstance which the ct. can take into consideration, & is a ground for reducing the proportion. The right of a wife to be maintained by her husband is based on her common law right to pledge her husband's credit for necessaries according to his means & does not depend wholly on the statutes.—DEAN *v.* DEAN, [1923] P. 172; 92 L. J. P. 109; 129 L. T. 704; 39 T. L. R. 602; 67 Sol. Jo. 704.

B. Jurisdiction to Grant.

See. now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5276. Where wife guilty party.]—WHITE *v.* WHITE, No. 2656, *ante.*

5277. ——.]—DART *v.* DART, No. 4753, *ante.*

5278. ——.]—PRICHARD *v.* PRICHARD, No. 2652, *ante.*

5279. ——.]—The Ecclesiastical Cts. had power to grant permanent alimony to a wife who was divorced *a mensâ et thoro* on account of her misconduct, & that power is not taken away from the Divorce Ct. by Matrimonial Causes Act, 1857 (c. 85), s. 17. The ct. therefore has now jurisdiction to grant permanent alimony to a wife against whom a decree of judicial separation has been made on account of her misconduct, & has also the power from time to time to vary such order.—GOODDEN *v.* GOODDEN, [1892] P. 1; 65 L. T. 542; 40 W. R. 49; 8 T. L. R. 32; 36 Sol. Jo. 60, C. A.

Annotation :— **Consd.** Leslie *v.* Leslie, [1911] P. 203.

5280. Whether grant of allmony pendente lite condition precedent.]—It is not necessary, in suits for judicial separation, that the wife should obtain an order for alimony *pendente lite* to enable the ct. to allot her permanent alimony after the final decree has been pronounced.

The wife obtained a decree of judicial separation by reason of the adultery of the husband. No application was made for alimony pending the suit, but more than three months after the final decree had been pronounced & duly registered, she filed a petition for permanent alimony. The husband appeared under protest :—*Held :* the ct. had power to entertain the petition, & the husband was bound to answer to the merits.—COVELL *v.* COVELL (1872), L. R. 2 P. & D. 411; 41 L. J. P. & M. 81; 27 L. T. 324; 20 W. R. 894.

Annotations :—**Consd.** Goodden *v.* Goodden, [1892] P. 1. **Mentd.** Fox *v.* Fox, [1925] P. 157.

5281. Wife convicted of fraud.]—(1) Although modern legislation has deprived the husband of the rights he formerly had to his wife's property, the obligation of the husband to provide for his wife's maintenance remains. The amount of the alimony to be granted to her, & in some degree the question whether or not it should be allowed is a matter within the discretion of the ct., a discretion to be exercised judicially according to established principles of law, & upon an equitable view of all the circumstances of the particular case. The conduct of the wife may be looked at when the ct. is asked to order permanent alimony, just as it may be considered upon an application for alimony *pendent lite.* A wife obtained a decree of restitution of conjugal rights, which the husband disobeyed. The wife thereupon obtained a decree of judicial separation. She was afterwards convicted of fraud & sentenced to penal servitude. She had also been convicted of fraud before her marriage, & the husband alleged that he had suffered great financial losses by reason of her conduct. On an application by her for permanent alimony, she having no means of her own : —*Held :* the ct. had jurisdiction, notwithstanding the wife's conduct, to order an inquiry as to granting her permanent alimony, but the whole of the circumstances should be taken into account on the inquiry.

(2) If she [the wife] has no means whatever, even though her conduct before & after matrimony has been reprehensible, the husband is bound to allow her a sum which will enable her to live a respectable life.—LESLIE *v.* LESLIE, [1911] P. 203; 80 L. J. P. 139; *sub nom.* L. *v.* L., 104 L. T. 462; 27 T. L. R. 316; 55 Sol. Jo. 386.

C. When Granted.

5282. After decree of judicial separation—Guilty husband—Subsequent petition by husband for divorce.]—The presentation of a petition by a husband for a dissolution of marriage on the ground of his wife's adultery is no answer to a petition by the wife for permanent alimony following a decree of judicial separation in a suit in which she was petitioner.—STOATE *v.* STOATE (1859), 29 L. J. P. M. & A. 166, n.; 23 J. P. 184.

Annotation :— **Refd.** Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39.

D. Amount.

(a) In General.

5283. General principles—Wife to be liberally supported.]—Undoubtedly, a much larger allowance is to be made for permanent alimony, than for alimony pending suit; the delinquency of the husband is now established; the wife is the injured party: she is separated from the comfort of matrimonial society, from the society of her family, not by the act of Providence, but by the misconduct of her husband; she must be liberally supported. The law has laid down no exact proportion: it gives sometimes a third, sometimes a moiety, according to circumstances (SIR JOHN NICHOLL).—OTWAY *v.* OTWAY (1813), 2 Phillim. 109; 161 E. R. 1092.

Annotations :—**Consd.** Smith *v.* Smith (1814), 2 Phillim. 235; Frankfort de Montmorency *v.* Frankfort de Montmorency (1844), 3 Notes of Cases, 68; Frankfort *v.* Frankfort (1845), 4 Notes of Cases, 280; Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39; Dean *v.* Dean, [1923] P. 172. **Refd.** Hooper *v.* Hooper (1861), 3 Sw. & Tr. 251.

5284. —— Wife to be enabled to lead respectable life—Though conduct reprehensible.]—LESLIE *v.* LESLIE, No. 5281, *ante.*

5285. —— Discretion of court.]—DEAN *v.* DEAN, No. 5275, *ante.*

5286. —— ——.]—It is a general rule that permanent alimony shall be larger than that

---

capacity of husband.]—Permanent alimony may be granted in a divorce suit where the wife has obtained a decree for divorce on the ground of impotence.—BROWN *v.* BROWN (1907), 13 B. C. R. 73; 10 —CAN.

PART XIII. SECT. 22, SUB-SECT. 1.—B.

b. *Must be before full court.*]—Deft. having consented to an order for alimony, a motion for the order was refused, as it would amount to a decree. It should be brought before the full ct. —CRAIG *v.* CRAIG (1859), 1 Ch. Ch. 41. —CAN.

PART XIII. SECT. 22, SUB-SECT. 1.—D. (a).

c. *General principles—Wife to be enabled to support herself.*]—The pur-

Sect. 22.—*Proceedings after decree: Sub-sect.* 1, *D.* (*a*), (*b*) & (*c*), *E.* & *F.*]

which is allowed during suit. Even when the bulk of the fortune originally belonged to the husband, the ct. allows a competent income to the wife. But there is in this case a circumstance which ought to weigh specially in favour of the wife; viz. that the bulk of the fortune originally belonged to her; & this circumstance is still strengthened by another, namely, that the property was settled on the wife, & that she was induced, by the hope of better treatment, to give it up to her husband (SIR JOHN NICHOLL).—SMITH *v.* SMITH (1814), 2 Phillim. 235; 161 E. R. 1130.

Annotations:—**Consd.** Frankfort de Montmorency *v.* Frankfort de Montmorency (1844), 3 Notes of Cases, 68; Frankfort *v.* Frankfort (1845), 4 Notes of Cases, 280; Hooper *v.* Hooper (1861), 3 Sw. & Tr. 251.

5287. —— —— Where husband proved guilty.]—The allotment [of alimony] is always more liberal when the husband's delinquency stands proved, than pending suit (SIR JOHN NICHOLL).—KEMPE *v.* KEMPE (1828), 1 Hag. Ecc. 532; 162 E. R. 668.

5288. —— Larger than alimony pendente lite.]—OTWAY *v.* OTWAY, No. 5283, *ante*.

5289. What court will consider—All circumstances of case.]—LESLIE *v.* LESLIE, No. 5516, *post*.

5290. ——.]—LESLIE *v.* LESLIE, No. 5281, *ante*.

5291. —— Conduct of parties—Guilty husband.]—WILCOCKS *v.* WILCOCKS (1859), 32 L. J. P. M. & A. 205.

5292. ——.]—HOOPER *v.* HOOPER, No. 4612, *ante*.

5293. — Wife.]—LESLIE *v.* LESLIE, No. 5281, *ante*.

5294. — Status of parties.]—HOOPER *v.* HOOPER, No. 4612, *ante*.

5295. —— Needs of wife—Wife in prison.]—LESLIE *v.* LESLIE, No. 5516, *post*.

(*b*) *Proportion of Husband's Income Allotted.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5296. No fixed proportion.]—OTWAY *v.* OTWAY, No. 5283, *ante*.

5297. ——.]—LESLIE *v.* LESLIE, No. 5281, *ante*.

5298. ——.]—DEAN *v.* DEAN, No. 5275, *ante*.

5299. Husband's income small.]—TAYLOR *v.* TAYLOR (1796), cited in 2 Phillim. at p. 44; 161 E. R. 1073.

Annotations:—**Consd.** Cooke *v.* Cooke (1812), 2 Phillim. 40. **Refd.** Otway *v.* Otway (1813), 2 Phillim. 109; Smith *v.* Smith (1814), 2 Phillim. 235.

5300. Husband compelled to live in expensive place.]—(1) In allotting permanent alimony the ct. will take into consideration the circumstance that the husband is obliged, in order to earn his income, to live in a more expensive place than the wife, & when that is the case will not allow her the usual proportion of such income.

(2) Where the income of the husband . . . was increased by promotion to £480 *per annum*, the ct. ordered the permanent alimony to the wife, who had obtained a decree of judicial separation, to be increased from £40 to £120 *per annum*, the augmentation to take place as soon as the husband came into the receipt of the increased pay.—LOUIS *v.* LOUIS (1866), L. R. 1 P. & D. 230; 35 L. J. P. & M. 92; 14 L. T. 770; 14 W. R. 1023.

5301. Husband's income precarious.]—DEAN *v.* DEAN, No. 5275, *ante*.

5302. Large part of income derived from wife.]—TAYLOR *v.* TAYLOR (1796), cited in 2 Phillim. at p. 44; 161 E. R. 1073.

Annotations:—**Consd.** Cooke *v.* Cooke (1812), 2 Phillim. 40; Otway *v.* Otway (1813), 2 Phillim. 109. **Refd.** Smith *v.* Smith (1814), 2 Phillim. 235.

Compare No. 5272, *ante*.

5303. Particular instances.]—BIGGS *v.* BIGGS (1791), cited in 2 Phillim. at p. 43; 161 E. R. 1073.

Annotation:—**Apld.** Cooke *v.* Cooke (1812), 2 Phillim 40.

5304. ——.]—TAYLOR *v.* TAYLOR (1796), cited in 2 Phillim at p. 44; 161 E. R. 1073.

Annotations:—**Consd.** Cooke *v.* Cooke (1812), 2 Phillim. 40. **Refd.** Otway *v.* Otway (1813), 2 Phillim. 109; Smith *v.* Smith (1814), 2 Phillim. 235.

5305. ——.]—DAWSON *v.* DAWSON (1802), cited in 2 Phillim at p. 45; 161 E. R. 1073.

Annotation:—**Refd.** Cooke *v.* Cooke (1812), 2 Phillim. 40.

5306. ——.]—COOKE *v.* COOKE, No. 5317, *post*.

5307. —— Calculation where wife has custody of children.]—MYTTON *v.* MYTTON, No. 4144, *ante*.

5308. —— ——.]—Where a wife had obtained a decree of judicial separation, & the ct. had ordered that she should have the custody of three children all under the age of seven, alimony *pendente lite* having been allotted on the assumption that the husband's income was £400 *per annum*, the ct. allotted to the wife £160 *per annum* as permanent alimony; £100 for herself, & £20 *per annum* for each of the children.—WHIELDON *v.* WHIELDON (1861), 2 Sw. & Tr. 388; 164 E. R. 1046; *sub nom.* WHILDON *v.* WHILDON, 30 L. J. P. M. & A. 174; 5 L. T. 138.

Annotations:—**Refd.** Gandy *v.* Gandy (1885), 30 Ch. D. 57. **Mentd.** Shaftesbury Union *v.* Brockway, [1913] 1 K. B. 159.

5309. ——.]—Where the only income of the husband was £60 a year, derived from independent property, & it appeared that he had turned his wife out of doors, & that his mistress was living with him, the ct. awarded a moiety of the income as permanent alimony.—AVILA *v.* AVILA (1862), 31 L. J. P. M. & A. 176.

5310. —— Husband's income large.]—BEECHAM *v.* BEECHAM (1903), *Times*, Mar. 14.

(*c*) *Where Wife has Separate Property or Income.*

See Matrimonial Causes Rules, 1924, r. 60.

5311. Whether considered—Legacies since marriage to wife's separate use.]—In estimating the amount of alimony to be allowed a wife after a separation, on the ground of cruelty, the husband is not entitled to a deduction out of what would otherwise be payable by him out of his income, in respect of money left by wills since the marriage to his wife's separate use, nor in respect of his wife's salary as a lady-in-waiting to the Queen; but he is entitled to such a deduction in respect of a pension from the Crown granted to his wife.—WESTMEATH (MARQUIS) *v.* WESTMEATH (MARCHIONESS) (1834), 3 Knapp, 42; 12 E. R. 563, H. L.

pose of allotting alimony is to enable a wife to support herself whilst living apart.—HAGARTY *v.* HAGARTY (1865), 11 Gr. 562.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 1.—D. (b).

5296 i. *No fixed proportion.*]—The obligation of a husband is to provide for the maintenance of his wife, in proportion to his ability so to do. Where alimony is decreed, the amount to be awarded is of discretion in the ct., a discretion to be exercised judicially according to established principles of law, & upon an equitable view of all the circumstances of the particular case. There is no fixed rule that the wife shall be allowed one-third of the husband's income.—MALCOLM *v.* MALCOLM (1920), 46 O. L. R. 198.—**CAN.**

d. —— *Conduct of wife.*]—The rule that the conduct of the wife should weigh much in determining the amount of alimony, is reasonable.—SEVERN *v.* SEVERN (1859), 7 Gr. 109.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 1.—D. (c).

e. *Whether considered—Wife able to maintain herself—Husband's means*

5312. —— Wife's salary as lady-in-waiting.]—WESTMEATH (MARQUIS) *v.* WESTMEATH (MARCHIONESS), No. 5311, *ante*.

5313. —— Wife's pension from Crown.]—WESTMEATH (MARQUIS) *v.* WESTMEATH (MARCHIONESS), No. 5311, *ante*.

5314. Proportion of joint income.]—The parties having lived together three years after their marriage, separated in 1814. £310 *per annum*, the produce of the wife's own fortune, was settled on her; & this sum has been continued to her ever since. The husband's separate income amounts to £750 or £800; & the question turns on the deduction of £160 *per annum*, the interest of money borrowed for the improvement of a house & land he has purchased in Sussex. I think I shall not depart from a just consideration of the effect of these circumstances, if I give a moiety of this £160, in addition to the £300 *per annum* now paid to the wife (SIR WILLIAM SCOTT).—BLAQUIERE (LADY) *v.* BLAQUIERE (1820), 3 Phillim. 258; 161 E. R. 1319.

5315. —— More than half brought into settlement by wife.]—HAIGH *v.* HAIGH, No. 5272, *ante*.

Compare No. 5302, *ante*.

5316. —— Custody of children given to wife.]—The wife had an income from property settled on her by the husband of £196 a year. The husband had an income of £367 a year. There were three children of the marriage who were in the custody of the wife. The ct. in allotting permanent alimony, ordered that in addition to the £196 a year which the wife enjoyed under the settlement, the husband should allow her £30 a year each for the maintenance of the children.—TODD *v.* TODD (1873), 42 L. J. P. & M. 62; 29 L. T. 252.

E. Duration.

See Matrimonial Causes Rules, 1924, r. 64.

5317. Commencement — Date of decree.]—A moiety of the husband's property given to the wife for permanent alimony; but given from the date of the sentence, & not from the return of the citation.—COOKE *v.* COOKE (1812), 2 Phillim. 40; 161 E. R. 1072.

Annotations:—**Consd.** Otway *v.* Otway (1813), 2 Phillim. 109; Frankfort de Montmorency *v.* Frankfort de Montmorency (1844), 3 Notes of Cases, 432; Covell *v.* Covell (1872), L. R. 2 P. & D. 411. **Refd.** Smith *v.* Smith (1814), 2 Phillim. 235; Frankfort de Montmorency *v.* Frankfort de Montmorency (1844), 3 Notes of Cases, 68; Frankfort de Montmorency *v.* Frankfort de Montmorency (1845), 4 Notes of Cases, 280; Hooper *v.* Hooper (1863), 3 Sw. & Tr. 251; Goodden *v.* Goodden, [1892] P. 1; Dean *v.* Dean, [1923] P. 172.

5318. —— —— Order appealed from.]—The judge of the consistory ct., by the same sentence, pronounced for a separation by reason of adultery, allotted alimony pending suit, & also permanent alimony. An appeal from the whole sentence was prosecuted in the Arches Ct., which ct. reversed the sentence so far as concerned the alimony pending the suit, affirmed the sentence in other respects, & retained the cause:—*Held:* permanent alimony was payable from the date of the sentence in the ct. below.—FRANKFORT DE MONTMORENCY (VISCOUNT) *v.* FRANKFORT DE MONTMORENCY (VISCOUNTESS) (1844), 3 Notes of Cases, 432; 8 Jur. 1105.

5319. Termination — Non-compliance by wife with order for custody of children—Whether sufficient ground.]—In a cause of separation promoted by the wife against the husband, alimony was allotted. The wife had not complied with an order of the Ct. of Ch. respecting the custody of the children:—*Held:* the refusal of the wife to obey the Ct. of Ch. was no ground for stopping the payment of alimony.—HOPE *v.* HOPE (1854), 18 Jur. 1086.

5320. — — Subsequent decree nisi for dissolution obtained by husband.]—If permanent alimony has been allotted to a wife on her obtaining a decree of judicial separation, & the husband afterwards obtains a decree *nisi* for dissolution of marriage on the ground of her adultery, the ct. will not, before that decree has been made absolute, discharge the order for payment of alimony.—STOATE *v.* STOATE (1861), 30 L. J. P. M. & A. 108.

F. Increase or Reduction of Amount.

See Matrimonial Causes Rules, 1924, r. 63.

5321. Jurisdiction of court.]—GOODDEN *v.* GOODDEN, No. 5279, *ante*.

5322. —— Financial position of parties changed.—Upon an application for an order for permanent alimony by a wife who has obtained a decree for judicial separation, the ct., in assessing the amount to be paid by the husband, will take into consideration a voluntary allowance made to him by trustees under a discretionary trust to apply the income of a fund for the maintenance & support or otherwise for the benefit of all or such one or more exclusively of the other or others of the husband, wife, & their issue.

But if in such a case the trustees should subsequently formulate a scheme for the application of the income of the fund for the maintenance of the husband & his wife & issue the ct. will have jurisdiction under Divorce Rules & Regulations, r. 92, to review the order, & discharge or suspend it.—MARTIN *v.* MARTIN, [1919] P. 283; 88 L. J. P. 163; 121 L. T. 337; 35 T. L. R. 602; 63 Sol. Jo. 641, C. A.

5323. Whether granted—Variation in party's circumstances slight.]—(1) Where both parties had long abstained from applying to the ct., the one for a reduction of alimony, the other to enforce the regular payment, it will not enforce arrears, nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of that alimony; nor will it reduce alimony on account of an express waiver of a part thereof by the wife, the additional expenses of the husband occasioned by the mature age of children, the failure, from the mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony, or slight additions, *aliunde*, to her means.

(2) Where there is a material alteration of

small.]—In awarding alimony, where the husband's means are small, his wife's ability to maintain herself may be taken into account.—KEWELUK *v.* KEWELUK, [1923] 2 W. W. R. 78; 2 D. L. R. 979.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 1.—E.

5317 i. *Commencement—Date of decree.*]—*Interim* alimony having been ordered, permanent alimony ran from the date of the judgment.—CROMARTY *v.* CROMARTY (1917), 38 O. L. R. 481; 33 D. L. R. 151.—**CAN.**

5317 ii. — — — — —.]—Permanent alimony should not be awarded except from & after the date of the decree. Where no application had been made for *interim* alimony a judgment which allowed arrears of alimony was reduced by the amount so allowed.—DE WITT *v.* DE WITT, [1919] 2 W. W. R. 181; 46 D. L. R. 242.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 1.—F.

5321 i. *Jurisdiction of court.*]—The ct. has jurisdiction to vary the amount of alimony fixed by consent of the parties.—MAGOWAN *v.* MAGOWAN, [1921] 2 I. R. 314.—**IR.**

5321 ii. ——.]—In a fit case the ct. has jurisdiction to increase the alimony allowed to a wife on the making of a decree for judicial separation on the ground of her cruelty.—SMITH *v.* SMITH (1892), 11 N. Z. L. R. 203.—**N.Z.**

Sect. 22.—*Proceedings after decree: Sub-sect.* 1, *F., G., H. & I.* (*a*) & (*b*).]

circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; & if the husband is *lapsus facultatibus* the wife's allowance ought to be reduced (DR. LUSHINGTON).—DE BLAQUIERE *v.* DE BLAQUIERE (1830), 3 Hag. Ecc. 322; 162 E. R. 1173.

Annotations:—*As to* (1) **Refd.** Kerr *v.* Kerr, [1897] 2 Q. B. 439; Campbell *v.* Campbell, [1922] P. 187. *Generally.* **Mentd.** Vander Gucht *v.* De Blaquiere (1838), 7 L. J. Ch. 270.

5324. —— **Waiver of part by wife.**]—DE BLAQUIERE *v.* DE BLAQUIERE, No. 5323, *ante.*

5325. Increase—Husband's income increased.]—DE BLAQUIERE *v.* DE BLAQUIERE, No. 5323, *ante.*

5326. —— ——.]—LOUIS *v.* LOUIS, No. 5300, *ante.*

5327. —— **Custody of children transferred from husband to wife.**]—(1) A separation deed contained a covenant by the husband with trustees to pay for the maintenance & education of the two youngest daughters, subject to certain conditions as to custody & residence:—*Held:* the infant children could not maintain an action to enforce the performance of the covenant for their maintenance, but if the trustees refused to sue, the wife could herself maintain such action.

(2) The wife, after the date of the deed, obtained a decree for judicial separation & custody of the children, but her application for increased alimony was refused on the ground that the subsequent adultery of her husband did not put an end to the deed, & that the husband maintaining the younger children no further liability was thrown upon her; & that view was acquiesced in by the husband. He now contended that the covenant was conditional, & that the wife having the custody of the children his liability was at an end:—*Held:* he could not, having taken advantage of one construction in 1882, now succeed on the contention that that construction was wrong; & proceedings under judgment appealed from ordered to be stayed, to enable the wife to apply for increased alimony.—GANDY *v.* GANDY (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803; 1 T. L. R. 520, C. A.

Annotations:—*As to* (2) **Consd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. *Generally,* **Mentd.** Clarke *v.* Birley (1889), 41 Ch. D. 422; Davis *v.* Marrable, [1913] 2 Ch. 421; R. *v.* Taylor, R. *v.* Amendt, [1915] 2 K. B. 593.

5328. Reduction—Husband's means reduced.]—DE BLAQUIERE *v.* DE BLAQUIERE, No. 5323, *ante.*

5329. —— —— **Husband still able to continue payments.**]—The reduction of the husband's income, by unprofitable speculation, is no ground for a proportionate reduction of permanent alimony allotted twenty years before.

I see no reason to moderate the original allotment of alimony; the husband has still the power of continuing it, &, if he chooses to speculate, he must, if unsuccessful, bear the inconvenience (DR. LUSHINGTON).—NEIL *v.* NEIL (1832), 4 Hag. Ecc. 273; 162 E. R. 1446.

Annotation:—**Distd.** Hall *v.* Hall, [1915] P. 105.

5330. —— ——.]—MOORE *v.* MOORE, No. 4126, *ante.*

5331. —— **Wife's income increased.**]—A. obtained a sentence of divorce *a mensâ et thoro* in 1847, by reason of her husband's cruelty. £300 *per annum* was taken by consent as permanent alimony. Upon her father's death, A. having received an accession of income, to the extent of £144 *per annum,* as admitted by herself, her husband applied for a reduction of alimony:—*Held:* no case was made out by the husband for a reduction of alimony. His income did not appear, & *non constat* that £300 would not have been originally allotted by the ct., even if A. had then been in possession of £144 *per annum.*—SAUNDERS *v.* SAUNDERS (1858), 1 Sw. & Tr. 72; 30 L. T. O. S. 311; 4 Jur. N. S. 147; 6 W. R. 328; 164 E. R. 634.

—— **Wife guilty of adultery after decree.**]—*See* No. 5352, *post.*

5332. Effect of deed of separation—Subsequent adultery by husband.]—A husband having committed adultery, disputes arose between him & his wife which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her £250 a year & to maintain the two youngest children who were not to be in her custody; & she covenanted not to take any proceedings to compel the husband to allow her a larger amount of alimony. Subsequently the husband committed adultery, & the wife obtained a decree for judicial separation & an order that she should have the custody of the two youngest children. The husband had since the date of the separation deed become wealthy, & the wife applied for an inquiry as to his means with a view to obtaining increased alimony:—*Held:* increased alimony could not be ordered, for that as the ct. had not, as it would have had in the case of a decree for dissolution, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, & must have effect given to it, the husband not having, in the opinion of the ct., been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed.—GANDY *v.* GANDY (1882), 7 P. D. 168; 51 L. J. P. 41; 46 L. T. 607; 30 W. R. 673, C. A.

Annotations:—**Distd.** Wood *v.* Wood (1887), 57 L. J. P. 31 Wilkinson *v.* Wilkinson (1893), 69 L. T. 459. **Consd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. **Refd.** Rose *v.* Rose (1883), 8 P. D. 98; Fearon *v.* Aylesford (1885), 14 Q. B. D. 792; Tress *v.* Tress (1887), 12 P. D. 128; Kunski *v.* Kunski & Josephs (1907), 23 T. L. R. 615; Thompson *v.* Thompson, [1916] P. 165; Williams *v.* Williams, [1921] P. 131.

G. Payment.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (5).

5333. Payment of arrears—Whether enforced.]

5325 i. *Increase—Husband's income increased.*]—The ct. made an order increasing the amount of alimony fixed by consent of parties, notwithstanding the lapse of eleven years, the husband's means having considerably improved in the interval.—MAGOWAN *v.* MAGOWAN, [1921] 2 I. R. 314.—**IR.**

f. *Reduction—Master's report—No interference with after acquiescence.*]—On an application to reduce the amount of alimony payable by deft. to pltf., the property of deft. was variously estimated at from $2,938 to $6,000, & the evidence of deft when cross-examined upon his affidavit filed by him in support of the motion, being unsatisfactory, the ct. refused to interfere with the report of the master fixing the amount which had been paid under such report for about eighteen months without objection.—HOLWAY *v.* HOLWAY (1881), 29 Gr. 41.—**CAN.**

g. —— *Not reduction in arrears.*]—That the earning power of resp. in a divorce action had fallen off to a considerable extent is ground for a reasonable reduction in the monthly allowance but not for a reduction in the arrears of alimony.—MOODY *v.* MOODY (1924), 34 B. C. R. 49.—**CAN.**

h. *Termination—Whether on wife's unchastity.*]—After a decree had been made, & alimony paid for several years under it, the ct. entertained & afterwards granted a petition by the husband to be relieved from the decree, on the ground of the wife's subsequent adultery.—SEVERN *v.* SEVERN (1867), 14 Gr. 150.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 1.—G.

k. *Payment of lump sum.*]—An agreement by husband to pay a lump

—DE BLAQUIERE *v.* DE BLAQUIERE, No. 5323, *ante*.

5334. —— ——.]—Alimony is allotted for the maintenance of the wife from year to year: the ct. therefore will not without sufficient cause being shown for the delay, enforce payment of arrears of alimony beyond one year prior to the monition.—WILSON *v.* WILSON (1830), 3 Hag. Ecc. 329, n.; 162 E. R. 1175.

Annotation:—**Refd.** Campbell *v.* Campbell, [1922] P. 187.

5335. What husband may deduct—Debts incurred by wife & paid by husband—Debts incurred through husband's default.]—A suit for separation was promoted by the wife against her husband. Alimony *pendente lite* was allotted, &, when sentence was given in favour of the wife, permanent alimony was allotted. The alimony *pendente lite* had not been obtained without delay & compulsion, & permanent alimony had not been paid at all. The wife had incurred debts, which the husband had been compelled to pay. He sought to deduct their amounts from his future payments of alimony:—*Held*: he was not entitled so to do.—HARMAR *v.* HARMAR (1857), Dea. & Sw. 282; 28 L. T. O. S. 344; 3 Jur. N. S. 168; 5 W. R. 413.

—— Income tax.]—*See* INCOME TAX.

Enforcement of order.]—*See* Sub-sect. 1, K., *post*.

H. Alienation.

5336. Whether assignable.]—On a decree for judicial separation an order was made for payment of £60 a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, & by an order in Lunacy & Chancery the dividends of a sum of stock to which he was entitled in a Chancery suit were ordered to be carried to his account in the Lunacy & £60 a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in Lunacy & in the suit to have the annuity paid to her:—*Held*: the petition must be refused, on the ground that whether the annuity was considered as alimony, or as an allowance made to the wife by the ct. in Lunacy, it was not assignable.—*Re* ROBINSON (1884), 27 Ch. D. 160; 53 L. J. Ch. 51 L. T. 737; 33 W. R. 17, C. A.

Annotations:—**Refd.** Linton *v.* Linton (1885), 15 Q. B. D. 239; Anderson *v.* Hay (1890), 7 T. L. R. 113; Watkins *v.* Watkins, [1896] P. 222; Kerr *v.* Kerr (1897), 77 L. T. 29; Maclurcan *v.* Maclurcan (1897), 77 L. T. 474; Smith *v.* Smith, [1923] P. 191; Walls *v.* Legge, [1923] 2 K. B. 240.

5337. —— As separate estate.]—Alimony received by a wife under a decree for judicial separation from her husband is not "separate estate" chargeable by the wife.—ANDERSON *v.* HAY (LADY) (1890), 55 J. P. 295; 7 T. L. R. 113.

I. Procedure.

(a) The Application.

See Matrimonial Causes Rules, 1924, rr. 57–62.

5338. Time for making—After final decree—Effect of delay.]—COVELL *v.* COVELL, No. 5280, *ante*.

5339. How made.]—WALLACE *v.* WALLACE, No. 4811, *ante*.

5340. —— Where no allotment of alimony pendente lite.]—Where an answer is filed to a petition for alimony *pendente lite*, but no such alimony is allotted, & the wife afterwards applies for permanent alimony, she will not be allowed to file a fresh petition, but, upon giving notice, may examine witnesses to contradict the statements in the husband's answer to the petition for alimony *pendente lite*.—SYKES *v.* SYKES (1859), 31 L. J. P. M. & A. 38.

5341. Notice of motion—Length of notice—How calculated.]—Under Rule 29, which requires that eight days at least before moving for permanent alimony notice of the motion should be given, the eight days must be reckoned exclusive of the day on which the notice is given & of that on which the motion is made.—ROBINSON *v.* ROBINSON (1861), 30 L. J. P. M. & A. 189.

5342. —— Application to vary—Upon whom served.]—Notice of an application for an increase of permanent alimony should be given to the husband. Notice to the attorney who conducted the suit for him is insufficient.—LOUIS *v.* LOUIS (1871), 41 L. J. P. & M. 18; 25 L. T. 856; 20 W. R. 215.

5343. The hearing—Who may be heard.]—To an application for permanent alimony, resp. filed no answer:—*Held*: he had no *locus standi* on the hearing of the petition. On payment of costs leave was afterwards given him to file an answer.—WATTS *v.* WATTS (1863), 3 New Rep. 215.

(b) Inquiry as to Husband's Income.

See Matrimonial Causes Rules, 1924, rr. 61, 62.

5344. Whether fresh inquiry ordered—Inquiry held on allotment of alimony pendente lite.]—In the absence of proof that the husband's income has altered, permanent alimony will be awarded upon the income upon which alimony *pendente lite* was allotted, & neither party will be allowed to dispute the correctness of the estimate then taken. *Qu.*: whether, upon the application for permanent alimony, a party can show that there has been such alteration in the husband's income, unless he has previously filed a pleading setting forth the facts on which he relies.—FRANKS *v.* FRANKS (1861), 31 L. J. P. M. & A. 25.

Annotation:—**Refd.** Bonsor *v.* Bonsor, [1897] P. 77.

5345. —— ——.]—In the absence of proof that the husband's income has altered since the application for alimony *pendente lite*, permanent alimony will be allotted upon that which appeared then to be his income, although the wife may since have discovered that his income at that time was greater.—GREENWOOD *v.* GREENWOOD (1862), 32 L. J. P. M. & A. 136.

Annotation:—**Refd.** Bonsor *v.* Bonsor, [1897] P. 77.

5346. —— ——.]—(1) Where in a suit for sum in lieu of periodical alimony is contrary to public policy & the ct. has no power to award or confirm such payment.—DERBY *v.* DERBY (1916), 26 Man. L. R. 320.—**CAN.**

[illegible] The ct. has no power to give a lump sum for alimony once for all. The very nature of alimony prevents the award of a lump sum, because the amount awarded may be varied from time to time on the application of either party.—KEWELUK *v.* KEWELUK, [1923] 2 W. W. R. 78; 2 D. L. R. 979.—**CAN.**

m. ——.]—The ct. has jurisdiction, under Divorce & Matrimonial Causes Act, 1904, s. 33, upon granting a decree to a wife for dissolution of her marriage, with the consent of the husband, to make an order for the payment of a gross sum of money to the wife by way of alimony. Having once made such an order the ct. would have no jurisdiction upon the application of the wife to make any further order for alimony.—GEORGETTI *v.* GEORGETTI (1908), 28 N. Z. L. R. 597.—**N.Z.**

PART XIII. SECT. 22, SUB-SECT. 1.—I. (a).

n. *Time for making—Before trial—Right of wife to examine witnesses before hearing.*]—In British Columbia a petition for permanent alimony may be filed in a dissolution case prior to the trial.

R. 26 of the Divorce Rules, which entitles a wife to examine witnesses in support of her petition for alimony, does not enable a wife in a dissolution case to examine witnesses in support of a petition for permanent alimony before the hearing of the cause.—DAVY *v.* DAVY (No. 1), [1922] 1 W. W. R. 359; 63 D. L. R. 341; 30 B. C. R. 356.—**CAN.**

Sect. 22.—Proceedings after decree: Sub-sect. 1, I. (b), & (c), J. & K.; sub-sect. 2, A., B. & C.]

dissolution of marriage or for judicial separation there has been a full inquiry into the husband's means upon an application for alimony *pendente lite*, the amount of permanent alimony or permanent maintenance to be allotted to the wife will be determined upon the evidence then given, without a repetition of such inquiry upon the petition for permanent alimony or maintenance.

(2) For the purpose of determining the amount of permanent alimony or maintenance, recourse may be had to income of which the husband has no legal power to enforce the payment.

A husband, who was largely indebted to his brother, was in receipt of a voluntary allowance from him so long as he should remain out of the country:—*Held:* the voluntary allowance was properly included in the husband's income for the purpose of fixing the amount of permanent maintenance.—BONSOR *v.* BONSOR, [1897] P. 77; 66 L. J. P. 35; 76 L. T. 168; 45 W. R. 304; 13 T. L. R. 184.

Annotations:—As to (2) **Folld.** Martin *v.* Martin, [1919] P. 283. **Refd.** Nott *v.* Nott, [1901] P. 241.

5347. —— How obtained.]—If upon an application for permanent alimony the wife desires to show that the husband's income has increased or that her own has diminished since alimony *pendente lite* was allotted, her proper course is to file a petition alleging such increase or diminution. *Qu.:* whether when such a petition has been filed, resp. is entitled to file an answer thereto.—FISK *v.* FISK (1862), 31 L. J. P. M. & A. 60.

How income calculated.]—*See* Sect. 9, sub-sect. 1, D., *ante*.

(c) Other Cases.

See Matrimonial Causes Rules, 1924, rr. 57–62.

5348. Service of petition—Substituted service—Affidavit in support of application—Whether necessary.]—Although it is a fixed rule of practice to require an affidavit by petitioner in support of every application for substituted service of a petition at the commencement of a matrimonial suit, this rule does not necessarily apply to petitions for permanent maintenance & alimony.—SCHRAML *v.* SCHRAML (1899), 68 L. J. P. 47; 80 L. T. 328.

5349. Evidence — Admissibility — Alteration in husband's income.]—FRANKS *v.* FRANKS, No. 5344, *ante*.

5350. —— —— ——.]—Where a husband's income has diminished since the allotment of alimony *pendente lite*, he may, on a motion for permanent alimony, prove such diminution by affidavit.—DAVIS *v.* DAVIS (1863), 4 Sw. & Tr. 228; 32 L. J. P. M. & A. 152; 164 E. R. 1504.

See, also, No. 5347, *ante*.

5351. Alimony charged on land—Registration of order.]—*Re* HOLDEN, *Ex p.* HOLDEN, No. 5898, *post*.

5352. Allegation of wife's adultery after decree—Issue to try allegation ordered.]—PINDER *v.* PINDER (1902), 46 Sol. Jo. 298.

5353. Appeal—Time for.]—BEECHAM *v.* BEECHAM (1903), *Times*, Mar. 14.

J. Costs of Application.

5354. Liability of husband.]—A wife acting under the implied authority of the husband retained a solr. to defend her in a divorce suit instituted by her husband, & also to commence an action of detinue against her husband in respect of her clothes. The divorce suit was dismissed against the husband with costs & a decree of judicial separation was made in favour of the wife. After the decree of judicial separation the wife obtained, first, an order increasing the *interim* alimony which had been previously allowed her, &, afterwards, an order for permanent alimony, & the action for detinue was tried & decided in the wife's favour. In the meantime the husband had instituted a second divorce suit, which was also resisted by the wife & dismissed with costs. On the taxation of the wife's costs of these proceedings under an order of course obtained by her solr. against the husband, the husband, who had duly paid the alimony as required by Matrimonial Causes Act, 1857 (c. 85), s. 26, disputed his liability to pay any costs (beyond the party & party costs, which he had been ordered to pay) after the decree of judicial separation:—*Held:* (1) as to the costs of the second divorce suit, the husband was not liable; (2) as to the costs of the action of detinue, the husband was liable inasmuch as the retainer continued until the conclusion of the action unless expressly withdrawn by the husband; (3) as to the costs of the alimony proceedings the husband was liable inasmuch as they were part of the proceedings in the first divorce suit.—*Re* WINGFIELD & BLEW (SOLICITORS), [1904] 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783; 48 Sol. Jo. 700, C. A.

Annotations:—As to (1) **Consd.** Sheppard *v.* Sheppard, [1905] P. 185. *Generally*, **Refd.** Gilroy *v.* Gilroy (1914), 58 Sol. Jo. 378.

K. Enforcement of Order.

Action in King's Bench.]—*See* No. 5990, *post*.

Charging order.]—*See* No. 5968, *post*.

Peremptory order.]—*See* No. 5910, *post*.

Injunction—Restraining husband from receiving legacy.]—*See* No. 5993, *post*.

See, also, Sect. 9, sub-sect. 1, K., *ante*.

SUB-SECT. 2.—MAINTENANCE.

A. In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190; Matrimonial Causes Rules, 1924, rr. 65—70.

5355. Whether principles governing permanent alimony apply.]—FISHER *v.* FISHER, No. 5362, *post*.

5356. ——.]—SIDNEY *v.* SIDNEY, No. 5383, *post*.

B. Jurisdiction to Grant.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5357. On decree of nullity — Wife already married.]—A case of nullity of marriage by reason of a former marriage [of the wife] established. Alimony to second wife refused.

PART XIII. SECT. 22, SUB-SECT. 2.—A.

o. *Wife's claim not prejudiced by existence of second wife & family.*]—The claim of a wife upon obtaining a divorce, to alimony is paramount to that of a second wife or any children had by her, & the liability of the husband to maintain her cannot be prejudiced by the existence of a second family.—MOODY *v.* MOODY (1924), 34 B. C. R. 49.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 2.—B.

p. *On dissolution of marriage—Provision made in decree nisi.*]—In a suit by a wife for divorce the ct. has jurisdiction, in granting divorce, to make a provision for her permanent maintenance. This provision may be made in the decree *nisi*, & may be effective after the decree absolute though not repeated or confirmed therein.

An allowance for such purpose in the decree *nisi* may more properly be

As to allowing her a sum of money I was of opinion I had no warrant to do it by law or practice (SIR GEORGE LEE).—BIRD (*alias* BELL) *v.* BIRD (1754), 1 Lee, 621; 161 E. R. 227.

5358. —— ——.]—Petitioner obtained a decree for nullity of marriage on the ground that at the time of the ceremony resp. had a husband still living. An application was made that he should be ordered to pay maintenance to resp. The contention of petitioner, who opposed the application, was that Matrimonial Causes Act, 1907 (c. 12), under which it was made, did not apply to marriages that were void *ab initio*:—*Held:* the ct. had power to order maintenance.—RAMSAY *v.* RAMSAY (OTHERWISE BEER) (1913), 108 L. T. 382.

5359. —— **For incapacity—Finding against both parties.**]—GULLAN *v.* GULLAN (OTHERWISE GOODWIN), No. 5469, *post*.

5360. On dissolution of marriage—For guilt of wife.]—There is no rule of practice that a wife against whom a decree *nisi* for dissolution of marriage is pronounced must show special circumstances to entitle her to an order under Matrimonial Causes Act, 1857 (c. 85), s. 32, that the decree shall not be made absolute except upon the condition of the husband securing a provision for her support. The ct. has an absolute discretion vested in it by the sect., to be exercised according to the circumstances of each case. Thus, it will order the husband to secure a provision for his guilty wife, even though his own conduct has been unimpeachable, if the wife is proved to be entirely without means of support & unable through ill-health to earn her own living. So in a case where the wife was found guilty of adultery, the ct., being satisfied that she was in delicate health & quite unable to support herself & earn her own living, & that she was entirely without means & had no friends or relations who would support her, ordered petitioner to secure her by deed the sum of £1 per week for life *dum sola et casta vixerit*, although petitioner had been guilty of no misconduct & had opposed the making of the order.—ASHCROFT *v.* ASHCROFT & ROBERTS, [1902] P. 270; 71 L. J. P. 125; 87 L. T. 229; 51 W. R. 292; 18 T. L. R. 821, C. A.

C. When Granted.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5361. When husband's circumstances allow.]—RATCLIFF *v.* RATCLIFF & ANDERSON, No. 3368, *ante*.

5362. ——.]—The rules & principles on which the ecclesiastical cts. awarded permanent alimony in cases of divorce *a mensâ et thoro* are not applicable to cases of dissolution of marriage, because in the former complainant remained the wife of deft. & in that character he was bound to maintain her. The legislature did not intend that a wife entitled to a dissolution of marriage should purchase it at the price of being left destitute; & where the circumstances of husband allow of it, the ct. will direct a maintenance to be secured to the woman so long as she remains chaste & unmarried.—FISHER *v.* FISHER (1861), 2 Sw. & Tr. 410; 31 L. J. P. M. & A. 1; 5 L. T. 364; 8 Jur. N. S. 103; 10 W. R. 122; 164 E. R. 1055.

Annotations:—**Consd.** Morris *v.* Morris (1861), 31 L. J. P. M. & A. 33. **Refd.** Sidney *v.* Sidney (1865), 4 Sw. & Tr. 178; Gladstone *v.* Gladstone (1876), 1 P. D. 442; Harrison *v.* Harrison (1887), 12 P. D. 130; Wood *v.* Wood (1891), 64 L. T. 586; Kettlewell *v.* Kettlewell, [1898] P. 138.

5363. ——.]—CHARLES *v.* CHARLES, No. 2321, *ante*.

5364. On decree of dissolution—What court will consider — Conduct of parties.] — RAWLINS *v.* RAWLINS, No. 5502, *post*.

5365. —— —— ——.] — After a decree of nullity [on the ground of impotence], as well as after a decree of dissolution of marriage, the "conduct of the parties" is one of the material matters to be taken into consideration in dealing with any application for an allowance; & the discretion of the ct., in ordering or refusing an allowance, must be exercised according to the circumstances of each particular case.

In a case where the wife was provided for independently of the order of the ct., & had long delayed the institution of her suit, having in the meantime lived in concubinage with another man, her application for maintenance was refused.—DUNBAR (OTHERWISE WHITE) *v.* DUNBAR, [1909] P. 90; 78 L. J. P. 35; 100 L. T. 380; 25 T. L. R. 230.

5366. —— **Where wife guilty.**]—After a decree *nisi* for dissolution of marriage at the petition of the husband, the wife filed a petition for permanent alimony, or for some payment in lieu thereof, setting forth, as usual, the amount & sources of the husband's income. On motion on behalf of the husband, the ct. directed the petition for alimony to be struck off the file of the ct., & refused to allow the costs to be taxed against the husband.—WINSTONE *v.* WINSTONE & DYNE (1861), 2 Sw. & Tr. 246; 30 L. J. P. M. & A. 109; 3 L. T. 895; 164 E. R. 989.

Annotations:—**Refd.** Covell *v.* Covell (1872), 41 L. J. P. & M. 81; Robertson *v.* Robertson (1883), 8 P. D. 94.

5367. —— ——.]—LEWIS *v.* LEWIS (1902), 18 T. L. R. 792.

5368. —— **Damages invested for wife's benefit.**]—Where a husband had obtained a decree of dissolution, upon the ground of adultery, with £150 damages against co-resp., permanent alimony was refused, but the damages awarded were ordered to be invested in the purchase of a government annuity for the wife's benefit.—LATHAM *v.* LATHAM & GETHIN (1861), 30 L. J. P. M. & A. 43; 7 Jur. N. S. 218.

5369. —— —— **Wife possessed of small means.**]—Where the misconduct of a wife was very great, & no blame was attributable to the husband, & where she possessed the means of purchasing a small annuity, the ct. refused, under Matrimonial

called alimony up to the time of the decree absolute & maintenance thereafter.—MCNAIR *v.* MCNAIR, [1923] 2 W. W. R. 46; 2 D. L. R. 465.—**CAN.**

q. *Not in absence of decree for dissolution.*]—It is not competent to the ct. dismissing a husband's petition for dissolution of marriage, to award maintenance to the wife under Indian Divorce Act, ss. 15 or 37. Though the wife might have filed an application for divorce or judicial separation on the husband's petition, still in the absence of a decree for dissolution or judicial separation, no order for maintenance can be made.—DEVASKAYAM *v.* DEVAMONY (1922), I. L. R. 46 Mad. 133.—**IND.**

r. *Not ousted by separation agreement.*]—Petitioner had obtained a decree absolute, the grounds of the decree being the separation of the parties for three years under a deed of separation. This deed contained provisions for the wife's maintenance during her life. Resp. now applied to the ct. for further maintenance:—*Held:* the covenant by the husband to pay the annuity provided for by the deed continued notwithstanding the divorce, & in no way excluded the jurisdiction of the ct. to make such provision for the wife's maintenance as it thought fit.—LODDER *v.* LODDER, [1923] N. Z. L. R. 785.—**N.Z.**

PART XIII. SECT. 22, SUB-SECT. 2.—C.

s. *On decree of dissolution—What court will consider.*]—In allowing maintenance to a wife who has obtained a decree *nisi* for dissolution of marriage the ct. will take into consideration not only the income of the husband, but also the fact that he is possessed of property which either produces no income at all, or produces less income

Sect. 22.—Proceedings after decree: Sub-sect. 2, C. & D. (a).]

Causes Act, 1857 (c. 85), s. 32, to compel the husband to make a permanent provision for her support, the marriage having been dissolved on account of the wife's adultery.—TURNER *v.* TURNER & WEDGEWOOD (1863), 1 New Rep. 405.

5370. —— —— Wife without means—Whether special reason must be shown.]—On Aug. 3, 1880, a decree *nisi* for dissolution of marriage was made against a wife, & in due course was made absolute. The wife appealed, & on July 19, 1881, her appeal was dismissed. On July 30, she took out a summons for permanent maintenance, but before the summons was heard she went abroad, & consequently it was not heard till Dec. 1882, when it was dismissed by the President:—*Held:* as the application to the President was out of time, & he had exercised a discretion under the special circumstances of the case, the ct. would not interfere with his decision.

Qu.: whether it is necessary to show special circumstances in order to induce the ct. to grant permanent alimony to a guilty wife against whom a decree for dissolution is made, & who has no means of support.—ROBERTSON *v.* ROBERTSON & FAVAGROSSA (1883), 8 P. D. 94; 48 L. T. 590; 31 W. R. 652, C. A.

Annotations:—**Consd.** Ashcroft *v.* Ashcroft & Roberts, [1902] P. 270; Scott *v.* Scott, [1921] P. 107. **Mentd.** *Re* Smith, Rigg *v.* Hughes (1884), 9 P. D. 68.

5371. —— —— —— ——.]—ASHCROFT *v.* ASHCROFT & ROBERTS, No. 5360, *ante*.

5372. —— Where husband guilty—Husband's income professional—Wife entitled to early reversion.]—RAWLINS *v.* RAWLINS, No. 5502, *post*.

5373. —— Effect of prior separation deed.]—The wife, under a deed of separation, agreed to accept a certain sum as a provision for her support, & covenanted not to sue her husband for any further maintenance. After their separation she discovered that her husband had been guilty of incestuous adultery, & she obtained a decree for dissolution of marriage on that ground:—*Held:* she was not precluded by the deed from claiming to have the usual order for permanent maintenance made in her favour.—MORRALL *v.* MORRALL (1881), 6 P. D. 98; 50 L. J. P. 62; 47 L. T. 50; 29 W. R. 897.

Annotations:—**Consd.** Gandy *v.* Gandy (1882), 7 P. D. 168. **Refd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138; Williams *v.* Williams, [1921] P. 131.

5374. —— ——.]—(1) A wife petitioned for a dissolution of her marriage. Before the case came on for hearing she withdrew her petition & compromised the suit, her husband agreeing to pay her the sum of £130 per annum during their joint lives for the maintenance of herself & the only child of the marriage. The agreement entered into between the parties contained the following passage: "This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved." Subsequently the husband was guilty of adultery & also of statutory desertion, & the marriage was dissolved on those grounds:—*Held:* the wife was not precluded by the existence of the above agreement from filing her petition for permanent maintenance in the usual way.

(2) The expense thrown upon the wife of educating a child is a reason for increasing her alimony beyond the sum which she has, in an agreement for separation, accepted as permanent maintenance. In deciding questions of alimony on a dissolution of marriage the attention of the ct. is not to be confined to the terms of a previous agreement for separation, where the agreement contains no covenant not to sue & the circumstances have changed, but all the facts must be considered. An agreement between parents cannot deprive the ct. of jurisdiction to give maintenance to children. A covenant not to sue for increased alimony in the event of a divorce grounded on future misconduct will not be implied in an agreement for separation.

We are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, & we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognised. There is no express covenant to that effect in the present case; & a covenant of such very questionable validity cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the ct. to obtain further maintenance in the events which have happened (LINDLEY, L.J.).—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, [1897] P. 138; 66 L. J. P. 69; 76 L. T. 409; 45 W. R. 567; 13 T. L. R. 366; 41 Sol. Jo. 559. C. A.

5375. —— —— In consideration of abandonment of former proceedings.]—A wife, who had obtained a decree dissolving her marriage, petitioned for permanent maintenance. By post-nuptial deeds, made apparently in consideration of the abandonment of former proceedings instituted by her, she was to receive an allowance of £100 a year in the event of the adultery or cruelty of her husband. The husband's income was £600 a year:—*Held:* she was entitled, notwithstanding the deed, to permanent maintenance at the rate of £200 a year.—WILKINSON *v.* WILKINSON (1893), 69 L. T. 459.

5376. On decree of nullity—What court will consider—Conduct of parties.]—DUNBAR (OTHERWISE WHITE) *v.* DUNBAR, No. 5365, *ante*.

5377. —— Re-marriage with brother of divorced husband.]—D'ETCHEGOYEN *v.* D'ETCHEGOYEN, No. 5824, *post*.

5378. —— For incapacity of husband—Wife living in concubinage—Delay in instituting suit.]—DUNBAR (OTHERWISE WHITE) *v.* DUNBAR, No. 5365, *ante*.

D. Amount of Order.

(a) On Dissolution of Marriage.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5379. General rule—Sufficient to maintain wife.]—In exercising the power given by Matrimonial Causes Act, 1857 (c. 85), s. 32, of ordering the husband to make provision for a wife who has obtained a decree of dissolution of marriage, the ct. will generally be guided by the principles laid down in *Fisher* v. *Fisher*, No. 5362, *ante*, where the husband was ordered to secure to the wife, so long as she should remain chaste & unmarried, an annuity sufficient to maintain her. There may, however, be circumstances in a case which would justify the ct. in ordering a more liberal provision for the wife. A wife having obtained a decree of dissolution of marriage on the ground of adultery & desertion, the ct., taking into consideration the conduct of the parties & other circumstances,

than the proceeds of the property would realise if the property were sold & the proceeds reinvested. Where there is such property the income producible from its estimated marketable value should be taken into account. —ALLARDICE *v.* ALLARDICE (1903), 23 N. Z. L. R. 178.—**N.Z.**

ordered the husband to secure to her the payment of the sum of £2,000 absolutely.—MORRIS *v.* MORRIS (1861), 31 L. J. P. M. & A. 33.

Annotations :—**Folld.** Stanley *v.* Stanley, [1898] P. 227. **Expld.** Twentyman *v.* Twentyman, [1903] P. 82. **Refd.** Waterhouse *v.* Waterhouse, [1893] P. 284.

5380. —— Provision for wife without beggaring husband.]—(1) Consideration of the question what sum of money a husband who had been divorced by his wife should be ordered to secure to her for her life & what sum he ought to be ordered to pay to her for her maintenance & support during their joint lives.

We have to ascertain as best we can what are the joint incomes of husband & wife; next, how we should divide it . . . between providing for the woman something which the husband cannot deprive her of, &, on the other hand not unduly beggaring the husband (PHILLIMORE, L.J.).

(2) As regards income tax it seems to me that the only safe mode of dealing with the matter is to give the allowance to the wife less income tax (PHILLIMORE, L.J.).

(3) There is also a question whether certain extra allowances made to him by the military authorities for lodging moneys, for rations, & for fuel & light should be brought into consideration. There is a further allowance made to him for the keep of a servant . . . with regard to these allowances I am of opinion that they ought not to be brought into consideration (PHILLIMORE, L.J.). —NAISH *v.* NAISH (1916), 32 T. L. R. 487, C. A.

5381. Proportion of husband's income—Sole income from property derived from wife.]—After decree *nisi* had been pronounced the wife petitioned the ct. for permanent alimony. The husband's sole property consisted in his life interest in certain houses belonging to the wife. The ct. declined to pronounce an opinion as to the effect of the dissolution of marriage on the husband's life interest, & allotted the wife two-thirds of the annual income arising from the houses, directing that the wife's right to the property should be reserved in the order.—GEORGE *v.* GEORGE (1869), 38 L. J. P. & M. 34; 20 L. T. 232.

5382. —— Whether proportion fixed.]—In July, 1915, on the petition of Mrs. H., a decree *nisi* was pronounced for the dissolution of the marriage between her & E. H. She filed a petition for maintenance in which she alleged that he had a very large income derived from shares in a private newspaper co., directors' fees, freehold & leasehold property, a racing establishment & breeding stud, greyhounds, & other property. By his answer E. H. declined to give minute details, but admitted an income of approximately £29,000 *per annum*, of which £12,000 *per annum* was derived from directors' fees, £11,475 from shares in the newspaper co., & £2,400 from shares in another co. He offered to agree to an order for £1,500 a year. On an application by petitioner for an order that he should make a further & better answer the registrar held that he had sufficient material to deal with the case in accordance with the principles laid down in *Sykes* v. *Sykes*, No. 4111, *ante*, & *Kettlewell* v. *Kettlewell*, No. 5393, *post*, & refused to order a further answer :—*Held :* there was no hard & fast rule fixing any particular proportion of the husband's income as the correct amount to be allowed for maintenance; but the ct. had to consider (*inter alia*) the security to be given for the allowance, & in this case there were no materials on which this could be done; a further affidavit must therefore be filed.—HULTON *v.* HULTON, [1916] 1 P. 57; 85 L. J. P. 137; 114 L. T. 449; 32 T. L. R. 319, C. A.

5383. Proportion of joint income—One-third of joint incomes.]—In awarding a permanent provision under Matrimonial Causes Act, 1857 (c. 85), s. 32, to a woman whose marriage has been dissolved by reason of her husband's misconduct, the ct. will in future act upon the same principles as those upon which the ecclesiastical cts. allotted permanent alimony after a decree of divorce *a mensâ et thoro*, & will order him to secure to her about one-third of the joint income.

The decree of the ct. will therefore be that the decree *nisi* be made absolute & that resp. secure to petitioner, *dum sola et casta vixerit*, the annual income of £245 (*per* CUR.).—SIDNEY *v.* SIDNEY (1865), 4 Sw. & Tr. 178; 34 L. J. P. M. & A. 122; 12 L. T. 826; 11 Jur. N. S. 815; 164 E. R. 1485; *on appeal* (1866), L. R. 1 P. & D. 78; (1867), 36 L. J. P. & M. 73, H. L.

Annotations :—**Consd.** Hulton *v.* Hulton (1916), 33 T. L. R. 137. **Refd.** Charles *v.* Charles (1866), L. R. 1 P. & D. 260; Ousey *v.* Ousey (1875), 1 P. D. 56; Bradley *v.* Bradley (1878), 3 P. D. 47; Wood *v.* Wood (1891), 64 L. T. 586; Scott *v.* Scott, [1921] P. 107; Fox *v.* Fox, [1925] P. 157.

5384. —— Sums covenanted to be paid under separation deed—Though exceeding one-third of joint incomes.]—It is within the discretion of the registrar to make a final order for maintenance of a wife, after she has been granted a decree absolute for the dissolution of her marriage, on the basis of the sum which the husband has covenanted to pay her under a deed of separation, notwithstanding that such order results in her income being more than one-third of the joint income of husband & wife. If such order is made, the ct. has power, *pari passu*, to restrain the wife from taking civil proceedings to enforce payment under the deed while the order of the Divorce Ct. is still effective, if the husband applies for variation under Matrimonial Causes Act, 1859 (c. 61), s. 5.—REID *v.* REID (1925), 42 T. L. R. 30.

5385. —— Bulk of unsettled property squandered by husband—Variation after husband's death.]—BASHALL *v.* BASHALL, No. 5724, *post*.

5386. —— Where husband guilty—Particular instances.]—DURANT *v.* DURANT, No. 5400, *post*.

5387. —— —— ——.]—The registrar having reported the income of the husband at £150 a year, the ct. made an order for payment to the wife, who had obtained a decree for dissolution of the marriage, of £1 per week, & further directed that out of a sum of £90 per year, placed in the hands of trustees by the husband & to be applied by them to the maintenance & education of the four children of the marriage in such manner as he should direct, one-third should be paid to the wife for the maintenance & education of the two younger children who were committed to her custody.—PRESCOTT *v.* PRESCOTT (1868), 18 L. T. 35.

5388. —— —— ——.]—On a wife's petition for permanent maintenance, it appeared that the husband, who had been found guilty of adultery & cruelty, was in receipt of an annual income of £337 7*s.*; of which £228 2*s.* 6*d.* was as surgeon in Her Majesty's navy, & the remainder arose from an interest in fee simple under his father's will, subject to a clause of forfeiture on alienation. The wife had no property :—*Held :* the ct. could not make an order for a weekly or monthly payment under Matrimonial Causes Act, 1866 (c. 32), except where the husband has no property on which the requisite amount can be secured, & the ct. was therefore bound to construe the will, the clauses of which were inconsistent & contradictory.

The ct., on an examination of the will, held that resp. took an estate in fee simple under it, & that

Sect. 22.—*Proceedings after decree: Sub-sect.* 2, *D.* (*a*) & (*b*), *E.* & *F.*]

the forfeiture clause was invalid, & accordingly, looking at the intervals when resp. would not be in receipt of his full pay, & the smallness of the property to be charged, ordered resp. to secure £84 a year for petitioner.—CORBETT *v.* CORBETT (1888), 13 P. D. 136; 57 L. J. P. 97; 59 L. T. 183; 37 W. R. 30; *affd.*, 14 P. D. 7, C. A.

5389. —— —— —— Both parties entitled to reversions.]—The wife obtained a decree absolute on the grounds of adultery & cruelty, & presented a petition for variation of the marriage settlements & for permanent maintainence. The present joint income of the husband & wife amounted to nearly £1,500 a year. Both were entitled to considerable property in reversion. The registrar recommended either that a present income of £700 a year should be secured to the wife for her life, or, in the alternative, that she should have secured to her an annual sum equal to one-third of the present joint income, such annual sum to be increased upon the falling in of the husband's reversionary interest. On behalf of the husband, it was stated that, if one of these two courses were to be adopted, he should, of the two, prefer the former. The ct. thereupon ordered that the husband secure to petitioner, by way of permanent maintainence, the sum of £700 a year for her life. —WARREN *v.* WARREN (1890), 63 L. T. 264.

5390. —— —— ——.]—WILKINSON *v.* WILKINSON, No. 5375, *ante*.

——.]—Upon an application after a decree for dissolution of marriage for an order under Matrimonial Causes Act, 1857 (c. 85), s. 32, that the husband should secure to the wife an annual sum of money, it appeared that he was partner in a brewery & was entitled to receive £200 per month in respect of his share of the profits, but could not draw anything more without the consent of his partner. His share of the profits had for several years past amounted to about £3,300 a year, but he had received only the monthly allowance, amounting to £2,400 a year, the rest being carried to his credit in the partnership books. The Ct. of Appeal held that, for the purpose of determining the amount of the annual payment to be secured to the wife, the husband must be treated as having only an income of £2,400, & made an order that he should secure to her the yearly sum of £300 in addition to the yearly sum of £500 a year already secured to her by her marriage settlement. Upon appeal to the House of Lords their Lordships expressed their opinion that having regard to the circumstances an application for an order under Matrimonial Causes Act, 1866 (c. 32), s. 1, was the more appropriate proceeding, & ordered that the order appealed from should be reversed, & that the husband should under sect. 1; during the joint lives of himself & his wife, pay her £600 a year in monthly instalments.—HANBURY *v.* HANBURY, [1895] A. C. 417; 72 L. T. 480; 11 R. 302, H. L.

5392. —— —— ——.]—RYDILL *v.* RYDILL (1896), 40 Sol. Jo. 753.

5393. —— —— ——.]—A wife obtained a divorce from her husband on the ground of his adultery & cruelty. The income of the husband had been £19,000 a year, & the wife, who had herself brought nothing into settlement, had £1,400 a year under her marriage settlement. The ct., on the petition of the wife for permanent maintenance, considering that £3,000 a year would have been an adequate jointure for the widow of a man in the husband's position, granted her £1,600 a year in addition to her present allowance, the additional £1,600 a year to be payable "*dum sola et casta vixerit.*"

In deciding whether a permanent allowance as above should be limited *dum sola et casta vixerit* or not, the ct. should consider—first, the conduct of the parties; secondly, their position in life, ages, & respective means; thirdly, the amount of provision actually made; fourthly, the existence or non-existence of children, & who has the custody of them; & fifthly, any other circumstances which may be important in the particular case.—KETTLEWELL *v.* KETTLEWELL, [1898] P. 138; 67 L. J. P. 16; 77 L. T. 631; 14 T. L. R. 96.

Annotations:—**Refd.** Smith *v.* Smith (1897), 78 L. T. 28; Dean *v.* Dean, [1923] P. 172.

5394. —— Where wife guilty.]—(1) On a decree *nisi* for dissolution of marriage on the ground of the adultery of a wife who on her marriage had a fortune of £1,678 which was not settled, but was received by the husband, the ct. ordered that the husband should settle £1,000 upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly & remained unmarried, & that upon her interest ceasing the fund should be held in trust for the children of the marriage in equal shares, & that the £1,000 damages awarded against co-resp., should be paid to the husband in lieu of the sum he would have to settle, & that the decree should be suspended until the settlement should be made.

(2) When a marriage is dissolved on the ground of the wife's adultery, the ct. will not order that she have the custody of or access to the children of the marriage.—BENT *v.* BENT & FOOTMAN (1861), 2 Sw. & Tr. 392; 30 L. J. P. M. & A. 175; 5 L. T. 139; 164 E. R. 1047.

Annotations:—*As to* (2) **Refd.** Handley *v.* Handley & Wroughton (1890), 39 W. R. 97; Blandford *v.* Blandford (1892), 8 T. L. R. 381; B. *v.* B., [1924] P. 176.

5395. —— ——.]—WILTON *v.* WILTON & GAMBIER (1881), 71 L. J. P. 126, n.

5396. —— ——.]—Upon an application for variation of marriage settlement by a husband who had obtained a decree for dissolution of his marriage, it appeared that petitioner & resp. were married in 1902. The latter had no means, but the husband by an ante-nuptial settlement assigned to trustees certain furniture & a moiety of the residuary estate under his mother's will upon trusts under which resp. took the first life interest. The decree was made absolute in Nov. 1913, & the husband then presented his petition for variation of the settlement by extinguishing all the rights of resp. thereunder. It appeared that the income of the settled property amounted to £137 a year, & petitioner refused to make any allowance. The judge made an order that the wife's interest in the settlement should be extinguished, except that the trustees thereof should pay to her 30*s.* a week for life, & refused to insert a *dum casta* clause. Petitioner appealed & contended that the weekly allowance was excessive, & that the clause ought to be inserted:—*Held:* the allowance must be reduced to £1 a week, & a *dum casta* clause must be inserted.

The true principle that ought to guide the ct. in dealing with cases where the insertion of the *dum sola et casta vixerit* clause is in question was enunciated in *Squire* v. *Squire & O'Callaghan*, No. 3582, *ante*, which was in accordance with the principle that was established in *Wigney* v. *Wigney*, No. 5664, *post*, & other authorities; & regard must be had to the wife's past life in determining whether it is right & proper that that clause should be inserted.—OLLIER *v.* OLLIER,

[1914] P. 240; 84 L. J. P. 23; 111 L. T. 697; 58 Sol. Jo. 754, C. A.
Annotation :—**Refd.** Woodcock *v.* Woodcock & Codesido (1914), 111 L. T. 924.

(*b*) *On Decree of Nullity of Marriage.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5397. For incapacity of husband.]—SHARPE (OTHERWISE MORGAN) *v.* SHARPE, No. 5710, *post.*

5398. Whether scale applicable on dissolution applies.]—GULLAN *v.* GULLAN (OTHERWISE GOODWIN), No. 5469, *post.*

5399. In discretion of court—No fixed principles.]—On an application by a wife petitioner for permanent maintenance after a decree of nullity of marriage the amount that ought to be awarded depends on the particular facts of the case, & is to be decided on the sense of propriety & moral justice of the ct. & not on any set of fixed principles.—GARDINER (OTHERWISE PHILLIPS) *v.* GARDINER (1920), 36 T. L. R. 294.

E. Duration.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5400. Commencement—Date of decree—Three years before—Delay pending appeal.]—In a suit for divorce brought by the wife, repeated & profligate adultery being proved on the part of the husband, who, however, had to maintain & educate twelve children, permanent alimony at the rate of £600 *per annum*, in addition to £120 *per annum* separate property, out of a net income of £4,000 allotted from the date of the sentence, three years before; the cause having in the interval been carried by appeal to the Delegates, but remitted, no steps being there taken by applt. & the remaining delay being occasioned by his absence from the kingdom.—DURANT *v.* DURANT (1828), 1 Hag. Ecc. 528; 162 E. R. 667.
Annotation :—**Refd.** Chetwynd *v.* Chetwynd (1865), L. R. 1 P. & D. 39.

5401. —— Decree absolute—Order made before decree nunc pro tunc.]—CAVENDISH *v.* CAVENDISH, No. 5505, *post.*

5402. Termination—Whether on wife's unchastity—No dum casta clause in deed.]—After a decree for a dissolution of marriage, on the ground of the husband's adultery & cruelty, resp. was ordered to secure to petitioner an annuity of £100 per annum, & it was referred to one of the conveyancing counsel of the Ch. Div. to prepare the necessary deed. After the deed had been prepared resp. applied to the ct. to insert a *dum casta* clause in the deed, but the ct. refused the application, & resp. executed the deed. Resp. afterwards moved for an order directing the deed to be delivered up to be cancelled & resp. to be released from his covenant, alleging that petitioner had, since the execution of the deed, been living an unchaste life :—*Held :* the ct. had not jurisdiction to order the deed to be cancelled.

Semble : the application to cancel the deed could only be entertained by the Ch. Div.—BRADLEY *v.* BRADLEY (1882), 7 P. D. 237; 51 L. J. P. 87; 47 L. T. 355; 31 W. R. 200.

Dum sola et casta clauses, *see, generally,* Sub-sect. 2, G., *post.*

5403. —— On wife's death—Jurisdiction of court to extend.]—The ct. has no power either to order a lump sum to be paid over to a wife absolutely for her permanent maintenance, or to order such lump sum to be secured to her or to the issue of the marriage by settlement for a longer period than her own life.—TWENTYMAN *v.* TWENTYMAN, [1903] P. 82; 72 L. J. P. 36; 88 L. T. 571; 51 W. R. 575; 47 Sol. Jo. 354.
Annotation :—**Consd.** Jagger *v.* Jagger (1926), 42 T. L. R. 315.

F. Variation of Order.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190; Matrimonial Causes Rules, 1924, rr. 63, 70.

5404. Jurisdiction of court.]—JARDINE *v.* JARDINE, No. 5456, *post.*

5405. ——.]—SHORTHOUSE *v.* SHORTHOUSE, No. 5471, *post.*

5406. —— No provision for variation in original order.]—A wife obtained a dissolution of marriage & filed a petition for maintenance. A large portion of resp.'s income was derived from a mtge. producing 5 per cent. The registrar made his report & the ct. confirmed it on the basis of resp.'s income during the subsistence of this mtge. Notice that the mtge. was to be paid off had now been given. Application was now made to vary the order on the ground that after payment of the mtge. interest at the rate of 5 per cent. could not be obtained, & that in the circumstances resp. would be deprived of an undue amount of income :—*Held :* the point not having been taken or reserved at the hearing of the motion to confirm the registrar's report, the ct. had now no power to vary the order, &, except by consent, no variation thereof could be obtained except by appeal.—SMITH *v.* SMITH (1898), 79 L. T. 124.

5407. —— After decree of nullity—Remarriage of wife.]—The ct. has power in nullity suits to fix permanent maintenance *dum sola,* & to reduce amount on remarriage.—MARIGOLD (OTHERWISE EVANS) *v.* MARIGOLD (1911), 55 Sol. Jo. 387.

5408. —— —— Original order for joint lives of husband & wife.]—In 1908 a wife obtained a decree for divorce, & filed a petition for permanent maintenance. The registrar reported that the amount to be paid was agreed by both parties at £90 a year for the wife & £30 a year for the only issue of the marriage, a daughter, until twenty-one; he submitted that the husband should be ordered to pay the agreed amount of £90 a year to the wife for her life & £30 a year to the daughter till she was twenty-one. In June, 1908, an order was made confirming the report & ordering the payment in the terms of the registrar's submission. In 1913, the wife petitioned for an increase of maintenance, & the husband cross-petitioned for a decrease. At the hearing before the registrar the wife's petition was withdrawn on the ground that as the order of June, 1908, was a consent order the ct. had no power to vary it. The registrar dismissed the cross-petition, & the President affirmed his order. The husband appealed :—*Held :* dismissing the appeal, if there had been an order by consent for the payment of maintenance to the wife during the joint lives of the husband & wife, the mere fact that the parties had agreed to amount to be paid would not have prevented an application under Matrimonial Causes Act, 1907 (c. 12), s. 1 (2) (*a*), for an increase or decrease of the sum if the circumstances of the parties afterwards changed, but that as the consent order was for the payment to the wife "for her life" there was no jurisdiction, & the presentation & withdrawal of the wife's petition for increase of maintenance did not affect her position, there having been no fresh agreement.—MAIDLOW *v.* MAIDLOW, [1914] P. 245; 84 L. J. P. 20; 112 L. T. 804, C. A.

5409. —— Consent order—Original order for life of wife.]—MAIDLOW *v.* MAIDLOW, No. 5408, *ante.*

Sect. 22.—*Proceedings after decree: Sub-sect.* 2, *F., G. & H.* (*a*).]

5410. —— —— Provision for variation in original order.]—A wife upon whose petition for divorce a decree absolute had been made obtained an order for permanent maintenance against the husband, a retired Army Officer, at the rate of £120 *per annum*. The order was expressed to be made by consent, the maintenance to be paid "out of his present income & until further order." At the date of the order his only income was derived from his pension of £420 *per annum*. He was afterwards obliged to commute a portion of his pension in order to pay the costs of the petition & to meet the expenses of illness from which he suffered. His income was thus reduced to £320 *per annum*. The wife had since the order carried on a business which yielded her an income. Upon a petition by the husband for reduction of the maintenance:—*Held:* notwithstanding the order was by consent & the husband's reduction of income was brought about by his own act the ct. had power under Matrimonial Causes Act, 1907 (c. 12), s. 1 (2) (*a*) to modify the order, & in so doing ought to have regard to all the circumstances of the case, including both the reduction in the husband's income & the increase in that of the wife.—HALL *v.* HALL, [1915] P. 105; 84 L. J. P. 93; 113 L. T. 58; 59 Sol. Jo. 381, C. A.

5411. Grounds for granting—Changed fortunes of husband.]—RAWLINS *v.* RAWLINS, No. 5502, *post*.

5412. —— —— Income not before registrar.]—SMITH *v.* SMITH, No. 5406, *ante*.

5413. —— —— Reduction of husband's income through own act—Provision for variation in original order.]—HALL *v.* HALL, No. 5410, *ante*.

5414. —— —— Decrease in income caused by own acts.]—HALL *v.* HALL, No. 5410, *ante*.

5415. —— Increase in wife's means—Nullity suit.]—SHARPE (OTHERWISE MORGAN) *v.* SHARPE, No. 5710, *post*.

5416. —— —— Dissolution suit.]—HALL *v.* HALL, No. 5410, *ante*.

5417. —— Subsequent unchastity of wife—No dum casta clause.]—Where upon a decree absolute being obtained by a wife on a petition for divorce against her husband an order is made for the payment of a fixed sum for her maintenance by the divorced husband, & in such order there is no *dum sola et casta* clause inserted, the ct. cannot vary the order as made where the divorced husband alleges that his wife has been guilty of adultery. The grounds for variation or modification are set out in Matrimonial Causes Act, 1907 (c. 12), s. 1, & there is no power given to vary an order made upon such grounds as the alleged adultery on the part of the wife. The *dum sola et casta* clause must be inserted in the order; it will never be inferred.—COLLINS *v.* COLLINS (1910), 103 L. T. 80; 26 T. L. R. 600; 54 Sol. Jo. 682.

5418. Grounds for refusing—Insufficient evidence.]—WITT *v.* WITT, No. 5783, *post*.

G. Dum sola et casta Clauses.

5419. Dum sola et casta clause—Jurisdiction of court to order—Effect of prior agreement between parties.]—WOODCOCK *v.* WOODCOCK & CODESIDO, No. 5711, *post*.

5420. —— Whether included in order.]—FISHER *v.* FISHER, No. 5362, *ante*.

5421. —— ——.]—SIDNEY *v.* SIDNEY, No. 5383, *ante*.

5422. —— ——.]—The ct. will, under special circumstances, review its orders for variation of marriage settlements made under Matrimonial Causes Act, 1859 (c. 61), s. 5. It will not do so by reason of circumstances which have occurred since the making of the order.

The marriage having been dissolved on the petition of the wife, the ct. varied the settlements by extinguishing the husband's interest in the wife's fortune, & declined to make the wife's enjoyment of the income of the settled property dependent on her living chaste & unmarried.—GLADSTONE *v.* GLADSTONE (1876), 1 P. D. 442; 45 L. J. P. 82; 35 L. T. 380; 24 W. R. 739.

Annotations:—**Consd.** Benyon *v.* Benyon (1890), 15 P. D. 54; Arkwright *v.* Arkwright (1895), 73 L. T. 287. **Reld.** Marsh *v.* Marsh (1878), 47 L. J. P. 78; Harrison *v.* Harrison (1887), 12 P. D. 130; Wood *v.* Wood (1891), 64 L. T. 586; Kettlewell *v.* Kettlewell, [1898] P. 138. **Mentd.** Wigney *v.* Wigney (1882), 7 P. D. 177.

5423. —— ——.]—HARRISON *v.* HARRISON, No. 5491, *post*.

5424. —— ——.]—There is no rule that in an order granting permanent maintenance to a divorced wife the *dum sola et casta* clause ought to be inserted unless there is some reason to the contrary, nor that it ought to be omitted unless there is some reason for inserting it. The ct. must in each case determine what is reasonable, having regard to the conduct of the parties; their position in life & their ages & their respective means; the amount of the provision made; the existence or non-existence of children, & who is to have the custody of them; & any other circumstances which may be important in any particular case.

The wife of an officer in the army obtained a decree for dissolution of marriage on the ground of adultery & cruelty. There was no child, & neither party had any property, the husband having only his pay. An order was made for permanent maintenance at the rate of £60 a year, & the judge directed the insertion of the *dum sola et casta* clause, considering that there was a general rule for inserting it unless there was some reason for omitting it:—*Held:* there was no such general rule, & in the present case, having regard to the innocence of the wife, the misconduct of the husband, the fact that the wife had no property, & the smallness of the allowance, the clause ought not to be inserted.—WOOD *v.* WOOD, [1891] P. 272; 60 L. J. P. 66; 64 L. T. 586; 7 T. L. R. 463, C. A.

Annotations:—**Consd.** Saunders *v.* Saunders & Beck (1893), 69 L. T. 498; Kettlewell *v.* Kettlewell, [1898] P. 138; Hall *v.* Hall (1914), 111 L. T. 403. **Expld.** Dean *v.* Dean, [1923] P. 172.

5425. —— —— Guilty wife.]—WELLER *v.* WELLER, FUNNELL & CASS, No. 6061, *post*.

5426. —— —— —— Husband guilty of cruelty.]—EDWARDS *v.* EDWARDS & FRANCIS, No. 3412, *ante*.

5427. —— —— ——.]—Where the parties had

PART XIII. SECT. 22, SUB-SECT. 2.—F.

5411 i. *Grounds for granting—Changed fortunes of husband.*]—Allowance increased from £25 to £200 *per annum*, it being shown that the husband's income had so increased as to justify the addition.—SEVERN *v.* SEVERN (1859), 7 Gr. 109.—**CAN.**

t. *Grounds for refusing.*]—In a decree absolute was embodied an order against resp. for payment of maintenance. The decree absolute was served on resp. & he paid maintenance for a year & a half. On application to vary or vacate the order for maintenance:—*Held:* while resp., if his application for relief had been made within a reasonable time after service of the decree absolute, might have been entitled *ex debito justitiæ* to an order striking out the clause objected to, he was now barred by his acquiescence & delay.—K. *v.* K., [1922] 3 W. W. R. 337; 70 D. L. R. 536.—**CAN.**

PART XIII. SECT. 22, SUB-SECT. 2.—G.

a. *Dum sola clause—Discretion of court.*]—On the petition of a wife a decree had been made for the dissolution of her marriage with resp. on the ground

lived apart for many years, & the husband ultimately obtained a decree *nisi* for a dissolution of his marriage on the ground of his wife's adultery, —The President refused to make the decree absolute until the husband had made provision for his wife's maintenance, & refused to order the insertion of a "*dum sola et casta*" clause into the order for such maintenance.—LANDER *v.* LANDER, [1891] P. 161 ; 60 L. J. P. 65 ; 64 L. T. 120 ; 55 J. P. 152 ; 39 W. R. 416.

Annotations :—**Consd.** Wood *v.* Wood (1891), 64 L. T. 586 ; Squire *v.* Squire, [1905] P. 4 ; Ollier *v.* Ollier, [1914] P. 240. **Refd.** Kettlewell *v.* Kettlewell, [1898] P. 138 ; Woodcock *v.* Woodcock & Codesido (1914), 111 L. T. 924.

5428. —— —— Or deed of security.]—MEDLEY *v.* MEDLEY, No. 5468, *post.*

See, also, Nos. 5494, 6061, *post.*

5429. —— What court will consider—Conduct of parties.]—WOOD *v.* WOOD, No. 5424, *ante.*

5430. —— —— ——.] — KETTLEWELL *v.* KETTLEWELL, No. 5393, *ante.*

5431. —— —— —— Past life of wife.]—MEDLEY *v.* MEDLEY, No. 5468, *post.*

5432. —— —— —— ——.] — SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante.*

5433. —— —— —— ——.] — OLLIER *v.* OLLIER, No. 5396, *ante.*

5434. —— —— Position in life of parties.]—WOOD *v.* WOOD, No. 5424, *ante.*

5435. —— —— Ages of parties.]—MEDLEY *v.* MEDLEY, No. 5468, *post.*

5436. —— —— -.]—WOOD *v.* WOOD, No. 5424, *ante.*

5437. —— —— Means of parties.]—WOOD *v.* WOOD, No. 5424, *ante.*

5438. —— —— Amount of provision.]—WOOD *v.* WOOD, No. 5424, *ante.*

5439. —— —— Existence of children.]—WOOD *v.* WOOD, No. 5424, *ante.*

5440. Dum sola clause—Whether included in order—Discretion of court absolute.]—The ct. in making an order, upon a decree for dissolution of marriage, that the husband shall pay to his wife an annual sum of money for her permanent maintenance, has, under Matrimonial Causes Act, 1857 (c. 85), s. 32, an absolute discretion, according to the circumstances of each case, either to order the payment during the whole of her life or so long as she remains unmarried.—LISTER *v.* LISTER (1889), 15 P. D. 4 ; 62 L. T. 90 ; 38 W. R. 81 ; 6 T. L. R. 51, C. A.

Annotation :—**Consd.** Wood *v.* Wood (1891), 64 L. T. 586.

5441. —— —— —— Guilty wife.]—SQUIRE *v.* SQUIRE & O'CALLAGHAN, No. 3582, *ante.*

5442. Decree of nullity—Obtained by wife.]—SHARPE (OTHERWISE MORGAN) *v.* SHARPE, No. 5710, *post.*

5443. —— —— ——.] — MARIGOLD (OTHERWISE EVANS) *v.* MARIGOLD, No. 5407, *ante.*

5444. —— Whether inserted alone.]—An order for permanent maintenance may be made containing a clause "*dum sola vixerit*" without the addition of "*et casta.*"—SMITH *v.* SMITH, [1898] P. 29 ; 67 L. J. P. 54 ; 78 L. T. 28 ; *subsequent proceedings*, 79 L. T. 124.

H. Payment.

(*a*) *In General.*

5445. Payment of arrears—Whether wife entitled to interest.]—Interest not given upon arrears of maintenance any more than upon arrears of a jointure.—MELLISH *v.* MELLISH (1808), 14 Ves. 516 ; 33 E. R. 619.

5446. Enforcing payment—Whether husband restrained from dealing with property.]—Where the Divorce Ct. has made an absolute order for dissolution of marriage, & an order for permanent alimony, & the late husband is dissipating his property, or putting it out of his power, the ct. will grant an injunction & receiver to protect it for the benefit of the former wife.—SIDNEY *v.* SIDNEY (1867), 17 L. T. 9 ; *previous proceedings* (1865), 4 Sw. & Tr. 178 ; (1866), L. R. 1 P. & D. 78 ; (1867), 36 L. J. P. & M. 73, H. L.

Annotations :—**Consd.** Burmester *v.* Burmester, [1913] P. 76 ; Jagger *v.* Jagger (1926), 42 T. L. R. 315. **Refd.** Carter *v.* Carter (1895), 12 T. L. R. 37 ; Bullus *v.* Bullus (1910), 102 L. T. 399. **Distd.** Newton *v.* Newton (1885), 11 P. D. 11. **Apld.** Newton *v.* Newton, [1896] P. 36.

5447. —— ——.]—The effect of Matrimonial Causes Act, 1857 (c. 85), s. 32, & the Rules & Regulations made under the provisions of the Divorce Acts, is to enable the ct., before a decree *nisi* for divorce has been made absolute, to confirm the report of the registrar approving of maintenance for the wife, to order the husband to secure the maintenance to the wife upon the decree becoming absolute, & in the meantime to restrain him from dealing with his property so as not to leave sufficient security.—WATERHOUSE *v.* WATERHOUSE, [1893] P. 284 ; 62 L. J. P. 115 ; 69 L. T. 618 ; 37 Sol. Jo. 617 ; 6 R. 630, C. A.

Annotation :—**Consd.** Fox *v.* Fox, [1925] P. 157.

5448. —— ——.]—Where, a wife having obtained a decree *nisi* for the dissolution of her marriage, an order had been made pursuant to s. 32 of the Matrimonial Causes Act, 1857 (c. 35), that the husband should secure a sum for her maintenance, & that, for that purpose, it should be referred to one of the conveyancing counsel of the Ch. Div. to draw a deed, the ct. granted an injunction restraining the husband, his servants & agents, from dealing with certain of his property until the execution of the deed.—NEWTON *v.* NEWTON, [1896] P. 36 ; 65 L. J. P. 15 ; 12 T. L. R. 65.

Annotations :—**Expld.** Jagger *v.* Jagger (1926), 42 T. L. R. 315. **Refd.** Burmester *v.* Burmester, [1913] P. 76.

5449. —— —— Before specific sum made payable.]—The ct., upon a petition for permanent maintenance, & before any specific sum has been made payable by a subsisting order, has no power to grant an injunction, at the instance of a wife, restraining her husband from dealing with his property which may ultimately be affected under a petition for permanent maintenance ; & the same principle applies to an application for permanent alimony.—BURMESTER *v.* BURMESTER, [1913] P. 76 ; 82 L. J. P. 54 ; 108 L. T. 272 ; 29 T. L. R. 323 ; 57 Sol. Jo. 392.

Annotation :—**Expld.** Jagger *v.* Jagger (1926), 42 T. L. R. 315.

5450. —— Jurisdiction to set aside settlement—Executed in consideration of second marriage.]—Petitioner, having obtained a decree absolute for divorce from her husband, presented a petition for permanent maintenance, &, before this petition was heard, resp. assigned the bulk of his property to trustees in consideration of a second marriage which he was about to enter into, & which was in fact celebrated. The result of the assignment was that resp. had no property whereby he could comply with an order requiring him to give security for the maintenance of petitioner :—

of his adultery. Her age was 27 & there were no children of the marriage. Neither the estate nor the income of the resp. was large, & he was carrying on his business by overdraft. On the application of petitioner for permanent maintenance :—*Held :* as petitioner was young, & there were no children, the maintenance should cease in the event of her marrying again.—ROBERTSON *v.* ROBERTSON, [1916] N. Z. L. R. 700.—**N.Z.**

Sect. 22.—*Proceedings after decree: Sub-sect.* 2, *H.* (*a*), (*b*),

Held: as the assignment was for good consideration & was not a sham the ct. had no power to set it aside, & no order for security ought to be included in the order for permanent maintenance. —JAGGER *v.* JAGGER (1926), 42 T. L. R. 315.

——.]—*See, generally*, Sect. 23, *post.*

(*b*) *Payment of Lump Sum.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.

5451. Jurisdiction of court to order.]—The ct. may under Matrimonial Causes Act, 1857 (c. 85), s. 32, order payment over of a sum absolutely to a wife who has obtained a decree dissolving her marriage with resp.

Where, on a petition for permanent maintenance by a wife, who had obtained a divorce from her husband on the ground of adultery & desertion, it appeared that the husband had not been heard of for several years, & that there was a sum of £320 standing to his credit in an action in the Ch. Div., the ct. ordered the wife's costs to be paid out of the fund & the balance to be paid to her for her & her children's maintenance.—STANLEY *v.* STANLEY, [1898] P. 227; 68 L. J. P. 7; 79 L. T. 104; 47 W. R. 272.

Annotation:—**Consd.** Twentyman *v.* Twentyman, [1903] P. 82.

5452. ——.]—TWENTYMAN *v.* TWENTYMAN, No. 5403, *ante.*

5453. Whether ordered.]—MORRIS *v.* MORRIS, No. 5379, *ante.*

5454. —— Fund in court to husband's credit—Husband not heard of for many years.]—STANLEY *v.* STANLEY, No. 5451, *ante.*

5455. —— No issue of marriage—Consent of husband.]—Where, on a petition for permanent maintenance, the registrar recommended that resp. should secure to petitioner the sum of £721 a year during their joint lives, or a gross sum of money of £6,000, the ct., on the application of petitioner, there being no issue of the marriage, & resp. not opposing, ordered that resp. should pay the sum of £6,000 direct to petitioner.—KIRK *v.* KIRK, [1902] P. 145; 71 L. J. P. 78; 87 L. T. 148.

Annotation:—**Consd.** Twentyman *v.* Twentyman, [1903] P. 82.

(*c*) *Weekly and Monthly Payments.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (2).

5456. Jurisdiction to order—Whether restricted to cases where husband poor.]—The provisions of Matrimonial Causes Act, 1866 (c. 32), do not apply exclusively to the case of a poor man, & the ct. may order sums of considerable amount to be paid weekly or monthly as permanent maintenance, & may from time to time modify the order.—JARDINE *v.* JARDINE (1881), 6 P. D. 213; 51 L. J. P. 4; 30 W. R. 91.

Annotations:—**Consd.** Hanbury *v.* Hanbury, [1894] P. 102. **Refd.** Watkins *v.* Watkins, [1896] P. 222.

5457. ——.]—CORBETT *v.* CORBETT, No. 5388, *ante.*

5458. —— Husband's property abroad—Sufficient & available for security.]—MEDLEY *v.* MEDLEY, No. 5468, *post.*

5459. —— As alternative to gross payment.]—MEDLEY *v.* MEDLEY, No. 5468, *post.*

5460. When order may be made—At any time from decree nisi to decree absolute.]—An application on behalf of resp. for an allowance to be made by petitioner is not confined or limited to the time when the decree *nisi* is pronounced, but may be made then or at any time up to & including the date when the decree is made absolute; & such allowance, if ordered for a monthly or weekly sum, under Matrimonial Causes Act, 1907 (c. 12), s. 1 (2), may not only be discharged, modified, suspended, or revived under (*a*) of that sub-sect., but is also liable to be increased under (*b*) of the same sub-sect. It is open to the ct., by consent, to make an order at the time of the decree *nisi*, & to embody it therein, dealing with the whole question of settlement & allowance.—K. *v.* K. (OTHERWISE R.), [1910] P. 140; 79 L. J. P. 33.

5461. —— ——.]—CAVENDISH *v.* CAVENDISH, No. 5505, *post.*

5462. Variation of payments—Power of court to order.]—JARDINE *v.* JARDINE, No. 5456, *ante.*

5463. —— ——.]—K. *v.* K. (OTHERWISE R.) (1910), No. 5460, *ante.*

5464. Discharge of payments—Power of court to order.]—K. *v.* K. (OTHERWISE R.) (1910), No. 5460, *ante.*

5465. Suspension of payments—Power of court to order.]—K. *v.* K. (OTHERWISE R.) (1910), No. 5460, *ante.*

5466. Revival of payments—Power of court to order.]—K. *v.* K. (OTHERWISE R.) (1910), No. 5460, *ante.*

(*d*) *Deduction of Income Tax on Allowance.*

See INCOME TAX.

I. Security for Maintenance.

5467. Jurisdiction of court to order—Husband out of jurisdiction.]—Where the husband is out of its jurisdiction, the only power which the ct. has, in case of dissolution of marriage, to make provision for the wife, is to make an order on the husband to secure a sum of money to her.

Qu.: whether under Matrimonial Causes Act, 1857 (c. 85), s. 35, as regards custody of children, the ct. should act on the rules hitherto acted upon in the Ct. of Ch., or use a wider discretion.

In a suit for dissolution of marriage, on the ground of the husband's bigamy & adultery, the ct. was asked, on decreeing dissolution, to order, under sect. 32 of above Act, that a sum of money standing in the names of the husband & wife in a savings bank should be paid to the wife; & that the custody of the children should remain with the wife. The ct. made an order that the husband should secure to the wife the sum of money in the bank, that being all they had power, by sect. 32, to do; but declined to make any order as to the custody of the children, on the grounds that there was no present necessity for it, the husband being in America & not likely to interfere with the custody of the children; that no ct. would aid him to wrest them from the wife; & that the order could not afterwards be modified, though circumstances might arise which would render such a modification desirable.—ROBOTHAM *v.* ROBOTHAM (1858), 1 Sw. & Tr. 190; 27 L. J. P. & M. 61; 31 L. T. O. S. 238; 6 W. R. 735; 164 E. R. 687.

5468. —— Gross or annual sum.]—(1) The provisions of Matrimonial Causes Act, 1857 (c. 85), s. 32, respecting permanent maintenance empowered

PART XIII. SECT. 22, SUB-SECT. 2.—H. (b).

5451 i. *Jurisdiction of court to order.*]—In a suit for divorce brought by the wife, the ct. has power to make the order for payment of a lump sum for the permanent maintenance of the wife.—TAYLOR *v.* BLEACH (1914), I. L. R. 39 Bom. 182.—**IND.**

b. *Agreement for—Validity of.*]—HYNES *v.* HYNES, [1923] N. Z. L. R. 928.—**N.Z.**

the ct. to order a gross or annual sum to be secured for the benefit of the wife, but not to make a direct order on the husband to pay a gross or annual or other periodical sum to the wife. (2) The qualification that the maintenance is to be for the wife "*dum sola et casta vixerit*" is not usually inserted in the order but in the deed of security. (3) The provisions of Matrimonial Causes Act, 1866 (c. 32), respecting the payment of monthly or weekly sums to the wife, do not apply to the case of a husband who has property abroad sufficient & available for a security. (4) An order for maintenance cannot be made in the alternative for securing a gross or annual sum of money, or else for the payment of monthly or weekly sums by the husband.

(5) *Semble:* if a woman is aged, the *dum casta* clause ought not to be inserted; but if she is young, & was a person of doubtful character before her marriage, the clause is properly inserted. —MEDLEY *v.* MEDLEY (1882), 7 P. D. 122; 51 L. J. P. 74; 47 L. T. 556; 30 W. R. 937, C. A.

Annotations:—*As to* (2) **Refd.** Harrison *v.* Harrison (1887), 12 P. D. 130; Wood *v.* Wood (1891), 64 L. T. 586. *As to* (3) **Refd.** Hanbury *v.* Hanbury (1894), 70 L. T. 569. *As to* (4) **Refd.** Corbett *v.* Corbett (1888), 13 P. D. 136.

5469. —— On decree of nullity.]—(1) Matrimonial Causes Act, 1907 (c. 12), gives the ct. power, in the exercise of its discretion in each particular case, to order the *de facto* husband to make an allowance to the *de facto* wife, after a decree of nullity of marriage [on the ground of impotence], &, where security can be given, to order the whole or any part of such allowance to be secured. (2) *Semble:* the amount of allowance [on nullity finding against both parties] is in the discretion of the ct. on the facts of each case, but will not be regulated by the scale obtaining in cases of dissolution.—GULLAN *v.* GULLAN (OTHERWISE GOODWIN), [1913] P. 160; 82 L. J. P. 118; 109 L. T. 411.

5470. Property under control of court—Property of wife formerly assigned to husband.]—CHALMERS *v.* CHALMERS, No. 5622, *post.*

5471. How calculated—Whether on capital or income.]—On an application for permanent maintenance by a wife who had obtained a decree *nisi* on the ground of her husband's cruelty & adultery, the registrar, treating the husband's property as producing 4 per cent. *per annum*, recommended that an annual sum should be secured to the wife on the husband's property, such sum amounting to one-third of the income thereof at 4 per cent. The ct. varied the report by ordering that this sum should be secured on a third only of the husband's property, & that, as to the difference between this sum & the sum produced by such third invested in trust securities, the wife must be content with the husband's personal covenant:—*Held:* this order was right, & the appeal must therefore be dismissed.—SHORTHOUSE *v.* SHORTHOUSE (1898), 79 L. T. 366, C. A.

Annotation:—**Refd.** Smith *v.* Smith (1898), 79 L. T. 124.

5472. Reference to registrar to settle deed—Jurisdiction of registrar.]—In a suit by the wife for dissolution of marriage the parties at the hearing agreed on certain terms of separation which were made an order of ct., & it was referred to the registrar to draft a deed of separation embodying these terms with the usual clause & with full power to determine all questions as to the form of the deed & all questions arising out of the terms of the settlement. The agreement, in addition to the usual conditions as to molestation, custody of, & access to children, stipulated that the husband should receive £250 a year out of the annual income secured to the wife by the marriage contract, & that the husband should give up to the wife all articles of plate, jewellery, etc., belonging to her. The parties being English subjects had been married in Paris, & the marriage contract declared that they adopted the French law as ruling the civil conditions of their marriage. The contract stipulated that the parents of petitioner as her dowry should pay over to the husband & wife a sum of 200,000 francs, & that they should further pay an annuity of 30,000 francs for the benefit of the wife & her children, the same to lapse if the donors died before the recipient & the children of the marriage, & in the case of the death of the wife, without children before her parents, they contracted to pay the husband an annuity of 12,500 francs. The contract also contained various conditions as to the investment & devolution of property acquired by the wife at & after her marriage, the power of disposing of property movable & immovable by the husband & wife mutually in each other's favour, the mutual liability for debts contracted by either, etc.

The deed of separation prepared by the registrar proposed that the income of 30,000 francs secured by the marriage contract should hereafter be deemed to be the sole property of the wife, & that all real & personal property, movable or immovable, now belonging or hereafter accruing to the wife, should be her separate property, independent of the control of her husband, & that all such property not disposed of by her will or gift should go to such persons as would have been entitled to it if the husband had died in her lifetime. It also required resp. to relinquish all rights conferred on him by the marriage contract as to the investment of property acquired by the wife after marriage, & as to the rights of inheritance of the survivor to the property of the party who died first, &, finally, it stipulated that either of the parties should be at liberty to apply to the proper French tribunal for the ratification of the deed or of any of its provisions. Resp. refused to execute the deed on the ground that it was *ultra vires* as varying the conditions of the marriage contract, & on a motion under Supreme Court of Judicature Act, 1884 (c. 61), s. 14, to nominate some person to sign the deed:—*Held:* (1) under the terms of the agreement, the registrar had power to determine the questions arising under the French law as to whether a separation of bodies effected a separation of goods, or whether a separation of goods was brought about by the agreement, even though a contrary effect might be inferred from its terms, & also, whether an intention that separation of goods should not take place could be gathered from the agreement; (2) the parties on signing the agreement, could only be taken to have intended that the deed should embody & carry out the modifications of the marriage contract relating to the respective proportions of the income to be paid to the husband & wife & to the giving up by the husband of all articles belonging to the wife, & the registrar had exceeded his powers in dealing with the pecuniary relations of the parties under the other terms of the marriage contract. The deed must be referred back to the registrar to be reformed.—DE RICCI *v.* DE RICCI, [1891] P. 378; 61 L. J. P. 17.

5473. —— By consent—Whether appeal lies.]—A husband, having obtained a decree for divorce, agreed, by his counsel, to make an unconditional allowance of £100 a year to his wife, the registrar to settle the deed in the event of the parties being unable to agree upon the terms. The parties not agreeing, the registrar settled the deed, inserting

Sect. 22.—Proceedings after decree: Sub-sect. 2, I., J. & K. (a), (b), (c), (d) & (e).]

dum sola et casta clause :- : as the parties had agreed to refer the settlement of the deed to the registrar, no appeal lay.—E. *v.* E., P. & N. (1908), 24 T. L. R. 858 ; 52 Sol. Jo. 699.

5474. Reference to conveyancing counsel to settle deed.]—Where a decree *nisi* has been made absolute & resp. husband has been ordered to secure permanent maintenance for the petitioning wife & the settlement of the deed has been referred to one of the conveyancing counsel of the ct., but the husband fails to comply with a direction by him to lodge with him certain necessary documents, the ct. has power to make an order on the husband to lodge the documents in question.—BARTLETT *v.* BARTLETT (1918), 34 T. L. R. 518.

5475. Cancellation of security—Jurisdiction of court—On subsequent unchastity of wife—Deed without dum casta clause.]—BRADLEY *v.* BRADLEY, No. 5402, *ante*.

J. Alienation or Release.

5476. Whether subject to solicitor's charging order.]—HARRISON *v.* HARRISON, No. 5971, *post*.

See, generally, SOLICITORS.

5477. Power of wife to alienate.]—Sums of money ordered under Matrimonial Causes Act, 1866 (c. 32), s. 1, to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance, & so long as the order subsists can neither be alienated nor released.—WATKINS *v.* WATKINS, [1896] P. 222 ; 65 L. J. P. 75 ; 74 L. T. 636 ; 44 W. R. 677 ; 12 T. L. R. 456, C. A.

Annotations :—**Consd.** Maclurcan *v.* Maclurcan (1897), 77 L. T. 474. **Apld.** Paquine *v.* Snary, [1909] 1 K. B. 688. **Consd.** Smith *v.* Smith, [1923] P. 191. **Refd.** Kerr *v.* Kerr, [1897] 2 Q. B. 439 ; Victor *v.* Victor, [1912] 1 K. B. 247 ; Campbell *v.* Campbell, [1922] P. 187. **Mentd.** Bishop *v.* Bishop (1897), 66 L. J. P. 69.

5478. ——.]—Where a decree for dissolution of marriage has been made & the husband has been ordered, under Matrimonial Causes Act, 1857 (c. 85), s. 32, to secure an annual sum to the wife, she can release or alienate it. A decree for dissolution of marriage having been made on a wife's petition an order was made directing her husband to secure to her on certain property the sum of £90 *per annum*, payable monthly, as permanent maintenance, & directing him to execute an assignment of the property to secure that sum. By agreement between the parties the deed was not executed & after several payments had been made under the order the wife by deed released her husband from further payments in consideration of a gross sum then paid to her :—*Held :* (1) although monthly payments were directed, the order was made under the above sect., & the wife had power to release the husband ; (2) although the deed of assignment had not been executed as directed, the ct. had no jurisdiction to direct the order to be perfected now by the execution of the deed.—MACLURCAN *v.* MACLURCAN (1897), 77 L. T. 474 ; 42 Sol. Jo. 32, C. A.

5479. Power of wife to release.]—WATKINS *v.* WATKINS, No. 5477, *ante*.

5480. ——.]—MACLURCAN *v.* MACLURCAN, No. 5478, *ante*.

Compare Sect. 9, sub-sect. 1, H. ; Sect. 22, sub-sect. 1, H., *ante*.

K. Procedure.

(a) The Application.

See Matrimonial Causes Rules, 1924, r. 65.

5481. How made—On decree of nullity—Whether by petition for variation of settlement—Or petition for maintenance.]—SHARPE (OTHERWISE MORGAN) *v.* SHARPE, No. 5710, *post*.

5482. Time for presenting petition—At any time after decree nisi.]—BRADLEY *v.* BRADLEY, No. 5509, *post*.

5483. —— **At any time before decree absolute.**]—K. *v.* K. (OTHERWISE R.) (1910), No. 5460, *ante*.

5484. —— **After decree.**]—ROBERTSON *v.* ROBERTSON & FAVAGROSSA, No. 5370, *ante*.

5485. —— —— **By leave.**]—When leave has once been given under Divorce Court Rules, r. 95, to file a petition for permanent maintenance, or *semble* for variation of a settlement, after one month has expired from the date of the decree absolute, petitioner is absolutely entitled to have the petition heard. As resp. to the petition is therefore precluded by leave being given from objecting to the petition being heard, an application for leave made without consent ought to be made to the judge only.

The question as to the jurisdiction of the registrar to make such an order was not decided, because the husband had appeared to the petition & taken further steps without objecting to the jurisdiction.—FYFFE *v.* FYFFE, [1920] P. 310 ; 89 L. J. P. 240 ; 123 L. T. 586 ; 36 T. L. R. 717 ; 64 Sol. Jo. 616.

Annotation :—**Refd.** Scott *v.* Scott, [1921] P. 107.

5486. —— —— **Within reasonable time.**]—In a wife's suit for divorce, alimony *pendente lite* at £500 a year was ordered in pursuance of an agreement by the wife to accept permanent maintenance at the same rate. A decree absolute was made in July, 1913. No order for permanent maintenance was ever made, but the £500 was paid until June, 1919, when the wife, hearing that her husband's income had very largely increased, took out a summons before the registrar for leave to file a petition for permanent maintenance. The registrar granted leave & the petition was filed in Nov. 1919. The husband took several steps in the proceedings & filed his answer. At the hearing of the petition he took the objection that the registrar had no power to give such a leave. This summons was then taken out before the judge for leave to file the petition :—*Held :* (1) in the absence of any express provision in the agreement that the wife would not apply for an increase, the ct. had the same power to grant an increase under Matrimonial Causes Act, 1907 (c. 12), s. 1 (2) (*b*), as it would have had if an order for permanent maintenance had been made ; (2) under the special circumstances leave to file a petition out of time ought to be given, & the husband's objection to the registrar's jurisdiction was waived by the steps he had taken after the petition was filed ; (3) by the Ct. of Appeal, the words " on any decree for dissolution of marriage " in sub-sect. 1 of the Act did not confer on the judge an unfettered discretion as to the time within which he would allow a petition to be filed, but they meant that the petition must be filed " at " or " within a reasonable time after " the decree, having regard to all the circumstances of the case ; (4) seven years after the decree was pronounced was not a reasonable time within which to apply for leave to file the petition, & leave must accordingly be refused.—SCOTT *v.* SCOTT, [1921] P. 107 ; 90 L. J. P. 171 ; 124 L. T. 619 ; 37 T. L. R. 158, C. A.

Annotation :—*As to* (3) **Refd.** Fox *v.* Fox, [1925] P. 157.

Compare Nos. 5508, 5509, *post*.

5487. Leave to present out of time—Jurisdiction to grant.]—FYFFE *v.* FYFFE, No. 5485, *ante*.

See, also, No. 5486, *ante*.

(*b*) *Service of Petition.*

See Matrimonial Causes Rules, 1924, rr. 66, 67.

5488. Substituted service—Affidavit in support of application—Whether necessary.]—SCHRAML *v.* SCHRAML, No. 5348, *ante*.

(*c*) *Inquiry as to Husband's Income.*

See Matrimonial Causes Rules, 1924, r. 69.

5489. Whether fresh inquiry ordered—Alimony pendente lite awarded.]—BONSOR *v.* BONSOR, No. 5346, *ante*.

Inquiry as to husband's income generally, *see* Sect. 9, sub-sect. 1, D., *ante*.

5490. Witnesses—Wife's right to call & examine.]—MEAD *v.* MEAD, No. 5492, *post*.

See, generally, Sect. 9, sub-sect. 1, I. (*d*) i., *ante*.

5491. Cross-examination of husband—Whether ordered to attend.]—MEAD *v.* MEAD, No. 5492, *post*.

See, generally, Sect. 9, sub-sect. 1, I. (*d*) ii., *ante*.

5492. —— Whether permissible.] — After a decree *nisi* for dissolution of marriage at the suit of the wife, the husband will not be ordered to attend in ct. that he may be examined on his answer to the petition for alimony *pendente lite*, with a view to getting an order that he secure a provision to the wife under Matrimonial Causes Act, 1857 (c. 85), s. 32. The wife may, however, examine witnesses to show the husband's means.

I have great doubt whether the husband is now bound to give any answer (*per* CUR.).—MEAD *v.* MEAD (1861), 31 L. J. P. M. & A. 30.

5493. —— ——.]—The husband having in 1888 divorced his wife on the ground of her adultery, subsequently by leave of the ct. filed his petition, in 1891, for variation of the marriage settlements. The registrar reported that the present "net annual income" of petitioner was £840 & that of resp. about £125 & that the latter would be increased by a further £200 a year upon the death of resp.'s mother, upon the happening of which event the registrar recommended that £160 should be paid annually by resp. to petitioner for the benefit of the children of the marriage, who were in the custody of their father, the petitioner, by order of the ct. The registrar refused to allow resp. to cross-examine petitioner as to the deductions he claimed to make from his gross income:—*Held:* the fact of resp. being an adulteress did not bar her to cross-examine her husband as to his means, it not being suggested against her that the proposal to cross-examine was vexatious; & as it appeared to the ct. to be desirable, in the present case, in order to arrive at a correct estimate of petitioner's net annual income, the ct. referred the matter back to the registrar for further investigation & report.—DRIFFIELD *v.* DRIFFIELD (1891), 65 L. T. 795.

5494. What must be included—Whether reversionary interest included—Husband guilty.]—(1) On a petition for variation of settlements & for permanent maintenance after a decree dissolving a marriage on the ground of the husband's misconduct, the ct. has power to take into consideration a reversionary interest of the husband; but the ct. will only do so in exceptional cases, as, for instance, where there is no other source of provision for the wife.

(2) A *dum sola et casta* clause will not, as a general rule, be [ordered to be] inserted in a deed securing permanent maintenance to a wife.—HARRISON *v.* HARRISON (1887), 12 P. D. 130, 145; 56 L. J. P. 76; 57 L. T. 119; 35 W. R. 703.

Annotations:—*As to* (1) **Consd.** Savary *v.* Savary (1898), 79 L. T. 607. *Generally*, **Refd.** Wood *v.* Wood, [1891] P. 272; Arkwright *v.* Arkwright (1895), 73 L. T. 287.

5495. —— Part of husband's income retained in business.]—HANBURY *v.* HANBURY, No. 5391, *ante*.

5496. —— Military allowances.] — NAISH *v.* NAISH, No. 5380, *ante*.

5497. & "command pay"—Construction of award of maintenance by agreement.] Pltf., who was formerly the wife of deft., an officer in the army, obtained a divorce from him in 1914. The amount of the permanent maintenance to be paid by deft. to pltf. was by agreement referred to an arbitrator who awarded a certain amount, which amount was to be increased according as deft.'s rate of pay increased. Deft., who was a major in the army at the time of the award, subsequently became a lieutenant-colonel & commanded an infantry regiment. His rate of pay was largely increased & he received in addition to his regimental pay 10*s*. per day as "command pay" & also certain daily allowances in respect of fuel, light, rations, etc. Pltf. claimed to recover from deft. arrears of maintenance on the basis that both command pay & allowances were "pay" within the meaning of the award:—*Held:* the amount received by deft. in respect of allowances was not "pay" within the meaning of the award, but that "command pay" was "pay" within the meaning of the award & must therefore be brought into account by deft. in calculating the amount payable to pltf.—BAYLEY *v.* BAYLEY, [1922] 2 K. B. 227; 91 L. J. K. B. 886; 127 L. T. 657; 38 T. L. R. 522.

See, generally, Sect. 9, sub-sect. 1, D. (*b*), *ante*.

5498. What may be deducted—Taxes.]—In ascertaining a husband's total income for the purpose of arriving at the amount of permanent maintenance to be allotted to a wife, his liability for all the King's taxes must be taken into consideration, & the relative proportion allotted to the wife should also be tax free.—DAYRELL-STEYNING *v.* DAYRELL-STEYNING, [1922] P. 280; 91 L. J. P. 210; 127 L. T. 846; 38 T. L. R. 898.

Annotation:—**Refd.** Smith *v.* Smith, [1923] P. 191.

See, generally, Sect. 9, sub-sect. 1, D. (*c*), *ante*.

(*d*) *Reference to Registrar.*

To settle deed, *see* Nos. 5172, 5173, *ante*.

(*e*) *The Order.*

See Matrimonial Causes Rules, 1924, r. 69.

5499. Time for making—General rule.] —Under Matrimonial Causes Act, 1907 (c. 12), s. 1 (1), the power to make the order arises "on any decree for dissolution . . . of marriage"; those words do not mean that the order must be made at the same moment that the decree for dissolution is made; & "on" may mean before, or simultaneously with, or after act done, according as reason & good sense require with reference to the context. It may be made before the decree absolute & in anticipation of it, upon materials which enable the ct. to make the order for the maintenance at the same time as the decree for dissolution.

On Oct. 15, 1923, the wife filed a petition for dissolution of marriage on the ground of the husband's adultery. On Feb. 23, 1924, an order was made by consent for payment of alimony

PART XIII. SECT. 22, SUB-SECT. 2.—K. (c).

c. *Respondent entitled to be heard —Though no appearance entered in suit.*] —Notwithstanding the failure to enter an appearance in a suit for dissolution of marriage resp. is entitled to be heard, on the question of maintenance.—UTICK *v.* UTICK (1907), 5 C. L. R. 400.—**AUS.**

Sect. 22.—*Proceedings after decree: Sub-sect.* 2, *K.* (*e*), *& L.; sub-sect.* 3.]

pendente lite. On Mar. 24, 1924, a decree *nisi* was made, the husband not defending the suit, & the custody of the children was given to the wife. Negotiations took place as to the amount of the permanent maintenance, but no result was arrived at. No application having been made by the wife to make the decree *nisi* absolute, the husband, on Apr. 21, 1925, took out a summons to dismiss the suit for want of prosecution. In the meantime, on Apr. 2, 1925, the wife filed a petition for permanent maintenance of herself & her children. On Apr. 27, 1925, the summons to dismiss was heard before SWIFT, J., sitting in Divorce. In the affidavit in opposition to the summons the wife's solr. stated that the wife would proceed to apply for the decree absolute as soon as the ct. had made the necessary order to secure the maintenance of the wife & to provide for the maintenance of the children of the marriage, & the security ordered by the ct. had been given. SWIFT, J., refused to make any order upon the summons "except that the same do stand adjourned pending maintenance order." On appeal:—*Held:* although an order for permanent maintenance could be made before decree absolute the judge before making such an order ought to be reasonably assured that the decree would be applied for & that the application would be pressed with due diligence; &, therefore, the order adjourning the summons to dismiss ought to have contained the words "stand over generally with liberty to restore," so as to prevent it being absolute, & the order must be so amended. —FOX *v.* FOX, [1925] P. 157; 133 L. T. 499; 41 T. L. R. 584; 69 Sol. Jo. 691, C. A.

5500. —— Whether before decree absolute.]—D'OYLEY *v.* D'OYLEY & BALDIE, No. 4183, *ante*.

5501. —— ——.]—*Qu.:* whether, when a decree *nisi* for dissolution of marriage has been pronounced, the ct. can, before the time for making it absolute has arrived, order that the husband make a provision for the wife, under Matrimonial Causes Act, 1857 (c. 85), s. 32.—LAXTON *v.* LAXTON (1861), 30 L. J. P. M. & A. 208.

Annotations:—**Consd.** Ellis *v.* Ellis (1883), 8 P. D. 188. **Refd.** Stanhope *v.* Stanhope (1886), 11 P. D. 103; Fox *v.* Fox [1925] P. 157.

5502. —— ——.]—(1) Under Matrimonial Causes Act, 1857 (c. 85), s. 32, the ct. can order an annuity to be secured to the wife only on making the decree; the order, therefore, would be permanent & incapable of being varied to meet the varying fortunes of the husband.

(2) Where the husband's income was professional, & the wife was entitled to a sum of money in reversion, which was imminent, the ct. refused to make any order under the sect.

(3) The ct. ought also to consider the conduct of the parties.—RAWLINS *v.* RAWLINS (1865), 4 Sw. & Tr. 158; 34 L. J. P. M. & A. 147; 13 L. T. 212; 164 E. R. 1477.

5503. -.]—WATERHOUSE *v.* WATERHOUSE, No. 5447, *ante*.

5504. —— —— Order nunc pro tunc—By consent.]—K. *v.* K. (OTHERWISE R.) (1910), No. 5160, *ante*.

5505. —— —— ——.]—An order under Matrimonial Causes Act, 1907 (c. 12), s. 1 (2), for the payment by a husband to his wife during their joint lives of a weekly or monthly sum of money may be made before decree absolute by way of confirmation of the usual registrar's report recommending such an order, such confirmation to be *nunc pro tunc* & the order operative as from the date of the decree absolute.—CAVENDISH *v.* CAVENDISH, [1913] P. 138; 82 L. J. P. 112; 108 L. T. 1039; 29 T. L. R. 653; 57 Sol. Jo. 741.

Annotation:—**Refd.** Fox *v.* Fox, [1925] P. 157.

5506. —— —— Simultaneous application for variation of settlement.]—Where one Act of Parliament enabled the ct., on a final decree of nullity or dissolution of marriage, to inquire into ante or post-nuptial settlements, with a view to alter the same for the benefit of the children or of their respective parents; & another Act provided that the ct. may, on any decree dissolving the marriage, after hearing the evidence, order that the husband shall secure to the wife a gross or annual sum of money, according to her fortune & the ability of the husband, etc.; & where a woman who had obtained a decree *nisi* for dissolution petitioned before the final decree, both for an alteration of the settlements, & also for the payment of a gross sum under the provisions of these Acts.

The ct., though considering the sects. apparently inconsistent, allowed an investigation to be made by the registrar before the final decree, with a view to complying with the prayers of the petition; but intimated that the motion for a decree absolute, & also for an order founded on the registrar's report, should come before the ct. at the same time, in order that both sects. should be complied with.—SOWDON *v.* SOWDON (1866), 15 W. R. 90.

5507. —— - - Judge assured of application for decree—Applicant proceeding with due diligence.]—FOX *v.* FOX, No. 5499, *ante*.

5508. —— Whether after decree absolute.]—The order for permanent alimony under Matrimonial Causes Act, 1857 (c. 85), s. 32, must be embodied in the decrees dissolving a marriage. If such a decree has been pronounced & registered [the ct. has no power to grant relief].—VICARS *v.* VICARS (1859), 29 L. J. P. & M. 20.

Annotations: **Consd.** Sidney *v.* Sidney (1866), 35 L. J. P. & M. 46. **Distd.** Covell *v.* Covell (1872), 41 L. J. P. & M. 81.

5509. —— ——.]—(1) The ct. has power under Matrimonial Causes Act, 1857 (c. 85), s. 32, to make an order for the permanent maintenance of a wife after a decree absolute has been pronounced, *Vicars* v. *Vicars*, No. 5508, *ante*, overd.

(2) A petition for maintenance under Matrimonial Causes Act, 1857 (c. 85), s. 32, may be presented at any time after the decree *nisi*, & the order for maintenance need not necessarily form part of the decree absolute.—BRADLEY *v.* BRADLEY (1878), 3 P. D. 47; 47 L. J. P. 53; 39 L. T. 203; 26 W. R. 831.

Annotations:—**Consd.** Fyffe *v.* Fyffe, [1920] P. 310; Scott *v.* Scott, [1921] P. 107. **Refd.** Langworthy *v.* Langworthy (1886), 55 L. J. P. 33; Fox *v.* Fox, [1925] P. 157.

5510. —— ——.]—FOX *v.* FOX, No. 5499, *ante*. *Compare* Nos. 5370, 5485, 5486, *ante*.

5511. —— ——.]—The petition for the dissolution of the marriage must be finally decided first, before the right to exercise the auxiliary or supplementary discretionary power can by possibility arise (LORD WESTBURY).—SIDNEY *v.* SIDNEY (1867), 36 L. J. P. & M. 73; 15 W. R. 1094, H. L.; *revsg.* (1866), L. R. 1 P. & D. 78; *subsequent proceedings* (1867), 17 L. T. 9.

Annotations:—**Consd.** Charles *v.* Charles (1866), L. R. 1 P. & D. 260. **Apld.** Bradley *v.* Bradley (1878), 3 P. D. 47. **Expld.** Scott *v.* Scott, [1921] P. 107; Fox *v.* Fox, [1925] P. 157. **Refd.** Ousey *v.* Ousey (1875), 1 P. D. 56; Carter *v.* Carter (1895), 12 T. L. R. 37; Burmester *v.* Burmester, [1913] P. 76. **Mentd.** Newton *v.* Newton (1885), 11 P. D. 11; Newton *v.* Newton, [1896] P. 36; Bullus *v.* Bullus (1910), 102 L. T. 399.

5512. Embodied in decree nisi.]—K. *v.* K. (OTHERWISE R.), No. 5460, *ante*.

5513. Order providing for alternative forms of maintenance—Gross sum or periodical payments.]—MEDLEY *v.* MEDLEY, No. 5468, *ante*.

Enforcement of.]—*See* Sub-sect. 2, L., *post*.

L. Enforcement of Order.

Attachment & committal.]—*See* No. 5917, *post*.

Writ of fieri facias.]—*See* No. 5965, *post*.

Garnishee.]—*See* No. 5974, *post*.

Injunction restraining dealings with property.]—*See* Nos. 5447–5449, *ante*.

Receiver.]—*See* Nos. 5979–5981, *post*.

SUB-SECT. 3.—PAYMENTS ON DISOBEDIENCE TO ORDER FOR RESTITUTION OF CONJUGAL RIGHTS.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (4).

5514. Jurisdiction of court—Property of wife subject to restraint.]—A wife having refused to comply with a decree obtained by her husband for restitution of conjugal rights, application was made under Matrimonial Causes Act, 1884 (c. 68), s. 3, for a settlement of her property for the benefit of the husband, when it appeared that the whole of the wife's property had been settled on the occasion of her marriage to her separate use without power of anticipation:—*Held:* the ct. had no power to order a settlement of the property which was subject to the restraint on alienation.—MICHELL *v.* MICHELL, [1891] P. 208; 60 L. J. P. 46; 64 L. T. 607; 39 W. R. 680; *sub nom.* MITCHELL *v.* MITCHELL, 7 T. L. R. 410, C. A.; *subsequent proceedings, sub nom.* MICHELL *v.* MICHELL, [1891] P. 305.

Annotations:—**Consd.** Churchward *v.* Churchward, [1910] P. 195; Morgan *v.* Morgan & Kirby, [1923] P. 1. **Refd.** Merton *v.* Merton (1900), 83 L. T. 223; Loraine *v.* Loraine & Murphy, [1912] P. 86.

5515. Nature of order.]—(1) An order for periodical payments under Matrimonial Causes Act, 1884 (c. 68), is a personal order against resp. & is to be enforced in the same manner as in the case of an order for permanent alimony made after a decree of judicial separation.

(2) Such periodical payments are made by analogy to alimony, to depend upon the means of the parties, & the ct. has power, under sect. 4 of that Act, to vary or modify any order for such periodical payments, or to suspend temporarily & to revive the order either wholly or in part, as the ct. may deem just.

(3) Notwithstanding the time limited by the ct. for restitution of conjugal rights, the parties may at any moment resume cohabitation, & in the event of any such resumption, an order for periodical payments previously obtained ought thereupon to be terminated or suspended.

(4) The legislature did not contemplate that periodical payments ordered to be made under Matrimonial Causes Act, 1884 (c. 68), should be more permanent or fixed, or should extend for a longer period, than the alimony obtainable if the further relief provided for by the Act, namely, judicial separation, were obtained.

(5) The fact that the ct. is empowered by Matrimonial Causes Act, 1884 (c. 68), to order periodical payments thereunder to be secured does not alter the character of the order or of the payments; the security being only for "such periodical payments," that is to say, payments expressly made variable & alterable by sect. 4 of the Act.

(6) A wife, having obtained a decree for restitution of conjugal rights, petitioned for periodical payments under Matrimonial Causes Act, 1884 (c. 68), s. 2. The registrar by his report submitted that the husband should make periodical payments to the amount of £760 a year to petitioner for her life, & that it should be secured on certain shares & upon an interest which the husband had under his father's will to come into possession after the death of his mother. On motion to confirm the report:—*Held:* an order to secure upon resp.'s reversionary interest did not comply with the provisions of the sect., & was not proper to make.—TANGYE *v.* TANGYE, [1914] P. 201; 83 L. J. P. 164; 111 L. T. 944; 30 T. L. R. 649; 58 Sol. Jo. 723.

5516. Right of wife to apply.]—(1) A wife, who has obtained a decree for restitution of conjugal rights, may, if the husband disobeys that decree, either apply for an alimentary provision & to have same secured to her under Matrimonial Causes Act, 1884 (c. 68), or, if she elects to petition for a judicial separation, she may apply for alimony, & after she has obtained a decree, may ask for permanent alimony to be allotted to her; but it is not open to her, after she has elected, to proceed for a judicial separation, &, after she has obtained a decree in that suit, to ask for an order & for security under the Act of 1884. A petition for judicial separation on the ground of statutory desertion extinguishes an order for permanent alimony made in a previous restitution suit.

(2) The question what is alimony & the practice which still guides the ct. in dealing with applications for alimony are the same as were laid down in, & which guided the old ecclesiastical cts. in considering applications for alimony.

(3) All the circumstances are to be considered in dealing with each particular case. If the ct. should find that the circumstances are such as show that the wife does not require any order for alimony for her personal support in her normal position, it may refuse to direct the registrar to proceed with an expensive & harassing inquiry, or to make any order for alimony. Permanent alimony would not be granted to a wife who had just been sentenced to a term of penal servitude.—LESLIE *v.* LESLIE, [1908] P. 99; 77 L. J. P. 23; 98 L. T. 62; 24 T. L. R. 148; 52 Sol. Jo. 97.

5517. Time for application—No limited period.]—There is no limit of time within which a petition for periodical payments after failure to comply with a restitution decree must be presented.—MANN *v.* MANN (No. 2) (1922), 127 L. T. 692; 38 T. L. R. 698.

5518. Duration of order—Discretion of court.]—By Matrimonial Causes Act, 1884 (c. 68), s. 2, the ct. may, after a decree for restitution of conjugal rights upon the application of the wife, order that, if he does not comply with the decree, resp. shall make to petitioner such periodical payments as may be just. The time during which such payments shall be ordered to be made, whether for the joint lives of the spouses, or for the life of the wife, is entirely a matter for the discretion of the ct.

A wife, aged forty-two, having obtained a decree for restitution of conjugal rights, petitioned for periodical payments to be secured to her by resp. Registrar by his report submitted that the husband who was seventy-seven years of age, should be ordered to secure periodical payments at the rate of £60 *per annum* "during their joint lives." On a motion to vary the report to the effect that the periodical payments should be secured to the wife for her life:—*Held:* the ct. had a discretion as to the duration of time for the payments, & having

Sect. 22.—*Proceedings after decree: Sub-sects.* 3 & 4, *A.*]

regard to the respective ages of the parties, the report should be varied as prayed.—CLUTTERBUCK *v.* CLUTTERBUCK (1913), 108 L. T. 573; 29 T. L. R. 480; 57 Sol. Jo. 463.

Annotation:—**Dbtd.** Tangye *v.* Tangye, [1914] P. 201.

5519. —— Joint lives of parties.]—Where a husband had not complied with a decree of restitution of conjugal rights obtained by the wife within the time named in the decree, the ct. ordered that he should secure to her for their joint lives a "periodical payment" equal to one-third of their joint incomes. In estimating the amount of the husband's average income the ct. refused to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed.—THEOBALD *v.* THEOBALD (1889), 15 P. D. 26; 59 L. J. P. 21; 62 L. T. 187.

Annotations:—**Distd.** Clutterbuck *v.* Clutterbuck (1913), 29 T. L. R. 480. **Refd.** Leslie *v.* Leslie, [1908] P. 99; Tangye *v.* Tangye, [1914] P. 201.

5520. —— Life of wife—Wife considerably younger than husband.]—CLUTTERBUCK *v.* CLUTTERBUCK, No. 5518, *ante.*

5521. —— As of order for permanent alimony.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5522. Calculation of husband's means—What deductions from income allowed—Temporary business loss during previous three years.]—THEOBALD *v.* THEOBALD, No. 5519, *ante.*

5523. —— Whether reversionary interest included.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5524. Amount of order—One third of joint incomes.]—THEOBALD *v.* THEOBALD, No. 5519, *ante.*

5525. —— According to means of parties.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5526. Security for payments—Effect on order—& payments.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5527. Variation of amount—Jurisdiction of court—Reversion falling into possession.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5528. —— ——.]—(1) By Matrimonial Causes Act, 1884 (c. 68), s. 4, "The ct. may from time to time vary or modify any order for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, & again revive the same order wholly or in part, as the ct. may think just":—*Held:* the sect. gave the ct. an unfettered discretion to suspend or vary periodical payments on any sufficient grounds.

(2) A wife, who had obtained a decree for restitution of conjugal rights & an order for periodical payments, subsequently committed adultery. On an application by the husband the judge made an order suspending the payments:—*Held:* the judge in making the order had rightly exercised his discretion, but the order was not a final order by reason of which the wife could never obtain an allowance for maintenance, & it would not preclude her, at a subsequent date, upon showing on facts that she was deserving of an allowance, from applying for a renewal of the periodical payments.—WICKINS *v.* WICKINS (No. 2), [1918] P. 282; 87 L. J. P. 169; 119 L. T. 663; 34 T. L. R. 568; 62 Sol. Jo. 702, C. A.

5529. —— ——.]—Where a deed has been executed to secure periodical payments to a wife in respect of her husband's disobedience to an order for restitution of conjugal rights, the ct. has the same power to vary the deed as it has to vary the order. In a proper case where the pecuniary circumstances of the party have changed an order may be made that payments to the wife under the deed shall be temporarily suspended, & the income of the investments comprised in it shall be paid to the husband notwithstanding the trusts in the deed.—HOOPER *v.* HOOPER, [1919] P. 153; 88 L. J. P. 141; 120 L. T. 672; 35 T. L. R. 370.

5530. Suspension of order—Jurisdiction of court—Resumption of cohabitation.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5531. —— ——.]—WICKINS *v.* WICKINS (No. 2), No. 5528, *ante.*

5532. —— Grounds for granting—Adultery by wife.]—WICKINS *v.* WICKINS (No. 2), No. 5528, *ante.*

5533. —— Effect of suspension—Whether permanent.]—WICKINS *v.* WICKINS (No. 2), No. 5528, *ante.*

5534. Revival of suspended order—Jurisdiction of court.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5535. —— —— On proof of deserving of allowance.]—WICKINS *v.* WICKINS (No. 2), No. 5528, *ante.*

5536. Termination of order—When ordered—On decree of judicial separation.]—LESLIE *v.* LESLIE, No. 5516, *ante.*

5537. —— —— Resumption of cohabitation.]—TANGYE *v.* TANGYE, No. 5515, *ante.*

5538. Waiver of right—By petition for judicial separation.]—LESLIE *v.* LESLIE, No. 5516, *ante.*

5539. Payment—Deduction of super tax—Effects of wife's acquiescence.]—CAMPBELL *v.* CAMPBELL, No. 5540, *post.*

5540. Arrears—Right of wife to recover.]—An order of the Divorce Div. made under the Matrimonial Causes Act, 1884 (c. 68), in a suit for restitution of conjugal rights, directing the husband to pay a certain proportion of his income by way of periodical payments to his wife, subject to specified deductions, does not entitle him to deduct super tax from his whole income in calculating the proportion to be paid. The relative positions of husband & wife under such an order are not those of debtor & creditor. A wife cannot release her husband's liability to make payments under such an order, & her acquiescence in his making any deduction does not prevent her afterwards complaining thereof. But the ct. has a discretion as to what, if any, arrears may be enforced; & in exercising its discretion will consider all the circumstances & the conduct of each party, including the nature & causes of any acquiescence by the wife.—CAMPBELL *v.* CAMPBELL, [1922] P. 187; 91 L. J. P. 126; 127 L. T. 29; 38 T. L. R. 320.

Annotation:—**Refd.** Smith *v.* Smith, [1923] P. 191.

As to enforcement of orders generally, *see* Sects. 23, 24, *post.*

SUB-SECT. 4.—SETTLEMENT OF PROPERTY OF GUILTY WIFE.

A. In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 191.

5541. Jurisdiction of court—To order settlement on wife.]—On a decree of dissolution by reason of the wife's adultery, the ct. directed two-thirds of the bulk of certain property to which she was entitled under certain trusts, to be settled on the children immediately, & the remaining third after her death. In making arrangements with regard

to a wife's property, the ct. will take into consideration the costs with which she will be burdened in defending the suit for a divorce, for which her husband is not strictly liable.—BACON *v.* BACON & BACON (1860), 2 Sw. & Tr. 86; 29 L. J. P. M. & A. 125; 2 L. T. 438; 8 W. R. 552; 164 E. R. 925.

Annotations:—**Consd.** Midwinter *v.* Midwinter, [1893] P. 93. **Refd.** Blandford *v.* Blandford (1892), 8 T. L. R. 381.

5542. —— To make order before decree absolute —Wife's property subject to restraint on anticipation.]—(1) By Matrimonial Causes Act, 1857 (c. 85), s. 45, in any case in which the ct. shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the ct. that the wife is entitled to any property either in possession or reversion, it shall be lawful for the ct., if it shall think proper, to order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party & of the children of the marriage:—*Held:* the ct. has jurisdiction before pronouncing a final decree for dissolution of marriage, or judicial separation, against a wife for adultery, to direct an inquiry as to her property, so that it may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced.

(2) His wife is entitled for life without power of anticipation to some property under her father's will. The restraint on anticipation will apply so long as she is covert; it will apply until there is a decree absolute, & it will apply, if she marries immediately after the decree, to the subsequent marriage. The husband suggests, that although he may obtain an order for a settlement, the settlement may be worthless because of the restraint on anticipation, which cannot be got rid of by any proceeding under the sects which relate to alteration of settlements, & he therefore asks the ct. to place him in a position to obtain what he is really entitled to (LINDLEY, L.J.).

(3) In making such an order, the ct. will direct the husband to give security for the costs of the inquiry, in case no final decree should be made.—MIDWINTER *v.* MIDWINTER, [1892] P. 28; 61 L. J. P. 1; 65 L. T. 438; 40 W. R. 33; 36 Sol. Jo. 12, C. A.; *subsequent proceedings*, [1893] P. 93.

Annotations:—*As to* (1) **Consd.** Fox *v.* Fox, [1925] P. 157. **Refd.** Garratt *v.* Garratt & Garratt, [1922] P. 230. *As to* (2) **Consd.** Loraine *v.* Loraine & Murphy, [1912] P. 222.

5543. Principles on which court acts—Principles governing variation of settlements.]—(1) The principles which should guide the ct. in ordering a settlement out of the property of a guilty wife under the powers conferred by Matrimonial Causes Act, 1857 (c. 85), s. 45, are similar to those adopted in cases of variation of settlements under Matrimonial Causes Act, 1859 (c. 61), s. 1, but the ct. has power, under Matrimonial Causes Act, 1857 (c. 85), s. 45, to deal with capital, whether in possession or reversion, as well as with income.

(2) The ct. in ordering a settlement under Matrimonial Causes Act, 1857 (c. 85), s. 45, should have regard to the pecuniary position which the husband & child or children would have been in if the marriage had not been dissolved through the fault of the wife, & should endeavour, as far as may be, to adjust any alteration made in their pecuniary position by reason of the change in their circumstances due to the wife's misconduct & the consequent dissolution of the marriage.—LORRIMAN *v.* LORRIMAN & CLAIR, [1908] P. 282; 77 L. J. P. 108; 99 L. T. 314; 24 T. L. R. 575; 52 Sol. Jo. 490.

5544. Inquiry as to wife's property—Jurisdiction of court to order—Before decree absolute.]—MIDWINTER *v.* MIDWINTER, No. 5542, *ante*.

5545. —— Security for costs.]—MIDWINTER *v.* MIDWINTER, No. 5542, *ante*.

5546. Evidence — Admissibility — Conduct of parties during cohabitation — Suit undefended.]—On an application for a settlement or allowance by virtue of the Matrimonial Causes Act, 1884 (c. 68), s. 3, out of the estate of a husband or wife against whom a decree of restitution of conjugal rights has been pronounced in an undefended suit, it is competent for the party making such application to tender evidence as to the conduct of the other party during cohabitation. Where a decree for restitution of conjugal rights made on husband's application has not been complied with by the wife, the ct. in its discretion to order a settlement out of wife's separate property for the benefit of husband under Matrimonial Causes Act, 1884 (c. 68), s. 3, may take into consideration the general conduct of the parties. In ascertaining the amount of the annual payment to be settled by the wife upon the husband, the ct. declined to go into a minute debtor & creditor account of the sums spent by the husband & wife on household expenses & the like, but directed that a deduction should be made from the amount of the annual payment to the husband until a loan of £300 which he had obtained from his wife was repaid; & also took into consideration the contingency of the husband being able to acquire an income by his own earnings.—SWIFT *v.* SWIFT, [1891] P. 129; 60 L. J. P. C. 14; 63 L. T. 711.

Annotation:—**Expld.** Michell *v.* Michell, [1891] P. 208.

5547. —— How given — By affidavits.]—Allegations of misconduct, short of a matrimonial offence, are relevant to a question of what allowance is to be made by a resp. to petitioner, upon non-compliance with a decree for restitution of conjugal rights, & such allegations are for the consideration of the learned judge. The registrar is not to reject evidence as to these allegations, but is to leave it, & them, for the learned judge, to whom his report is to be made, to consider & act upon, in his, the judge's discretion. The ct. allowed evidence as to alleged misconduct by petitioner to be given upon affidavit, reserving to the incriminated party leave to cross-examine deponents thereon, if so desired.—SWIFT *v.* SWIFT (1890), 63 L. T. 262; *subsequent proceedings*, [1891] P. 129.

5548. —— Cross-examination of deponents to affidavits — Right of incriminated party.]—SWIFT *v.* SWIFT, No. 5547, *ante*.

5549. Effect of application—As lis pendens—Whether restraint on anticipation prevented from reattaching on re-marriage.]—(1) Upon a petition for a settlement under Matrimonial Causes Act, 1857 (c. 85), s. 45, the ct. has no jurisdiction, in a case where the wife has married again, to order a settlement by her of property to which she is entitled under the trusts of her father's will for her separate use without power of anticipation. To order such a settlement would be in effect to vary the trusts of the will, which the ct. has no power to do, either under Matrimonial Causes Act, 1857 (c. 85), s. 45, or under Matrimonial Causes Act, 1859 (c. 61), s. 5.

(2) In such a case the presentation of a petition under sect. 45 will not operate as a *lis pendens* so as to prevent the restraint upon anticipation from reattaching upon the wife's subsequent marriage.

(3) *Semble:* an order for a settlement under sect. 45 of an interest derived under an instrument

Sect. 22.—*Proceedings after decree: Sub-sect.* 4, *A., B. & C.* (*a*) *&* (*b*), *& D.; sub-sect.* 5, *A*

containing a provision for forfeiture on alienation of, or on the commission by the donee of any act divesting, such interest would not work a forfeiture of the same.—LORAINE *v.* LORAINE & MURPHY, [1912] P. 222; 82 L. J. P. 29; 107 L. T. 363; 28 T. L. R. 534; 56 Sol. Jo. 687, C. A.

Annotations:—*As to* (1) **Consd.** Public Trustee *v.* Wolf, [1923] A. C. 544; *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56. **Refd.** Garratt *v.* Garratt & Garratt, [1922] P. 230. *As to* (2) **Refd.** Morgan *v.* Morgan & Kirby, [1923] P. 1; *Re* Rush, Warre *v.* Rush, [1923] 1 Ch. 56; Jagger *v.* Jagger (1926), 42 T. L. R. 315.

5550. Costs of application—Liability of co-respondent.]—STONE *v.* STONE & BROWNRIGG, No. 5551, *post.*

B. Property Subject to Control of Court.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 191.

5551. Reversionary property—Contingent reversion.]—(1) Under the marriage settlement of her father, a wife, upon the ground of whose adultery a divorce had been granted, was entitled to a sum of money after the death of her father in the event of his not otherwise disposing of it:—*Held:* this was not property to which the wife was entitled in reversion, & the ct. therefore had no power under Matrimonial Causes Act, 1857 (c. 85), s. 45, to order a settlement of it.

(2) A husband, with moneys received by him in right of his wife, purchased railway stock, which was transferred into their joint names. By a deed of separation, this stock was vested in trustees upon trust for the husband for life, then for the wife for life, & afterwards for the children of the marriage, subject to the proviso that in the event of the marriage being dissolved the trusts should become null & void. The marriage was dissolved on the ground of the wife's adultery, & the trustees thereupon sold the railway stock & paid the proceeds to the wife:—*Held:* assuming the deed of separation to be a post-nuptial settlement within Matrimonial Causes Act, 1859 (c. 61), s. 5, the trusts of the deed having determined, the ct. had no power to deal with the property comprised in it.

Semble: such a deed is a post-nuptial settlement within Matrimonial Causes Act, 1859 (c. 61), s. 5.

(3) Co-resp. is liable to costs of a successful application to deal with property under settlement; but if part of such application fails, & the costs of that part can be separated from the other costs, they ought not to be thrown on co-resp.—STONE *v.* STONE & BROWNRIGG (1864), 3 Sw. & Tr. 372; 33 L. J. P. M. & A. 95; 10 L. T. 140; 12 W. R. 1088; 164 E. R. 1319.

Annotation:—*As to* (2) **Refd.** Worsley *v.* Worsley & Wignall (1869), 38 L. J. P. & M. 43.

5552. —— Insurance policy payable on wife surviving husband.]—The money secured to a wife under a policy of insurance, & to be paid to her under the terms thereof if she is living at the time of her husband's death, may be "property in reversion," although the policy itself may not be a marriage settlement, & the ct. has power to compel her, if she is the guilty party in divorce proceedings, to settle her interest under the policy in favour of her husband & children.—STEDALL *v.* STEDALL (1902), 86 L. T. 124; 50 W. R. 320; 18 T. L. R. 254.

5553. ——.]—LORRIMAN *v.* LORRIMAN & CLAIR, No. 5543, *ante.*

5554. Trust fund under separation deed—Proviso avoiding deed on dissolution of marriage.]—STONE *v.* STONE & BROWNRIGG, No. 5551, *ante.*

5555. Income subject to forfeiture on anticipation.]—Under the will of her father resp. had a life interest to her separate use in certain property, unless she, being discovert, should do or suffer any act or thing, or any event should happen, whereby the same income, or any part thereof, should either voluntarily or involuntarily be aliened or incumbered, or be receivable otherwise than by herself personally, in which case the trust for her benefit was to be void, & such annual income was to be applied for the benefit of resp. or her children at the discretion of the trustees. On a decree for dissolution of marriage, the ct. ordered a settlement to be made out of resp.'s life income derived under her father's will in favour of petitioner & his children, but refused to extend the order to any moneys the trustees in their discretion might think proper to pay to her in case the substituted trust came into operation by reason of such order. Such a possibility of income is not property in reversion within Matrimonial Causes Act, 1857 (c. 85).—MILNE *v.* MILNE & FOWLER (1871), L. R. 2 P. & D. 295; 40 L. J. P. & M. 67; 25 L. T. 274; 19 W. R. 1118.

Annotation:—**Refd.** Loraine *v.* Loraine & Murphy, [1912] P. 86.

5556. ——.]—SWIFT *v.* SWIFT, No. 5546, *ante.*

5557. Income under settlement made on dissolved marriage.]—SWIFT *v.* SWIFT, No. 5546, *ante.*

See, also, No. 5549, *ante.*

5558. Possibility of income—Income payable at discretion of trustees.]—MILNE *v.* MILNE & FOWLER, No. 5555, *ante.*

5559. Property subject to restraint on anticipation.]—MIDWINTER *v.* MIDWINTER, No. 5542, *ante.*

5560. ——.]—LORAINE *v.* LORAINE & MURPHY, No. 5549, *ante.*

C. The Order.

(a) In General.

5561. Whether provision made for variation.]—On a petition for the settlement of the property of a wife found guilty of adultery, for the benefit of her husband & the children of the marriage, it appeared that the wife's income amounted to £1,140 a year, consisting chiefly of a life interest in leasehold property under the will of her father; & the husband's income was £350, derived from his business. The ct. ordered the wife to settle £250 for life on her husband, & £60 a year on each child, & refused to make the allowance to the husband variable according to the possible fluctuation in the value of the wife's property, or to limit it to such time as he should remain unmarried, or to order that the allowance to the children should cease at the age of sixteen.—MIDWINTER *v.* MIDWINTER, [1893] P. 93; 62 L. J. P. 77; 68 L. T. 262; 41 W. R. 560; 1 R. 512.

Annotation:—**Consd.** Lorriman *v.* Lorriman & Clair, [1908] P. 282.

5562. Whether dum solus clause inserted.]—MIDWINTER *v.* MIDWINTER, No. 5561, *ante.*

5563. Allowance to children—Whether limited to sixteen years of age.]—MIDWINTER *v.* MIDWINTER, No. 5561, *ante.*

5564. Effect of order—Wife's property subject to forfeiture on alienation—Whether order operates as forfeiture.]—LORAINE *v.* LORAINE & MURPHY, No. 5549, *ante.*

See, also, Nos. 5406, 5555, *ante.*

(b) Amount of Order.

5565. What court will consider—Wife's costs of defence—Though no application made for security.]—BACON *v.* BACON & BACON, No. 5541, *ante.*

5566. Husband's costs of petition—Increased by wife's countercharges.]—(1) Where co-resp. has acted with imprudence with a person whom he knew to be a married woman, the ct. will leave him to pay his own costs.

(2) Where resp., the wife, became entitled in possession to £500 after the decree *nisi*, but before the decree absolute was pronounced, & was proved to have been guilty of very gross misconduct, & to have put petitioner to heavy expense by opposing his petition, the ct. declined to order a settlement of any portion of the fund on petitioner in satisfaction of part of the costs incurred, as the wife had no other means of subsistence. If the sum had been large in amount, a settlement would have been ordered to be made under Matrimonial Causes Act, 1857 (c. 85), s. 45.—CARSTAIRS *v.* CARSTAIRS & DICKENSON (1864), 3 Sw. & Tr. 538; 4 New Rep. 381; 33 L. J. P. M. & A. 170; 10 L. T. 696; 12 W. R. 1015; 164 E. R. 1384.

Annotation:—*As to* (2) **Refd.** Miller *v.* Miller (1869), L. R. 2 P. & D. 13.

5567. —— Amount of wife's means.]—CARSTAIRS *v.* CARSTAIRS & DICKENSON, No. 5566, *ante*.

5568. —— —— Relative means of parties.]—The husband obtained a divorce on the ground of his wife's adultery with co-resp. He petitioned that certain jewellery belonging to his wife should be sold, & a settlement made of the proceeds, giving her a life interest in the income arising from the investment of those proceeds with remainder to himself. His income was substantial, & his wife's only £72 a year. The registrar reported against petitioner. The ct. confirmed the registrar's report, & refused to order any settlement. The petition was thereupon dismissed with costs.—*r.* SCHOFIELD & COWPER (1891), 61 L. T. 838.

5569. —— Conduct of parties.]—SWIFT *v.* SWIFT, No. 5546, *ante*.

5570. —— Household expenses.]—SWIFT *v.* SWIFT, No. 5546, *ante*.

5571. —— Loan by wife to husband.]—SWIFT *v.* SWIFT, No. 5546, *ante*.

5572. —— Husband's earning capacity.]—SWIFT *v.* SWIFT, No. 5546, *ante*.

5573. —— Pecuniary position of husband & children—If marriage had not been dissolved.]—LORRIMAN *v.* LORRIMAN & CLAIR, No. 5543, *ante*.

5574. Proportion of joint income allotted to husband.]—MIDWINTER *v.* MIDWINTER, No. 5512, *ante*.

5575. Proportion of wife's income allotted.]—BACON *v.* BACON & BACON, No. 5541, *ante*.

D. Payment of Allowance.

Deduction of income tax.]—*See* INCOME TAX.

SUB-SECT. 5.—VARIATION OF SETTLEMENTS.

A. In General.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 191; Matrimonial Causes Rules, 1924, r. 71.

5576. Discretion of court—As to amount allowed out of guilty wife's property.]—Where the husband, petitioner, had only a small official income, & resp. by reason of whose adultery the marriage was dissolved was a lady of considerable fortune, in which she took the first life interest, the ct., in dealing with her marriage settlement, allotted to the husband such a portion of her settled property as would place him somewhat in the status in which he would have been had the union continued. The joint annual income of the parties amounted to £1,718, £260 being derived from petitioner's official appointment, & £1,458 from property brought into settlement by resp., or bequeathed to her separate use by her mother, the judge ordinary having ordered to be paid out of the income of resp.'s settled property £200 *per annum* to petitioner, during the minority of the son of the marriage, for his maintenance & education, & on his attaining his majority to the son himself, & £440 *per annum* to petitioner, during the joint lives of himself & resp.:—*Held:* where an allowance is ordered to be paid for the benefit of a child of the marriage, it should be paid to the father so long only as the child is in his custody; & the fact that the original order did not give such a direction was not a ground of appeal, as the order would have been so framed if application for that purpose had been made to the judge ordinary at the time of making it. When an order is made for the payment of an annual sum of money to an individual, even if it be to the father, for the benefit of a child of the marriage, the limitation should be added "so long as the child remains in his custody." It is competent to the judge ordinary, under Matrimonial Causes Act, 1859 (c. 61), s. 5, to direct, by the same order, property settled by an ante-nuptial or post-nuptial settlement, to be applied for the benefit of the children of the marriage & the parent. The amount to be allowed to the husband out of the wife's settled property is in each case a matter of discretion: & in this case the judge ordinary had, in making the allowance, exercised his discretion on right principles & in an equitable manner. In exercising its discretion under the sect., the conduct of the parties, as well as the relative amounts contributed by each, the total amount of their joint income, the relations it bears to their requirements, & their respective prospects of increased income, is an element to be taken into consideration.—MARCH *v.* MARCH & PALUMBO (1867), L. R. 1 P. & D. 440; 36 L. J. P. & M. 64; 16 L. T. 366; 15 W. R. 799.

Annotations:—**Consd.** Schofield *v.* Schofield & Cowper (1891), 64 L. T. 838. **Apprvd.** Savary *v.* Savary (1898), 79 L. T. 607. **Apld.** Beauchamp *v.* Beauchamp & Watt (1904), 20 T. L. R. 273; Constantinidi *v.* Constantinidi, [1905] P. 253. **Consd.** La Terriere *v.* La Terriere & Grey (1920), 124 L. T. 575. **Refd.** Blandford *v.* Blandford (1892), 67 L. T. 392; Midwinter *v.* Midwinter, [1893] P. 93; Lorriman *v.* Lorriman & Clair, [1908] P. 282.

5577. —— Absolute judicial discretion.]—WIGNEY *v.* WIGNEY, No. 5664, *post*.

5578. —— Exercise of discretion—Variation sought as means of enforcing order for custody.]—After a decree *nisi* had been made on the prayer of the husband for a dissolution of his marriage, resp. under cover of an order of the ct. for access to her child, took possession of it, & removed it beyond the jurisdiction of the ct. The judge ordinary refused to alter the settlement made on the marriage of the parties, so far as related to the property settled on behalf of resp. in such a manner & for the express purpose to compel resp. to submit to the authority of the ct., & to restore the child to the custody of petitioner.—SYMONDS *v.* SYMONDS & HARRISON (1872), L. R. 2 P. & D. 447.

5579. —— How far exercise subject to appeal.]—On a petition for variation of a settlement the judge refused to give the wife, petitioner, any part of the capital of the fund, which had been all settled by the husband, although there were no children of the marriage, or to order payment of petitioner's costs out of the funds, & he gave a portion only of the income to the wife. The Ct. of Appeal affirmed the decision, holding that although the

Sect. 22.—*Proceedings after decree: Sub-sect.* 5, *A. & B.* (*a*).]

ct. had undoubted jurisdiction to deal with the capital it was not for the benefit of the wife to give her any portion of it; & the ct. refused to interfere with the discretion of the judge as to the amount of income awarded to her.—PONSONBY *v.* PONSONBY (1884), 9 P. D. 122; 53 L. J. P. 112; 51 L. T. 174; 32 W. R. 746, C. A.

Annotations:—**Consd.** Meredyth *v.* Meredyth, [1895] P. 92; Dormer (otherwise Ward) *v.* Ward, [1901] P. 20. **Apld.** Lorriman *v.* Lorriman & Clair, [1908] P. 282.

5580. —— ——.]—The Ct. of Appeal will not interfere with the decision of a judge of the Divorce Div. who has exercised his discretion as to allowing the marriage settlements of divorced persons to be varied, unless the discretion has been exercised upon wrong principles or upon a wrong view of the facts.—LA TERRIERE *v.* LA TERRIERE & GREY (1921), 37 T. L. R. 671, C. A.

5581. Protection of settled property—Pending order for variation—Injunction to restrain dealing by respondent.]—WATTS *v.* WATTS, No. 6001, *post.*

5582. —— —— ——.]—A petitioner had obtained a decree *nisi* for dissolution of his marriage. Before an order could be obtained to vary the post-nuptial settlement, resp. was about to sell or otherwise dispose of some of the property. The ct. granted an injunction to restrain her from dealing with it.—NOAKES *v.* NOAKES & HILL (1877), 4 P. D. 60; 47 L. J. P. 20; 39 L. T. 47; 26 W. R. 284.

Annotations:—**Distd.** Newton *v.* Newton (1885), 11 P. D. 11. **Consd.** Jagger *v.* Jagger (1926), 42 T. L. R. 315. **Refd.** Carter *v.* Carter (1895), 12 T. L. R. 37; Burmester *v.* Burmester, [1913] P. 76.

B. Jurisdiction of Court.

(*a*) *In General.*

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

5583. On dissolution of marriage.]—NORRIS *v.* NORRIS & GYLES, No. 3936, *ante.*

5584. As to powers of appointment.]—(1) The ct. made an order for the trustees of a wife's settled property, against whom a decree of judicial separation had been pronounced, on the ground of her adultery, to pay a moiety of the income of such property for the maintenance & education of the children.

(2) The ct. cannot vary a power of appointment vested in a guilty wife.—SEATEL *v.* SEATEL (1860), 4 Sw. & Tr. 230; 30 L. J. P. M. & A. 216; 164 E. R. 1504.

Annotations:—**Consd.** Michell *v.* Michell, [1891] P. 208. **Refd.** Midwinter *v.* Midwinter (1893), 68 L. T. 262.

5585. —— **Power in favour of husband & issue of second marriage.**]—EVERED *v.* EVERED & GRAHAM, No. 5673, *post.*

5586. —— —— **Power postponed till death of first husband.**]—BRANTON DAY *v.* BRANTON DAY & ERSKINE, No. 5675, *post.*

5587. —— —— ——.]—The ct. has a discretion in making an order, under Matrimonial Causes Act, 1859 (c. 61), s. 5, as to variation of a marriage settlement & disposition of property settled by the wife. Where a guilty wife had married co-resp. during the life of her husband, petitioner, the ct. extinguished a power, given to her by the settlement, of appointing interests to the husband & children of any subsequent marriage, except a marriage contracted after the death of petitioner.—WILLIAMS *v.* WILLIAMS & KILBURN, [1920] P. 69; 89 L. J. P. 79; 122 L. T. 748.

See, further, Sub-sect. 5, D. (*c*), *post.*

5588. —— **Power to insert.**]—Where, under a marriage which had been dissolved, no power had been given, by the terms of the marriage settlement, to the innocent party if survivor to appoint a portion of the settled fund in favour of a future spouse & the children by any future marriage, the ct., in varying such a settlement, may, although issue of the dissolved marriage survive, give power to make such an appointment, & in the lifetime of the guilty party, to an extent, having due regard to the facts, not detrimental to the interests of such issue.—ATKINS *v.* ATKINS & URQUHART, [1913] P. 211; 83 L. J. P. 18; 109 L. T. 640.

5589. —— **Appointment of new trustees.**]—The judge ordinary has no power, under Matrimonial Causes Act, 1859 (c. 61), s. 5, to vary the provisions for appointing new trustees contained in a deed of settlement executed in anticipation of the marriage, the dissolution of which he has decreed.—HOPE *v.* HOPE & ERDODY (1874), L. R. 3 P. & D. 226; 44 L. J. P. & M. 31; 31 L. T. 592; 23 W. R. 110.

Annotations:—**Refd.** Hart *v.* Hart (1881), 18 Ch. D. 670 Churchward *v.* Churchward, [1910] P. 195.

5590. —— —— **Joint power.**]—In the variation of settlements the ct. has jurisdiction to extinguish a joint power of appointment of new trustees.—OPPENHEIM *v.* OPPENHEIM & RICOTTI (1884), 9 P. D. 60; 53 L. J. P. 48; 32 W. R. 723.

See, further, Sub-sect. 5, D. (*c*), *post.*

5591. In absence of respondent—After notice of application for order.]—After a decree *nisi* for dissolution of marriage petitioner filed a petition praying for an order to vary a marriage settlement. Before the decree was made absolute, resp. was served abroad with a copy of the petition, & with a notice that after the decree was made absolute, the ct. would be moved to make the order as to the settled property. Resp. had not appeared at any stage of proceedings:—*Held:* the ct. had power to vary the marriage settlement in the absence of resp.—LAWRENCE *v.* LAWRENCE (1863), 3 Sw. & Tr. 207; 32 L. J. P. M. & A. 124; 9 L. T. 23; 9 Jur. N. S. 1158; 164 E. R. 1253.

5592. Post-nuptial settlement by third parties.]—(1) *Semble:* under Matrimonial Causes Act, 1859 (c. 61), s. 5, the ct. has power to deal with post-nuptial settlements made on the parties to the marriage by third persons.

(2) In allotting a certain portion of the wife's income derived under settlement for the maintenance & education of the children of the marriage, the ct. refused to make it a condition in the decree that the husband should deliver up to the wife the jewels belonging to her of which he had retained possession.—THOMAS *v.* THOMAS & VIGNE (1865), 13 L. T. 412.

5593. Whether retrospective—Dividends already accrued due.]—PAUL *v.* PAUL & FARQUHAR, No. 5699, *post.*

5594. —— **Income already paid to respondent.**]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5641, *post.*

5595. Limited to orders for benefit of spouses or children.]—SYKES *v.* SYKES & SMITH, No. 5700, *post.*

5596. ——.]—*Held:* the power of altering marriage settlements given to the ct. by sect. 5

PART XIII. SECT. 22, SUB-SECT. 5.—B. (a).

d. *Statutory power—Given after filing of petition & before final decree.*]—After the filing of the petition for divorce, but before the making of the final decree, the ct. may under 1885 Act, alter, vary or set aside any settlement made by & between parties whose marriage shall have been dissolved.—CHURCH *v.* CHRISTIE (1888), 20 N. S. R. (8 R. & G.) 468; 9 C. L. T. 254.—**CAN.**

of Matrimonial Causes Act, 1859 (c. 61), & sect. 3 of Matrimonial Causes Act, 1878 (c. 19), is limited to such alterations as are for the personal benefit of the husband, wife or children of the marriage. Where, therefore, petitioner dies after obtaining a decree absolute for dissolution of the marriage & after presenting a petition for variation of the marriage settlement, & there are no children of the marriage, the petition for variation abates by the death of petitioner, & the proceedings cannot be continued by his personal representatives for the benefit of his estate.—THOMSON *v.* THOMSON & RODSCHINKA, [1896] P. 263; 65 L. J. P. 80; 74 L. T. 801; 45 W. R. 134; 12 T. L. R. 464; 40 Sol. Jo. 583, C. A.

5597. Where no issue of marriage—Matrimonial Causes Act, 1878 (c. 19), s. 3.]—By above sect., amending Matrimonial Causes Act, 1859 (c. 61). s. 5, the ct. may vary marriage settlements where there are no children of the marriage. The ct., under the circumstances of the case, held, that the later Act was not retrospective.—YGLESIAS *v.* YGLESIAS & SELBY (1879), 4 P. D. 71; 40 L. T. 37; 27 W. R. 432.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

5598. Variation adverse to children's interest.]—The ct. has no power to vary a marriage settlement, so as to deprive an infant child of the marriage of an interest secured to it by such settlement.—CRISP *v.* CRISP (1872), L. R. 2 P. & D. 426; 42 L. J. P. & M. 13; 27 L. T. 428; 21 W. R. 79.

Annotations:—**Folld.** Forsyth *v.* Forsyth, [1891] P. 363. **Consd.** Hartopp *v.* Hartopp & Akhurst, [1899] P. 65; Blood *v.* Blood, [1902] P. 190.

5599. ——.]—(1) The ct. has power to entertain a petition for variation of settlements although petitioner & resp. were domiciled in S. at the time of the marriage, & although the settlement were made in the Scottish form.

(2) The ct. cannot vary settlements to the detriment of infant children.—FORSYTH *v.* FORSYTH, [1891] P. 363; 61 L. J. P. 13; 65 L. T. 556.

Annotation:—*As to* (2) **Consd.** Hartopp *v.* Hartopp & Akhurst, [1899] P. 65.

5600. ——.]—The ct. has power to vary a marriage settlement so as to deprive infant children of the marriage of part of their interests secured to them by such settlement.

Where a marriage settlement gave petitioner, the wife, power to appoint, after the death of resp., in favour of a second husband & the children of a second marriage, the ct. recognising the principle of *quid pro quo* in such cases, gave petitioner power so to appoint, during resp.'s lifetime, a portion of the fund which had been settled for the ultimate benefit of the children of the marriage upon the ground that the extinguishment of resp.'s interests being part of the order would, while depriving them of that portion, accelerate their interests in the remainder.—WHITTON *v.* WHITTON, [1901] P. 348; 71 L. J. P 10; 85 L. T. 646.

Annotations:—**Consd.** Blood *v.* Blood, [1902] P. 190. **Apld.** Hodgson Roberts *v.* Hodgson Roberts & Whitaker, [1906] P. 142.

5601. Over capital of settled fund.]—PONSONBY *v.* PONSONBY, No. 5579, *ante.*

5602. —— Payment of costs.]—PRATT *v.* JENNER, *Ex p.* JENNER, No. 5772, *post.*

5603. —— Reconveyance.]—By a settlement on his marriage with resp., petitioner settled certain property on himself for life, with remainder to the sons of his marriage with resp., with remainder to the sons of any subsequent marriage, with remainder to a brother of petitioner & the sons of that brother, with remainder to the daughters of petitioner & resp., & with ultimate remainder to himself. The marriage, of which there was no issue, had been dissolved on the ground of the misconduct of resp., & the brother of petitioner had died unmarried:—*Held:* under Matrimonial Causes Act, 1859 (c. 61), s. 5, an order might be made for the reconveyance of the property to petitioner for his own use.—MEREDYTH *v.* MEREDYTH & LEIGH, [1895] P. 92; 64 L. J. P. 54; 72 L. T. 898; 43 W. R. 304; 11 T. L. R. 186; 11 R. 651.

Annotations:—**Folld.** Wynne *v.* Wynne (1898), 78 L. T. 796. **Distd.** Walpole *v.* Walpole & Goddard, [1901] P. 196. **Consd.** Blood *v.* Blood, [1902] P. 78. **Refd.** Dormer *v.* Ward, [1901] P. 20; Churchward *v.* Churchward, [1910] P. 195.

—— ——.]—*See, further,* Sub-sect. 5, D. (*d*) *post.*

5604. Where decree pronounced by court—Though settlements in Scottish form.]—A decree for dissolution of marriage having been granted on the husband's petition, it appeared that resp., a Scottish woman, was married in Scotland to petitioner, an Englishman, & that in contemplation of the marriage there had been a settlement of her property according to the Scottish law:—*Held:* under Matrimonial Causes Act, 1859 (c. 61), s. 5, the ct. had power to order a variation of the settlement.—NUNNELEY *v.* NUNNELEY & MARRIAN (1890), 15 P. D. 186; 63 L. T. 113; 39 W. R. 190.

Annotation:—**Expld. & Folld.** Forsyth *v.* Forsyth, [1891] P. 363.

5605. —— ——.]—FORSYTH *v.* FORSYTH, No. 5599, *ante.*

5606. —— Decree pronounced by colonial court.]—The power to vary settlements conferred upon the Court by Matrimonial Causes Act, 1857 (c. 85), s. 45, & 1859 (c. 61), s. 5, can only be exercised where the decree upon which the application to vary the marriage settlement is founded has been pronounced by the ct. Therefore, where a decree of nullity had been pronounced by a colonial ct., & the parties afterwards returned to this country & applied for leave to file a petition here for the variation of their marriage settlement:—*Held:* the ct. had no jurisdiction to entertain such application.—MOORE (FALSELY CALLED BULL) *v.* BULL, [1891] P. 279; 60 L. J. P. 76; *sub nom.* BULL (OTHERWISE MOORE) *v.* BULL, 7 T. L. R. 486.

5607. Effect of death of party—After decree absolute.]—LING *v.* LING & CROKER, No. 5738, *post.*

See, also, No. 5739, *post.*

5608. —— After petition for variation.]—THOMSON *v.* THOMSON & RODSCHINKA, No. 5596, *ante.*

5609. Extends to all nullity suits—Grounds for decree immaterial.]—DORMER (OTHERWISE WARD) *v.* WARD, No. 5629, *post.*

5610. —— Nullity decreed for impotence.]—The power given to the ct. by Matrimonial Causes Act, 1859 (c. 61), s. 5, & extended by Matrimonial Causes Act, 1878 (c. 19), s. 3, to inquire into & vary settlements, extends to cases where nullity of marriage has been decreed for impotence. "Property settled" includes money covenanted to be paid by third parties. For the purpose of such alteration the annulled marriage must be treated as if it were valid.—NEPEAN (OTHERWISE LEE WARNER) *v.* NEPEAN, [1925] P. 97; 94 L. J. P. 42; 133 L. T. 287; 41 T. L. R. 366.

5611. Settlement conditional on future event—Marriage pronounced void before event.]—DORMER (OTHERWISE WARD) *v.* WARD, No. 5629, *post.*

5612. Where child of marriage has attained vested interest—Interest vested in husband as next of kin.]—BLOOD *v.* BLOOD, No. 5630, *post.*

Sect. 22.—*Proceedings after decree: Sub-sect.* 5, *B.* (*a*) &

5613. Petition for variation by guilty party.]—WOOTTON-ISAACSON *v.* WOOTTON-ISAACSON, No. 5742, *post.*

5614. Interests, rights & liabilities of persons not parties to suits.]—(1) By a marriage settlement the wife's father covenanted that his exors. should within twelve months of his death, if the wife were then living, pay to the trustees £10,000 on trust, in default of issue, which happened, for the wife absolutely "if she shall survive her now intended coverture, but if she shall die during her now intended coverture," then in trust for the father absolutely. The husband obtained an absolute decree for dissolution of the marriage, & the wife survived her father:—*Held:* the wife had survived the coverture within the meaning of the settlement, & was therefore entitled to receive the £10,000 from the trustees when paid to them.

(2) *Semble:* an order of the Divorce Ct. having dealt with the settled property as if the husband were dead, the husband must be considered as dead for the purpose of construing the settlement, & the coverture might be considered as terminated in this manner also.

Qu.: whether under the Matrimonial Causes Acts, 1857 (c. 85), 1859 (c. 61), 1878 (c. 19), the Divorce Ct. has power to interfere with the interests, rights, & liabilities of persons not parties to the suit, for example, a wife's father covenanting to settle a fund.—*Re* CRAWFORD'S SETTLEMENT, COOKE *v.* GIBSON, [1905] 1 Ch. 11; 74 L. J. Ch. 22; 91 L. T. 683; 53 W. R. 107.

5615. Interests of third parties—Created before filing of petition.]—Upon a petition for variation of settlements, the ct. has power to make an order in favour of the interests of third parties created before the filing of that petition.

Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the marriage settlements.

Before a decree *nisi* was made for dissolution of the marriage, resp. had charged his interest under the marriage settlement with payment of his solr.'s costs of suit:—*Held:* under the circumstances, the charge was valid & resp.'s interests could not be extinguished without providing for this charge.—WIGNEY *v.* WIGNEY (1882), 7 P. D. 228; 51 L. J. P. 84; 47 L. T. 129; 31 W. R. 140.

Annotation:—**Consd.** Nevill *v.* Nevill (1893), 69 L. T. 463.

5616. Before decree absolute.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5752, *post.*

5617. ——.]—CLARKE *v.* CLARKE & LINDSAY, No. 5766, *post.*

5618. Effect of events happening after decree absolute.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5752, *post.*

5619. To override restraint on anticipation.]—On a petition for variation of settlement, after decree absolute for dissolution of marriage, the ct. has full power under Matrimonial Causes Act, 1859 (c. 61), s. 5, as extended by Matrimonial Causes Act, 1878 (c. 19), s. 3, to vary such settlement in such a way as to override the restraint upon anticipation clause & put an end to the restraint, notwithstanding the remarriage of the innocent party before an order of the ct. is made, though after petition filed.—CHURCHWARD *v.* CHURCHWARD [1910] P. 195; 79 L. J. P. 59; 102 L. T. 862; 26 T. L. R. 401.

Annotation:—**Refd.** Loraine *v.* Loraine & Murphy, [1912] P. 86.

5620. — — Remarriage of wife before variation.]—The power of the ct. to vary settlements under the Matrimonial Causes Act, 1859 (c 61), includes a power to override a restraint on anticipation contained in a delinquent wife's settlement, even in a case where the wife has married co-resp. after the decree absolute & before the order to vary.—MORGAN *v.* MORGAN & KIRBY, [1923] P. 1; 92 L. J. P. 8; 128 L. T. 252; 39 T. L. R. 47.

5621. In divorce court only.]—By a settlement made in 1912 in contemplation of the marriage of a domiciled Scotsman with an English woman, a fund brought into settlement by the wife's relations was settled in trust for the wife for life, & after her death in trust for her husband with trusts over in favour of the issue of the marriage, & it was thereby agreed & declared by all the parties thereto that the settlement should be construed & the rights of all persons claiming thereunder regulated according to the law of England in the same manner as if the husband & wife were to remain thenceforth during their respective lives domiciled in England. The marriage was solemnised in Oct. 1912, & in Dec. 1914, the husband obtained a divorce in Scotland, but did not raise the question as to the rights that the respective parties subsequently have in the settled property. Six months later he commenced an action against his divorced wife & the trustees of the marriage settlement for a declaration that the wife by reason of the divorce had as the party injurer forfeited all provisions in her favour under the settlement, & that her life interest in the settled fund ceased as at the date of the decree of divorce as if she were naturally dead, & that the income fell to be paid to the husband, & alternatively for such equitable relief as he would have obtained according to the law of England if he had been domiciled in England at the date of the divorce:—*Held:* the alternative claim was wholly unsustainable, inasmuch as it was to the Divorce Ct. alone that Parliament had given a discretional jurisdiction to vary the provisions of settlements & alter the bargain which the parties had made.—MONTGOMERY *v.* ZARIFI (1918), 88 L. J. P. C. 20; 119 L. T. 380, H. L.

(*b*) "*Settlement*" *and* "*Property Settled.*"

5622. What is a "settlement"—Assignment to spouse of property.]—The wife obtained a decree dissolving her marriage, & she thereupon petitioned for variation of settlements or, in the alternative, for maintenance. Some twenty years before the date of the decree, she assigned to her husband certain property of which she then stood possessed subject to mtges. This she now sought to have re-assigned to her, subject to all valid mtges.:—*Held:* the assignment was not a "settlement" within Matrimonial Causes Act, 1859 (c. 61), but, upon a petition by the wife for maintenance, the ct. could order, & did order, resp. to secure to petitioner, by way of maintenance, the property which she had formerly assigned to him, subject to outstanding mtges.—CHALMERS *v.* CHALMERS (1892), 68 L. T. 28; 1 R. 504.

Annotation:—**Apprvd.** Hubbard *v.* Hubbard, [1901] P. 157.

5623. —— ——.]—A husband executed a deed by which he assigned to a trustee a leasehold house & some furniture, upon trust to assign the same at once to the wife absolutely, & the trustee assigned the same accordingly. The wife afterwards obtained a decree of nullity of marriage:—*Held:* the assignment was not a "settlement" within Matrimonial Causes Act, 1859 (c. 61), s. 5, & the ct. had no jurisdiction to vary its provisions.—HUBBARD (OTHERWISE ROGERS) *v.* HUBBARD, [1901] P. 157; 70 L. J. P. 34; 84 L. T. 441, C. A.

5624. Settlement on wife by will.]—LORAINE *v.* LORAINE & MURPHY, No. 5549, *ante*.

5625. —— Will bequeathing funds to trustees of settlement—Funds to be held on trusts of settlement.]—The power of the ct. under Matrimonial Causes Act, 1859 (c. 61), s. 5, to vary the trusts of a marriage settlement, does not enable it to vary the trusts of a will, even when the gift by will is to the trustees of a marriage settlement upon the trusts of the settlement.—GARRATT *v.* GARRATT & GARRATT, [1922] P. 230; 91 L. J. P. 207; 127 L. T. 559; 38 T. L. R. 620.

—— **Deed of separation.**]—*See* Part XI., Sect. 9, *ante*.

5626. What is "property settled"—Trust fund under separation deed.]—STONE *v.* STONE & BROWNRIGG, No. 5551, *ante*.

5627. —— Property to be applied at discretion of trustees.]—Under the settlement made on the marriage of the parties an absolute discretion was vested in the trustees in respect of the application of the income of the settled property. The marriage was dissolved on the petition of the wife in Apr. 1872. In Mar. 1877, the trustees who had up to that date exercised their discretionary power in her favour, declined to continue the payment of the income of the fund to her, & she thereupon filed a petition for a variation of the settlement:—*Held:* petitioner was not barred by delay from presenting her petition, &, notwithstanding the absolute discretion vested in the trustees, the ct. had power to make such order in respect of the application of the settled property as to it might seem fit.—MARSH *v.* MARSH (1878), 47 L. J. P. 78; 39 L. T. 545.

5628. —— ——.]—The power of the ct. with reference to the application of settled property under Matrimonial Causes Act, 1859 (c. 61), is not limited to absolute interests. Orders may be made with reference to property so settled as to be applied at the discretion of the trustees.—VALLANCE *v.* VALLANCE (1907), 77 L. J. P. 33.

5629. —— Charge in favour of beneficiaries—Whether charge or property charged the "property settled."]—The jurisdiction of the ct., conferred by Matrimonial Causes Act, 1859 (c. 61), s. 5, & extended by Matrimonial Causes Act, 1878 (c. 19), s. 3, to inquire into the existence of ante-nuptial & post-nuptial settlements, & to make orders varying the same, is not limited to any particular class of nullity cases, but includes all cases in which a decree of nullity has been pronounced, upon whatsoever ground.

By a marriage settlement resp., the intended husband, covenanted with trustees to pay to them, if the marriage should take place, a yearly sum of £200, in trust to pay the same to petitioner, the intended wife, during the joint lives of husband & wife. He also, in virtue of certain powers vested in him, appointed in favour of petitioner, if she should survive him, a jointure rent-charge, to be charged on certain specified hereditaments, & secured by a term of years to commence from his death. He also, in exercise of powers vested in him, appointed certain other hereditaments to the use of the trustees for a term of years, to raise a capital sum, the interest of which was to be paid to him during his life, & after his decease the fund was to be held in trust for the issue of the marriage, & in default of issue for the intended wife, but subject to the proviso that no part should be raised during his lifetime without his consent in writing. The marriage took place, but, on the petition of the wife, a decree of nullity of marriage was made on the ground of the impotence of resp. On an application by petitioner to vary the settlement:—*Held:* (1) although the marriage had been declared void, & the covenant as to the payment of £200 a year no longer took effect, the ct. had jurisdiction under the Matrimonial Causes Act, 1859 (c. 61), s. 5, on the application of petitioner, to vary the settlement in respect of that settled property; (2) the ct. would have had power to vary the settlement as to the jointure rent-charge, & the capital sum directed to be raised, on the ground that they were "property settled" within Matrimonial Causes Act, 1859 (c. 61), s. 5, but for the conditions that the former was only to commence after the death of resp., & the latter could not be raised in his lifetime without his consent, neither of which events had happened.

Where property is settled under a marriage settlement, conditionally on the happening of a future event, & the marriage has been pronounced to be void before the happening of the event, the ct. cannot ignore the condition, & vary the settlement in respect of the property so settled.

(3) Where in a marriage settlement, property is charged in favour of the intended beneficiaries, the "property settled," within Matrimonial Causes Act, 1859 (c. 61), s. 5, is the charge & not the property settled.—DORMER (OTHERWISE WARD) *v.* WARD, [1901] P. 20; 69 L. J. P. 144; 83 L. T. 556; 49 W. R. 149; 17 T. L. R. 12, C. A.

Annotations:—As to (1) **Consd.** Nepean (otherwise Lee Warner) *v.* Nepean, [1925] P. 97. **Refd.** *Re* Garnett, Richardson *v.* Greenep (1905), 74 L. J. Ch. 570; *Re* Wombwell's Settlmt., Clerke *v.* Menzies, [1922] 2 Ch. 298. *Generally*, **Refd.** E. *v.* E. (otherwise T.) (1902), 50 W. R. 607; Attwood *v.* Attwood, [1903] P. 7; Sharpe *v.* Sharpe, [1909] P. 20.

5630. Vested interest of deceased child—Vested in husband as next of kin.]—By marriage settlement property was settled upon trust for the wife for life, remainder to the husband, remainder to the children of the marriage. There was only one child, who died after having acquired a vested interest in the fund, & his father became entitled to his interest as his sole next of kin. The wife obtained a decree dissolving the marriage:—*Held:* the father's interest as next of kin of his deceased son was "property settled" within Matrimonial Causes Act, 1859 (c. 61), s. 5, & the ct. had power under that sect. to extinguish not only the father's life interest, but also his interest as next of kin of the son.—BLOOD *v.* BLOOD, [1902] P. 190; 71 L. J. P. 97; 86 L. T. 641; 50 W. R. 547; 18 T. L. R. 588; 46 Sol. Jo. 499, C. A.

Annotation:—**Refd.** Churchward *v.* Churchward, [1910] P. 195.

5631. —— Money covenanted to be paid by third parties.]—NEPEAN (OTHERWISE LEE WARNER) *v.* NEPEAN, No. 5610, *ante*.

C. What Court will Consider.

5632. Means of parties.]—WEBSTER *v.* WEBSTER & MITFORD, No. 5693, *post*.

5633. ——.]—CHETWYND *v.* CHETWYND, No. 5786, *post*.

5634. ——.]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante*.

5635. —— Husband's probable increase in income.]—TUPPER *v.* TUPPER & TERRELL, No. 5663, *post*.

5636. Requirements of parties.]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante*.

5637. Conduct of parties.]—In making a settlement of property belonging to a wife, the ct. looks not only to the portions of her fortune which the husband may have already received, but to all the circumstances of the case, & particularly to the husband's conduct. Where a widow about to marry again assigned all her property except a

Sect. 22.—Proceedings after decree: Sub-sect. 5, C.

life interest in the income of £10,000 Consols, to which she was entitled under a former settlement, in trust for her separate use during the coverture, & afterwards in trust for herself, if she survived, or if not, for the second husband, & it appeared that he had married her from interested motives only, & there had been a divorce *a mensâ et thoro* for adultery on his part, the ct. settled the whole income of the £10,000 Consols on the wife, irrespectively of the question whether it had been by mistake or otherwise left out of settlement.—BARROW *v.* BARROW (1854), 5 De G. M. & G. 782; 3 Eq. Rep. 149; 24 L. J. Ch. 267; 3 W. R. 122; 43 E. R. 1073; *sub nom.* BARROW *v.* WILLIAMS, BARROW *v.* BARROW, 24 L. T. O. S. 198, C. A.

Annotations:—**Refd.** *Re* Ford (1863), 2 New Rep. 349. **Mentd.** *Re* Cooke's Trusts (1887), 56 L. T. 737.

5638. ——.]—CHETWYND *v.* CHETWYND, No. 5786, *post.*

5639. — -.]- -MARCH *v.* MARCH & PALUMBO, No. 5576, *ante.*

5640. — -.]- -WIGNEY *v.* WIGNEY, No. 5664, *post.*

5641. ——.]—(1) In exercising the power of varying settlements conferred by Matrimonial Causes Act, 1859 (c. 61), s. 5, the ct. must have regard not only to the rights & liabilities of the parties *inter se*, but also to the interests of society & public morality & relief will not be given to a person guilty of matrimonial misconduct unless such misconduct can be palliated.

(2) The sum to be awarded to an injured husband by variation of settlements should be measured by what is necessary to give him means according to the scale to which he may have accommodated his mode of life, & this measure ought not to be disregarded for the purpose of preventing the co-resp. obtaining a pecuniary profit from his adultery. There is no general rule that a co-resp. is not to be allowed to get any profit from his adultery; but the ct. must exercise its discretion so as to promote virtue & discourage vice, & the fact that the guilty resp. & co-resp. have married may turn the scale in favour of a liberal allowance to petitioner, or against resp., but it will not justify the depriving resp. of everything beyond the bare necessities of life in the condition in which she has been brought up.

(3) There is no power for the ct. in the exercise of its jurisdiction to make an order having a retrospective effect so as to recoup to a husband income of a fund settled by him which has been received by the wife after she had deserted him.

A decree *nisi* for the dissolution of marriage was made on the petition of the husband, which was based on the ground that the wife had left him, & gone to America & obtained a divorce there, & subsequently married co-resp. there & cohabited with him, neither the divorce nor the marriage in America being such that it could be recognised by the law of England. It was alleged & admitted at the trial that petitioner had committed adultery before the presentation of the petition, & afterwards, & close up to the time of resp. putting in her answer. Petitioner did not go into the witness-box & offer any explanation as to his adultery, or submit himself to cross-examination. The decree was afterwards made absolute. There were no children of the marriage. Resp. had brought into settlement property yielding an income of about £2,200. Under the settlement resp. took the first life interest, & there was a trust, in default of issue of the marriage taking a vested interest, to pay the income of the trust fund to any husband surviving the resp. during his life. Resp. was also entitled to a protected life interest in certain funds under her father's will subject to her mother's life interest. Petitioner had brought into settlement property yielding an income of about £400. Resp. took the first life interest in this fund under the settlement. Petitioner had from other sources an income of about £250 a year. Petitioner applied for variation of the settlements:—*Held:* resp.'s interest in petitioner's settlement ought to be extinguished; but having regard to the conduct of petitioner, the ct. ought not under the discretionary power vested in it by Matrimonial Causes Act, 1859 (c. 61), s. 5, to vary the resp.'s settlement in his favour.—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, [1905] P. 253; 74 L. J. P. 122; 93 L. T. 651; 54 W. R. 121; 21 T. L. R. 651; 49 Sol. Jo. 634, C. A.

Annotations:—*As to* (1) **Apld.** Evans *v.* Evans & Elford, [1906] P. 125; Hines *v.* Hines & Burdett, [1918] P. 364; La Terriere *v.* La Terriere & Grey (1920), 124 L. T. 575; Tickner *v.* Tickner, [1924] P. 118. **Refd.** Tulk *v.* Tulk (1906), 23 T. L. R. 120; Craven *v.* Craven & Robinson (1909), 26 T. L. R. 4; Pullen *v.* Pullen & Holding (1920), 123 L. T. 203. *Generally*, **Mentd.** Jagger *v.* Jagger (1926), 42 T. L. R. 315.

5642. Interests of children.]—On an application for an alteration of the settlements under Matrimonial Causes Act, 1859 (c. 61), s. 5, the husband offered, if allowed to withdraw from settlement the moneys brought in by himself, to surrender his interest in favour of the child in the moneys settled by the wife, by reason of whose adultery the marriage was dissolved. The ct. refused the application, it not being satisfied that the proposed alteration would be for the benefit of the child.—POCOCK *v.* POCOCK & BARTON (1868), 18 L. T. 338; 16 W. R. 712.

—— **Power of court to prejudice.**]—*See* Nos. 5598–5600, *ante.*

5643. Remarriage of respondent with co-respondent—Ignorance of co-respondent that respondent's circumstances might be altered adversely.]—(1) The marriage of petitioner & resp. was solemnised in 1870, & in 1872 a deed of separation was entered into between them, in which, amongst other things, it was arranged that resp., the wife, should pay petitioner during their joint lives an annuity of £100 a year out of the settled property. In 1874 the marriage was dissolved by reason of resp.'s adultery:—*Held:* on a revision of the settlements petitioner was not precluded by the deed of separation from asking for a larger allowance out of the wife's settled property than that which was secured to him by the deed.

A decree absolute for dissolution of marriage between petitioner & resp. was pronounced in July, 1874; in Dec. 1874, a marriage was solemnised between resp. & co-resp., who were ignorant of the fact that in the previous Nov. a petition had been filed for variation of the settlements made on the marriage of resp. with her previous husband:—*Held:* (2) there had been no unreasonable delay on the part of petitioner in applying for an alteration of the settlements; (3) co-resp. must be taken to have known all the circumstances of resp., &

PART XIII. SECT. 22, SUB-SECT. 5.—C.

5642 i. *Interests of children.*]—On a petition by one who has procured a decree absolute of divorce, to vary the terms of an ante-nuptial settlement, the ct. will not make a variation, though consented to by the other party to the marriage where the variation affects an infant interested under the settlement, if the ct. is not clearly satisfied that the variation is advantageous to the infant, also, on such petition, the ct. should not, as a rule, allow variations so as to create interests in favour of wrongdoers.—BURNS *v.* BURNS, [1924] 1 W. W. R. 498; 1 D. L. R. 462.—**CAN.**

his ignorance of the fact that those circumstances were likely to be altered to her disadvantage did not constitute a sufficient ground for the ct. refusing to deprive her of a portion of the property brought into settlement by her on her marriage with petitioner.

(4) A wife's property, yielding an income of £1,350 a year, was settled on herself for life for her separate use; there was a covenant by the husband to appoint in favour of the wife the income arising from a certain sum, £8,000, in which he had a prospective interest; the marriage was dissolved by reason of the wife's adultery. The ct., in varying the settlements, relieved the husband of his covenant & allowed him, he having himself only an allowance of £100 a year, £300 a year out of the wife's income, & £200 a year for the maintenance & education of the only child of the marriage, a son, until he attained the age of twenty-one.—BENYON *v.* BENYON & O'CALLAGHAN (1876), 1 P. D. 447; 45 L. J. P. 93; 24 W. R. 950.

Annotations:—*As to* (1) **Apld.** Gandy *v.* Gandy (1882), 7 P. D. 77; Wilkinson *v.* Wilkinson (1893), 69 L. T. 459. **Refd.** Hanbury *v.* Hanbury (1894), 70 L. T. 569; Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138. *As to* (4) **Refd.** Blandford *v.* Blandford (1892), 67 L. T. 392; Midwinter *v.* Midwinter (1893), 68 L. T. 262; Thomasset *v.* Thomasset, [1894] P. 295. *Generally*, **Refd.** Benyon *v.* Benyon & O'Callaghan (1890), 59 L. J. P. 39.

5644. Payment by respondent wife of costs of suit.]—NOEL *v.* NOEL, No. 5674, *post*.

5645. Rights & liabilities of parties inter se.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5641, *ante*.

5646. Interests of third parties.]—WIGNEY *v.* WIGNEY, No. 5615, *ante*.

5647. Interests of public morality.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5641, *ante*.

D. What Orders will be Made.

(a) Object of Orders.

5648. Protection of interest of innocent party.]—The ct. will make no order respecting settled property under Matrimonial Causes Act, 1859 (c. 61), s. 5, after dissolution of marriage by reason of the wife's adultery, to deprive the husband of any benefit derived from the settlement.—THOMPSON *v.* THOMPSON & BARRAS (1862), 2 Sw. & Tr. 649; 32 L. J. P. M. & A. 39; 7 L. T. 396; 9 Jur. N. S. 26; 11 W. R. 193; 164 E. R. 1150.

5649. ——.]—MAUDSLAY *v.* MAUDSLAY, No. 5681, *post*.

5650. ——.]—The principle of the decisions on Matrimonial Causes Act, 1859 (c. 61), s. 5, is that, where the breaking up of the family life has been caused by the fault of resp., the ct. ought to place petitioner & the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up.

A wife, whose marriage had been dissolved on the ground of her adultery, had under her marriage settlement a power of appointment in her husband's favour, if he should survive her, over a fund, which, apart from the exercise of the power, would upon her death have vested in the children of the marriage, & this was the husband's only interest in his wife's property under the settlement:—*Held*: as it was reasonable to suppose that, if the family life had continued, she would have exercised the power in his favour, the income should, after her death, be paid to him during his lifetime.—HARTOPP *v.* HARTOPP & AKHURST, [1899] P. 65; 68 L. J. P. 33; 80 L. T. 297; 15 T. L. R. 168.

Annotations:—**Refd.** Blood *v.* Blood, [1902] P. 78; Lorriman *v.* Lorriman & Clair, [1908] P. 282.

5651. Not punishment of guilty party.]—WIGNEY *v.* WIGNEY, No. 5664, *post*.

5652. Benefit of parties & issue.]—THOMSON *v.* THOMSON & RODSCHINKA, No. 5596, *ante*.

5653. Retention of parties in same position as before dissolution.]—(1) The main object & intent of the legislature in giving the Divorce Ct. power to vary marriage settlements is to place the parties in the same position, as far as possible, as if the marriage had not been put an end to through the fault of one of them.

(2) Where a marriage settlement gives an innocent party to it the power, if survivor, of appointing a portion of his or her settled fund in favour of a second spouse & the children of a second marriage, the ct. in varying such a settlement under the powers of Matrimonial Causes Act, 1859 (c. 61), will, although issue of the first marriage exists, permit the immediate exercise of such a power in the lifetime of the guilty party to an extent in the opinion of the ct. not, having due regard to all the facts, detrimental to such existing issue.—HODGSON ROBERTS *v.* HODGSON ROBERTS & WHITAKER, [1906] P. 142; 75 L. J. P. 48; 94 L. T. 621; 22 T. L. R. 395.

(b) Extinction or Modification of Guilty Party's Interest in Settled Funds.

5654. Interest in property brought in by innocent spouse — Respondent husband.] — BOYNTON *v.* BOYNTON, No. 4782, *ante*.

5655. —— ——.] — The wife divorced her husband on the grounds of cruelty & adultery. The decree *nisi* was pronounced in Dec. 1891, & the decree absolute on Nov. 22, 1892. Petitioner was ordered to have the custody of the three children of the marriage. A settlement of the wife's property was made in 1877, upon the marriage, & no contest arose as to the extinguishment of all interest of resp. thereunder. By a post-nuptial deed, executed in 1878, resp. brought property into settlement. Under that deed resp. took the first life interest, subject to an annuity of £300 a year payable to petitioner until her death or remarriage, & after his death the property was to go to resp.'s children by petitioner or by any future wife, as he should appoint, & in default of appointment, it was to be equally divided among all his children by petitioner or any future wife. He was also empowered to raise a sum of £4,000 upon mtge. of his life interest, & there was also a proviso empowering him, under certain conditions, to appoint the income accruing after his death to any future wife for life, & it gave him power to appoint new trustees. On Dec. 17, 1892, resp. married again, after executing, on the previous day, a settlement substantially in favour of his second wife, & exercising his power of appointment under the post-nuptial deed of 1878 in favour of the child or children, if any, of his second marriage, to the exclusion of the three children of the first marriage. On Dec. 23, 1892, being the last day limited by the rules, petitioner filed a petition to vary the ante-nuptial settlement of 1877, &, on Jan. 19, 1893, amended that petition by including the post-nuptial settlement of 1878. On Feb. 14, 1893 resp. was served, under an order for substituted service obtained on Feb. 7, with the petition as amended, & he subsequently entered an appearance thereto, & filed an answer, objecting to any variation of the post-nuptial settlement. Resp., during the year 1888, charged his life interest under the deed of 1878 with various sums advanced to him. In Mar. 1891, resp. was adjudicated bkpt., & in Sept. 1892, his life interest under the settlements of 1877 & 1878 were sold by auction by the trustee in bkpcy., the purchase being

Sect. 22.—*Proceedings after decree: Sub-sect.* 5, *D.* (*b*) & (*c*).]

completed on Dec. 30, 1892. The conditions of sale contained a notice of the divorce & consequent possible application to vary the settlements. The trustees of the settlement of Dec. 16, 1892, were represented at the reference before the registrar, who recommended that all interest of resp. in the property comprised in the settlement of 1877 should be extinguished, & that his powers of appointment under the deed of 1878 should also be extinguished. Upon motion to confirm the registrar's report, the ct. confirmed the first recommendation, but ordered that the powers of appointment under the deed of 1878 should be extinguished only to the extent of leaving the children of the first marriage to take as if there had been a default of appointment, &, that this extinction should only operate during petitioner's life or until she married again.—NEVILL *v.* NEVILL (1893), 69 L. T. 463.

5656. —— ——.]—POLLARD *v.* POLLARD, No. 5678, *post*.

5657. —— ——.]—Petitioner, a widow with one child by her first husband, settled, upon her marriage, certain property producing an annual income of about £750, upon trust to pay the income to herself for life; then to her husband, resp., for his life, & in the events which happened, with remainder to her only child, if he should attain twenty-one, with ultimate remainder to petitioner. Petitioner obtained a decree absolute dissolving her marriage, &, in her petition to vary the settlement, she prayed that resp.'s life interest in the trust funds should be extinguished; &, further, that the trustees should be ordered to pay to her a sum of £1,000, or such other sum as the ct. should direct, to cover the costs & other incidental & additional expenses of petitioner, arising out of resp.'s misconduct. The registrar reported in favour of the first, but submitted in regard to the second part of the prayer, that, as it would be to some extent prejudicial to the child's interests, no order ought to be made directing any payment out of the corpus of the fund until the infant was represented. Upon motion to vary the registrar's report, the ct. ordered an adjournment, so that the infant might be represented, & thereupon made an order extinguishing resp.'s interests, & directing the trustees to raise & pay to petitioner a sum of £450 to cover costs, including the costs of the application.—DOUGLAS *v.* DOUGLAS (1896), 74 L. T. 384.

5658. —— **Respondent wife.**]—NOEL *v.* NOEL, No. 5674, *post*.

5659. Interest brought in by guilty spouse—Partial extinction—Immediate income given to children.]—BEAUCHAMP *v.* BEAUCHAMP & WATT (1904), 20 T. L. R. 273, C. A.

5660. —— **Small income.**]—Dissolution of a marriage having been decreed on the wife's petition, an order was made under Matrimonial Causes Act, 1859 (c. 61), s. 5, extinguishing the life interest of the husband in settled property, the whole of which was brought into settlement by him & the income of which amounted to £45 a year, there being one child of the marriage who had not attained a vested interest:—*Held:* the order made was not only a legitimate order, but the best one possible that could be made in the interests of the wife & child.—KAYE *v.* KAYE (1902), 86 L. T. 638; 50 W. R. 499, C. A.

5661. Interest in property brought in by both parties—Trusts of property of guilty husband not varied.]—By settlements made before & after the marriage £724 Consols, the property of the husband, & £700, & also some leaseholds, the property of the wife's father, were settled upon the wife for life, & after her death on the husband for life, & after the death of the survivor upon the children of the marriage. The ct. after a decree absolute for dissolution of marriage at the suit of the wife, made an order, under Matrimonial Causes Act, 1859 (c. 61), s. 5, that the trustees of the settlements should deal with the proceeds of the property which came from the wife as if the husband was dead at the date of the decree absolute, but as to the £724 settled by the husband, refused to alter the settlement.—JOHNSON *v.* JOHNSON (1861), 31 L. J. P. M. & A. 29.

5662. —— **Trust of property of guilty wife modified—To provide maintenance for child.**]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante*.

5663. —— —— ——.]—After final decree dissolving the marriage upon the ground of the adultery of resp. with co-resp. petitioner presented a petition for variation of two settlements executed in 1882 in contemplation of the marriage. Substantially, the settlements gave the wife a first life interest in half the income of the fund brought into settlement by herself, & further conferred upon her conditional benefits in certain contingencies, the principal one being that, upon the death of resp.'s mother, now aged about seventy, resp.'s income would be immediately increased from about £300 to about £650 a year. There was also a power of appointing new trustees by petitioner & resp. during their joint lives, & by the survivor of them during his or her life. The registrar recommended, as to the property brought into settlement by petitioner, that the whole of the wife's interest & powers should be extinguished; & as to the property brought into settlement by resp., that the terms of the settlement should be varied by ordering the trustees to pay £50 a year to petitioner for the maintenance & education of the infant child of the marriage during her minority, & after twenty-one to the said child; & that upon the death of resp.'s mother the allowance for the child should be increased to £150 a year. Further, that resp.'s power of appointment amongst the children or remoter issue of the said marriage should be extinguished. It was left for the ct. to say whether her power of appointing, or joining in the appointment of, new trustees should be extinguished as prayed by petitioner. The registrar refused to take into account the great probability of the husband's promotion in the office held by him in Her Majesty's household, by which promotion, it was said, that his income would be increased by about the amount of income which would accrue to resp. on the death of her mother: *Held:* (1) the registrar was right in not taking the husband's probable future promotion & consequent increase of salary into account; (2) as the wife's increase of income was a vested interest to which she was absolutely entitled in reversion, the registrar's report as to the increased amount to be paid by resp. for the benefit of the child upon the reversion falling in was not unreasonable nor contrary to the practice; (3) as the wife was still to retain an interest in the fund brought into settlement by herself, her right to appoint, or join in the appointment of, new trustees must be retained in her favour.—TUPPER *v.* TUPPER & TERRELL (1890), 62 L. T. 665.

5664. Extinction subject to payment of debts—Debts incurred for upkeep of joint establishment.]—(1) The fortune of a wife was settled as to a part producing £950 a year on the husband for life, then on the wife for life; as to the residue, producing £1,200 a year, on the wife for life, then on the

husband for life; & after the decease of the survivor, in default of children of the marriage, then as to the whole property on such trusts as the wife should by will appoint, & in default of appointment to the husband absolutely. There was no child of the marriage. The wife obtained a decree for dissolution of the marriage on the ground of adultery & cruelty. The husband had mortgaged his life interest for debts incurred in keeping up the joint establishment, & alleged that he had incurred other debts for the same purpose. The President of the Divorce Ct., upon the wife's petition, made an order that the trustees of the settlement should stand possessed of all the funds upon the trusts which would be applicable thereto if the husband were dead, & had died in the lifetime of the wife, & free from the ultimate trust in default of appointment, but subject to the wife undertaking to pay the charges made by the husband on the trust funds:—*Held:* the order must be affirmed, with this variation, that an account should be taken of all debts due from the husband incurred for the purpose of the joint establishment, & the wife must undertake to pay them.

(2) Though the power given to the ct. of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively.

(3) The judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, & the Ct. of Appeal will not interfere with that discretion, unless there has been a clear miscarriage in its exercise.—WIGNEY *v.* WIGNEY (1882), 7 P. D. 177; 51 L. J. P. 60; 46 L. T. 441; 30 W. R. 722, C. A.

Annotations:—*As to* (1) **Consd.** Dormer *v.* Ward, [1901] P. 20. *As to* (2) **Consd.** Ollier *v.* Ollier, [1914] P. 240. *As to* (3) **Refd.** Ollier *v.* Ollier, [1914] P. 240.

5665. —— Charges incurred before filing of petition.]—WIGNEY *v.* WIGNEY, No. 5615, *ante*.

5666. Certain acceleration of infant's interest—Possible prejudice through petitioner's exercise of power.]—Upon a petition to vary two post-nuptial settlements after decree absolute for divorce, it appeared that the whole property was in land, & that, if resp.'s interests were extinguished, petitioner would, by virtue of a clause in one of the settlements, have power to call upon the trustees to raise forthwith a sum which, at the present time, would exceed the sale value of the whole of the settled property, & which would therefore, if exercised by petitioner, absolutely blot out all interests of the infant child of the parties under the settlements. The registrar notwithstanding this, recommended that resp.'s interests should be extinguished as if he were dead:—*Held:* inasmuch as the child's interest was accelerated by the extinguishment of resp.'s interests, the child was thereby obtaining a certain gain, against an uncertain loss if petitioner should now exercise the power conferred upon her by the settlement. Report of the registrar confirmed.—CREAGH *v.* CREAGH (1896), 74 L. T. 430.

(c) *Variation, Postponement and Extinction of Powers of Appointment.*

5667. Power of appointment over fund—By consent—Refusal of court to carry out.]—The ct. refused to carry out alterations, in a settlement, agreed upon between the parties, whose marriage had been dissolved, so as to extinguish the power of appointment given to resp. by the settlement, or to affect the appointment of new trustees.—DAVIES *v.* DAVIES & M'CARTHY (1868), 37 L. J. P. & M. 17.

Annotations:—**Consd.** Oppenheim *v.* Oppenheim (1884), 9 P. D. 60; Bosvile *v.* Bosvile & Craven (1888), 58 L. T. 640.

5668. —— Continuance of part of settled income to respondent.]—(1) In a petition for variation of settlements after a decree of dissolution on account of the wife's adultery, the registrar by his report recommended that the power of appointment over the fund given to the wife by the settlement should be extinguished, & that she should be deprived of the power of appointing or joining in the appointment of new trustees. Petitioner had signified his willingness that resp. should continue to receive £100 a year out of £150 settled on her. The ct. confirmed the first of these recommendations, but disallowed the second, on the ground that as resp. was to continue to receive an income from the fund she had an interest in the appointment of trustees.

(2) An order extinguishing the power of appointment of funds in the settlement, is an order made, within the words of Matrimonial Causes Act, 1859 (c. 61), s. 5, "with reference to the application of the whole or a portion of the property settled."—BOSVILE *v.* BOSVILE & CRAVEN (1888), 13 P. D. 76; 57 L. J. P. 62; 58 L. T. 640; 36 W. R. 912.

Annotation:—*As to* (1) **Apld.** Tupper *v.* Tupper & Terrell (1890), 62 L. T. 665.

5669. —— Power of appointment in favour of children or remoter issue.]—TUPPER *v.* TUPPER & TERRELL, No. 5663, *ante*.

5670. —— ——.]—BEAUCHAMP *v.* BEAUCHAMP & WATT (1904), 20 T. L. R. 273, C. A.

5671. —— To leave issue as if default in appointment—Until petitioner's death or remarriage.]—NEVILL *v.* NEVILL, No. 5655, *ante*.

5672. —— Power in favour of husband—Presumption of future exercise of power.]—HARTOPP *v.* HARTOPP & AKHURST, No. 5650, *ante*.

5673. —— Power in favour of husband & issue of second marriage—Husband's petition—Interests of second husband postponed to those of issue of first marriage.]—Under a post-nuptial settlement a power was given to the wife, resp. in the suit, to appoint a life interest in the real & personal estate comprised in the settlement in favour of any future husband. There was one child, issue of the marriage, which was dissolved by reason of the wife's adultery:—*Held:* the ct. had power under Matrimonial Causes Act, 1859 (c. 61), s. 5, to deal with the power of appointment possessed by the wife, & to postpone the interests of the second husband to those of the child of the first marriage under the settlement.—EVERED *v.* EVERED & GRAHAM (1874), 43 L. J. P. & M. 86; 31 L. T. 101; 22 W. R. 845.

5674. —— —— —— Exercise postponed until death of petitioner.]—A marriage had been dissolved at the suit of the husband. By the marriage settlements the wife had certain interests in her husband's property, & had also power to appoint a portion of her own property for the benefit of any husband she might marry after the death of her late husband, & for the children of that marriage. She & her husband had at present about £400 a year each, but she was entitled to reversionary property of great value, & was liable to pay the costs of the suit:—*Held:* (1) half of the wife's present & reversionary income must be given to the husband for himself & the two children of the marriage; (2) her interest in her husband's property must be extinguished; (3) her

Sect. 22.—Proceedings after decree: Sub-sect. 5, D. (c), (d) & (e).]

powers of appointment in favour of a future husband & children must not take effect until after the death of her late husband; (4) in varying the settlements the ct. must not take into consideration in her favour that she has to pay the costs of the suit.—NOEL *v.* NOEL (1885), 10 P. D. 179; 54 L. J. P. 73; 33 W. R. 552.

Annotations:—As to (1) **Apprvd.** Savary *v.* Savary (1898), 79 L. T. 607. **Distd.** Constantinidi *v.* Constantinidi, [1905] P 253. **Consd.** Lorriman *v.* Lorriman & Clair, [1908] P. 282. *As to* (3) **Consd.** Nevill *v.* Nevill (1893), 69 L. T. 463. **Folld.** Branton Day *v.* Branton Day & Erskine (1898), 78 L. T. 358. **Consd.** Hartopp *v.* Hartopp & Akhurst, [1899] P. 65. *Generally*, **Refd.** Bosvile *v.* Bosvile & Craven (1888), 58 L. T. 640; Meredyth *v.* Meredyth, [1895] P. 92; Walpole *v.* Walpole & Goddard, [1901] P. 196; La Terriere *v.* La Terriere & Grey (1920), 124 L. T. 575.

5675. -.]—(1) Where under a marriage settlement a wife has power to resettle settled property in the event of surviving her husband & marrying again, &, having been divorced, has married co-resp. during her husband's lifetime, the ct. may make an order preventing any resettlement on any husband married, or children born, during the husband's lifetime.

(2) The ct. will not make payment to a father, for maintenance of a child, conditional on the latter residing with the father & being under his control, on the ground that after sixteen the child may wish to reside with the divorced wife.

(3) Payment to a child of an annual sum after attaining majority to which he is not entitled under the settlement, will not be refused on the ground that he may receive larger benefits from the wife.—BRANTON DAY *v.* BRANTON DAY & ERSKINE (1898), 78 L. T. 358.

5676. —— —— —— ——.]—BEAUCHAMP *v.* BEAUCHAMP & WATT (1904), 20 T. L. R. 273, C. A.

5677. —— —— —— ——.]—WILLIAMS *v.* WILLIAMS & KILBURN, No. 5587, *ante*.

5678. —— —— Wife's petition—Whether exercise postponed until death of respondent.]—A marriage was dissolved on the wife's petition. There had been a settlement of property practically the whole of which came from the wife. The settlement contained a provision that after the husband's death, if the wife married again she could appoint half the income to the second husband for life, & appoint half the capital among the children of the second marriage:—*Held:* the proper settlement to be made should extinguish the husband's beneficial interest & powers of consent, etc., as if he were dead, but should not accelerate the wife's power to resettle, which should only be exercised on the death of the first husband.—POLLARD *v.* POLLARD, [1894] P. 172; 63 L. J. P. 104; 70 L. T. 815; 6 R. 594.

Annotations:—**Consd.** Hartopp *v.* Hartopp & Akhurst, [1899] P. 65; Whitton *v.* Whitton, [1901] P. 348. **Refd.** Blood *v.* Blood, [1902] P. 190; Hodgson Roberts *v.* Hodgson Roberts & Whitaker, [1906] P. 142.

5679. -.]—WHITTON *v.* WHITTON, No. 5600, *ante*.

5680. —— —— —— -.]—HODGSON ROBERTS *v.* HODGSON ROBERTS & WHITAKER, No. 5653, *ante*.

—— Jurisdiction of court.]—*See* Nos. 5584, 5587, 5673, 5675, *ante*.

5681. Power of appointment of trustees—Extinction of respondent's power—By consent—Refusal of court to carry out.]—DAVIES *v.* DAVIES & M'CARTHY, No. 5667, *ante*.

5682. —— —— Not where interest in fund retained by respondent.]—BOSVILE *v.* BOSVILE & CRAVEN, No. 5668, *ante*.

5683. -.]—TUPPER *v.* TUPPER & TERRELL, No. 5663, *ante*.

5684. —— Variation of powers—By consent of parties.]—The functions of the ct. in varying the provisions of a marriage settlement are not to punish the guilty party, but to prevent, as far as it may think just & practicable, the innocent party being damaged, in a pecuniary sense, by the decree of dissolution. It will not deprive the father of the power of exercising parental judgment & discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother. Both parties desiring it, the ct. made an order varying the provisions of the settlement as to the appointment of new trustees.—MAUDSLAY *v.* MAUDSLAY (1877), 2 P. D. 256; 47 L. J. P. 26; 38 L. T. 323.

Annotations:—**Consd.** Oppenheim *v.* Oppenheim (1884), 9 P. D. 60; Bosvile *v.* Bosvile & Craven (1888), 58 L. T. 640. **Refd.** Bishop *v.* Bishop, Judkins *v.* Judkins (1897), 76 L. T. 409.

—— Jurisdiction of court.]—*See* Nos. 5589, 5590, *ante*.

(d) Reconveyance to Parties of Settled Property.

5685. Whether ordered—Child born—Between decree nisi & absolute—Fourteen months after separation—Dissolution on husband's petition.]—On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree *nisi* & decree absolute, & fourteen months after the wife had eloped from her husband, the ct. refused to transfer funds in settlement to the parties free from the trusts of the settlement, & also refused to order an inquiry into the legitimacy of the child.—PRYOR *v.* PRYOR & SHELFORD (1887), 12 P. D. 165; 56 L. J. P. 77; 57 L. T. 533; 35 W. R. 349.

Annotations:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274. **Refd.** Douglas *v.* Douglas & Trevor (1897), 78 L. T. 88; Russell *v.* Russell, [1924] A. C. 687.

5686. —— No issue of marriage.]—Where under a marriage settlement there is a limitation of the wife's settled property in the event of failure of issue upon such trusts as she should by will or codicil appoint, & in default of appointment to her absolutely if she survive the husband, but if she die in his lifetime upon trust for her next of kin, the ct. may, if she obtain a decree *nisi* without issue born, order the settled property to be reconveyed to her freed from the trusts of the settlement.—WYNNE *v.* WYNNE (1898), 78 L. T. 796.

Annotation:—**Distd.** Walpole *v.* Walpole & Goddard, [1901] P. 196.

5687. —— —— No property brought in by respondent.]—MEREDYTH *v.* MEREDYTH & LEIGH, No. 5603, *ante*

5688. —— —— Settlement containing limitations in favour of petitioner's next of kin.]—By a settlement on his marriage with resp. petitioner settled certain property upon trust to pay the income to himself until he should alienate, or attempt to alienate, his interest therein, or until some event should occur whereby the income should become payable to some one other than himself, or until his death, whichever should first happen. The second interest was given to resp. for her life or widowhood, &, there being no children of the marriage, there was an ultimate trust in favour of the next of kin of petitioner, but this ultimate trust was only to take effect after the death of resp. if she should have married again & again become a widow. In 1899 petitioner gave a certain undertaking in the Ch. Div. to the effect that he would apply forthwith to vary the settlement so as to vest the remainder of the

settled property in himself absolutely, & that he would in any event give a charge over all his interests under the settlement. After the decree absolute petitioner contracted a second marriage, & at the present time, were he to die, the persons entitled to share in his estate under the Statute of Distributions would be the second wife, the mother, & a nephew & niece of petitioner, the last two being also beneficially interested in the mtge. of his interest in the settled property. Upon motion to confirm the registrar's report upon the petition to vary the settlement & to order the reconveyance of the settled property to petitioner absolutely:—*Held:* this would be going too far, & the right order to make was simply to extinguish resp.'s interests in the settlement, so that subject to the engagement given by petitioner in the Ch. Div., petitioner's resulting life interest in the settled property would become operative.—WALPOLE *v.* WALPOLE & GODDARD, [1901] P. 196; 70 L. J. P. 49; 84 L. T. 727.

5689. —— Whole fund settled by petitioner—Agreed terms not by division of income.]—By a post-nuptial settlement a husband assigned certain property to trustees on trusts to pay him the income during his life, or until he had incurred a forfeiture, & on a determination of his interest, to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage. The husband became bkpt., & by a compromise sanctioned by the Chancery Div. a portion of the fund was assigned to his trustee in bkpcy., & his interest in the remainder was assigned to the trustees of the settlement. Subsequently the marriage was dissolved on account of the wife's adultery, & on a petition for variation of settlements the registrar proposed that the trusts of the settlement should be extinguished, & that seven-twelfths of the fund should be paid to the husband, & five-twelfths to the wife. Both parties agreed to this, but the trustees of the settlement objected, & the ct. refused to sanction a division of the fund, but ordered that the income of five-twelfths of it should be paid to the wife, & that in all other respects the trusts of the settlement should remain in force.—SMITH *v.* SMITH & GRAVES (1887), 12 P. D. 102; 56 L. J. P. 51; 57 L. T. 375; 35 W. R. 459.

5690. —— Settlement on innocent wife with restraint—Remarriage of wife.]—On their marriage both husband & wife brought property into settlement. The wife's property was settled on her for life, with a restraint on anticipation. The wife obtained a decree dissolving the marriage, & remarried. She then presented a petition for variation of the marriage settlement. The registrar recommended that the property brought into settlement by husband & wife should be given back to them freed from all trusts:—*Held:* the report ought to be confirmed, & the restraint on anticipation did not, even after petitioner's remarriage, affect the power of the ct. to make the suggested variation.—MERTON *v.* MERTON (1900), 83 L. T. 223.

Annotation:—**Apld.** Morgan *v.* Morgan & Kirby, [1923] P. 1.

5691. By consent of only living persons interested—Though interests of persons unborn adversely affected.]—Where the only living persons who could be interested under the terms of a marriage settlement consented, the ct. upon the petition of the innocent settlor whose marriage had been dissolved, & notwithstanding that the interests of unborn persons might be adversely affected, ordered the trustees to reconvey to petitioner the whole of the settled property.—MORRISSEY *v.* MORRISSEY, [1905] P. 90; 74 L. J. P. 11; 92 L. T. 476.

Annotation:—**Refd.** Churchward *v.* Churchward, [1910] P. 195.

—— **On decree of nullity.**]—*See* Sub-sect. 5, D. (*g*), *post.*

Jurisdiction of court over capital generally.]—*See* No. 5579, *ante.*

(*e*) *Application of Settled Property for Benefit of Children.*

5692. Application of part of income for children—Interest of guilty husband in wife's property.]—BOYNTON *v.* BOYNTON, No. 4782, *ante.*

5693. —— Income of guilty wife.]—(1) The ct. will require full information of the husband's means when asked to vary the interest of the wife in her moneys in settlement in favour of the child.

(2) Where the marriage had been dissolved by reason of the wife's adultery, & she was entitled to a life interest in a sum of about £2,900 Consols, her own moneys in settlement, & the husband had scarce any income, the ct. ordered the trustees of the settlement to pay £20 *per annum* out of the life income of resp. to the paternal grandfather of the only child of the marriage, a daughter, for her use & benefit.—WEBSTER *v.* WEBSTER & MITFORD (1862), 3 Sw. & Tr. 106; 1 New Rep. 109; 32 L. J. P. M. & A. 29; 7 L. T. 646; 9 Jur. N. S. 182; 11 W. R. 86; 164 E. R. 1212.

5694. —— —— Not conditional on delivery-up by husband of wife's jewels.]—THOMAS *v.* THOMAS & VIGNE, No. 5592, *ante.*

5695. —— ——.]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante.*

5696. —— —— Annuity provided by husband.]—CALLWELL *v.* CALLWELL & KENNEDY, No. 4746, *ante.*

5697. —— —— ——.]—The fact that, by reason of dissolution of a marriage in consequence of a wife's misconduct, an annuity provided by the husband will not be payable to the wife, & will be lost to the family is a detriment to the children, & a ground for compensating them out of the wife's property brought into settlement.—NEWALL *v.* NEWALL & PLATT (1898), 78 L. T. 203.

5698. Application of whole income for children—On respondent surviving petitioner.]—By a marriage settlement property was settled upon the husband for life, then upon the wife for life, then upon the children of the marriage. The marriage having been dissolved on the ground of the adultery of the wife, who continued to cohabit with co-resp., the ct., under sect. 5 of Matrimonial Causes Act, 1859 (c. 61), ordered that after the death of petitioner the settled property should, in the event of resp. surviving petitioner, be applied to the benefit of the children of the marriage as if resp. were dead.—PEARCE *v.* PEARCE & FRENCH (1861), 30 L. J. P. M. & A. 182.

5699. —— Whole property brought in by guilty wife.]—On the marriage of the parties, which marriage was subsequently dissolved by reason of the adultery of the wife, the father of resp. settled property, in the first place, for the benefit of his daughter for life, & then for the benefit of her husband, & on the death of the survivor of them, for the benefit of their children. No property was settled on behalf of petitioner. The ct. varied the settlement by ordering the whole income of the settled property to be applied during the joint lives of petitioner & resp. for the benefit of their children. The ct. has no authority to alter the destination of dividends due & payable

Sect. 22.—*Proceedings after decree: Sub-sect.* 5, *D.* , (*g*),

before the date of its order.—PAUL *v.* PAUL & FARQUHAR (1870), L. R. 2 P. & D. 93; *sub nom.* ST. PAUL *v.* ST. PAUL & FARQUHAR, 39 L. J. P. & M. 50; 23 L. T. 196; 18 W. R. 1007.
Annotation:—**Refd.** Nevill *v.* Nevill (1893), 69 L. T. 463.

5700. —— Annuity payable after death of petitioner—Right of respondent surviving children preserved.]—The ct. has no power to vary marriage settlements under Matrimonial Causes Act, 1859 (c. 61), s. 5, unless it be for the benefit of the children of the marriage or of their parents. A petitioner's father having covenanted to pay resp., after petitioner's death, an annuity of £100 during the joint lives of himself & resp., an order was made that after petitioner's death the annuity should be applied for the benefit of the only child of the marriage; but the ct. held that it had no power to deprive resp. of the annuity in the event of her surviving the child.—SYKES *v.* SYKES & SMITH (1870), L. R. 2 P. & D. 163; 39 L. J. P. & M. 52; 23 L. T. 239; 18 W. R. 984.
Annotation:—**Refd.** Thomson *v.* Thomson, [1896] P. 263.

5701. Application for benefit of children & parent—Included in same order.]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante*.

5702. Children's interests secured—By guilty wife.]—BEAUCHAMP *v.* BEAUCHAMP & WATT 1904), 20 T. L. R. 273, C. A.

5703. Evidence required—Of husband's means.]—WEBSTER *v.* WEBSTER & MITFORD, No. 5693, *ante*.

(*f*) *Variation of Separation Deeds.*

See Part XI., Sect. 9, *ante*.

(*g*) *In Nullity Suits.*

5704. Reconveyance of property to parties.]—A marriage having been annulled, the ct. ordered all the property of the alleged wife to be reconveyed to her freed from the trusts of the settlement upon the alleged marriage.—A. *v.* M. (1884), 10 P. D. 178; 54 L. J. P. 31; *sub nom.* ADDINGTON (FALSELY CALLED MELLOR) *v.* MELLOR, 33 W. R. 232.
Annotations:— **Folld.** Leeds *v.* Leeds (1886), 57 L. T. 373. **Consd.** *Re* Garnett, Richardson *v.* Greenep (1905), 74 L. J. Ch. 570. **Refd.** Smith *v.* Smith & Graves (1887), 57 L. T. 375; Dormer *v.* Ward, [1901] P. 20; Churchward *v.* Churchward, [1910] P. 195.

5705. ——.]—After a decree, declaring a marriage null, the ct., upon a petition for variation of settlements, made an order that the property brought into settlement should be reconveyed to the parties, in the proportion in which they had respectively contributed to the settled fund, & freed from all the trusts of the settlement.—LEEDS *v.* LEEDS (1886), 57 L. T. 373.
Annotation:— **Refd.** Smith *v.* Smith & Graves (1887), 57 L. T. 375.

5706. —— Subject to deduction—Costs of petitioner & trustees.]—Without deciding whether an ante-nuptial settlement came to an end upon a decree absolute for nullity of the marriage being pronounced, the ct., being of opinion that all points affecting the settlement should be dealt with finally & forthwith, ordered that the interest of resp., husband, in the fund settled on behalf of petitioner, wife, should be extinguished, & that the fund settled by resp. should, subject to payment thereout by the trustees of their costs & the costs of petitioner, be handed over to resp.—ATTWOOD (OTHERWISE POMEROY) *v.* ATTWOOD, [1903] P. 7; 71 L. J. P. 129; 87 L. T. 750; 18 T. L. R. 833.
Annotations:—**Consd.** *Re* Garnett, Richardson *v.* Greenep (1905), 74 L. J. Ch. 570. **Refd.** *Re* Wombwell's Settlmt., Clerke *v.* Menzies (1922), 127 L. T. 295.

5707. ——.]—On an application by a wife who had obtained a decree of nullity, the ct. ordered, under Married Women's Property Act, 1882 (c. 75), s. 17, the restoration to her of a sum of money standing in the joint names of herself & her husband, both being members of the Jewish faith, which on the occasion of the marriage had been provided by the relations of the wife by way of so-called dower, being in fact a provision of separate estate for the wife.—JOSEPH (OTHERWISE KING) *v.* JOSEPH, [1909] P. 217; 78 L. J. P. 51; 100 L. T. 864; 25 T. L. R. 439; 53 Sol. Jo. 400; *previous proceedings, sub nom.* J. (OTHERWISE K.) *v.* J. (1908), 24 T. L. R. 622.

5708. ——.]—The ct. on the application of resp., the wife, in a nullity suit, made an order varying an ante-nuptial settlement, by directing a transfer of the trust funds to her free from the trust.—S. *v.* S. (OTHERWISE H.) (1910), 26 T. L. R. 595.

5709. Wife's settled fund—Decree on husband's petition—Annuity to husband for life ordered.]—E. *v.* E. (OTHERWISE T.) (1903), No. 2376, *ante*.

(*h*) *Dum sola and dum sola et casta Clauses.*

5710. Dum sola clause—Decree of nullity on wife's petition.]—(1) By indenture of settlement dated June 8, 1891, & made between resp., petitioner, & trustees, resp., in consideration of the marriage then intended between himself & petitioner, transferred to the trustees certain stocks, shares, & securities upon trust, *inter alia*, to pay the income arising therefrom to himself for life, then to petitioner, if she should survive him, for her life, whether *covert* or *discovert*, without power of anticipation, & if there should be no child of the intended marriage who should attain a vested interest, then in trust for resp. absolutely. The marriage having been annulled at the instance of the wife, she presented a petition to vary the settlement. The income of the wife, as found by the registrar, was £197, & that of the husband £674 *per annum*. The ct. ordered that the matter be referred to one of the conveyancing counsel of the ct. to prepare a deed to provide for the placing in the hands of trustees, to be appointed, a sum, which resp. was by this order directed to provide, sufficient to produce £100 *per annum*; that this income be paid to resp.; & that he be ordered to pay £100 a year to petitioner for her life *dum sola vixerit*.

(2) The proper proceeding to obtain an allowance to a wife obtaining a decree of nullity on the ground of her husband's incapacity is not by way of an order for variation of settlement, the settlement itself being avoided by the decree, but by an application for an allowance under Matrimonial Causes Act, 1907 (c. 12).

(3) *Semble*: the contingency of the means of a petitioner increasing after the order, & a consequent reservation of liberty to resp. to apply for a reduction in that event, is *casus omissus* in the Act.—SHARPE (OTHERWISE MORGAN) *v.* SHARPE, [1909] P. 20; 78 L. J. P. 21; 99 L. T. 884; 25 T. L. R. 131.
Annotation:—*As to* (1) **Refd.** Hall *v.* Hall, [1915] P. 105.

PART XIII. SECT. 22, SUB-SECT. 5.—D. (g).

5704 i. *Reconveyance of property to parties.*]—P. *v.* P., [1916] 2 I. R. 400.—**IR.**

5711. Dum sola et casta clause—Discretion of court.]—There is nothing in an agreement, even assuming it to be a valid one, between a husband & wife that in proceedings by the husband for dissolution of their marriage their marriage settlement shall in no circumstances be so varied as to deprive the wife of a certain portion of the income of the settled property that will have the effect of fettering the judicial discretion of the ct. as to the insertion of the *dum sola et casta vixerit* clause in an order made for the dissolution of the marriage. —WOODCOCK *v.* WOODCOCK & CODESIDO (1914), 111 L. T. 924, C. A.

5712. —— Dissolution of marriage—On husband's petition.]—OLLIER *v.* OLLIER, No. 5396, *ante*.

5713. —— —— —— Variation of separation deed.]—The husband & wife were married in 1884, & separated in 1889 under a deed, by which the husband paid his wife £200 a year without any *dum casta* clause. He afterwards found that she was living with co-resp. under petitioner's name. He thereupon petitioned to have the marriage dissolved, & a decree *nisi* was pronounced, which was in due course made absolute. Upon petition to vary the post-nuptial deed:—*Held:* the allowance to resp. should be reduced to £100 *per annum*, & this should be payable to resp. only *dum sola et casta vixerit*.—SAUNDERS *v.* SAUNDERS & BECK (1893), 69 L. T. 498.

5714. —— —— On wife's petition—Husband's interest in wife's fund extinguished.]—GLADSTONE *v.* GLADSTONE, No. 5422, *ante*.

5715. —— Agreement between parties—Wife not to be deprived of part of income.]—WOODCOCK *v.* WOODCOCK & CODESIDO, No. 5711, *ante*.

(*i*) *As to Heirlooms.*

5716. Heirlooms settled by respondent—Settled on petitioner for life remainder to issue.]—BEAUCHAMP *v.* BEAUCHAMP & WATT (1904), 20 T. L. R. 273, C. A.

(*j*) *Extinction of Contingent Interests.*

5717. In absence of one of several—Contingency remote.]—Where there were five beneficiaries who might become entitled in a remote contingency to share in the settled fund, four of them consented to an order upon the trustees to repay the corpus of the fund to petitioner, but the fifth was somewhere in the interior of Africa, & could not be communicated with; the ct. made the order, extinguishing the interests of all five; &, as it further appeared that one of the trustees of the settlements had left this country, & his whereabouts could not be ascertained, the costs of the two trustees who had appeared upon these proceedings were allowed out of the settled fund, in his absence, as if he had joined with them.—STORER *v.* STORER (1894), 71 L. T. 704; 6 R. 653; *subsequent proceedings*, 11 R. 618.

5718. Interests of persons unborn.]—MORRISSEY *v.* MORRISSEY, No. 5691, *ante*.

(*k*) *Payment of Costs out of Settled Funds.*

See Sub-sect. 5, G. (*g*), *post*.

E. Amount Ordered to be Settled.

5719. Amount of charges on income.]—(1) In determining the settlement to be made out of the income of a person who is ordered to make a settlement under the Divorce Act, 1857 (c. 85), it must be ascertained what the person ordered to settle receives after keeping down all charges on the income.

(2) In ordering a settlement to be made under sect. 45 of the Act, the ct. has jurisdiction to take into account any property to which a guilty wife is entitled in reversion, & it is proper so to do.

(3) Although, in principle, it is not desirable to make a child, even of a wife who has misconducted herself, independent of his parent, by ordering his allowance for maintenance & education, under Matrimonial Courses Act, 1857 (c. 35), s. 45, to continue after he has attained his majority, yet, under special circumstances, it is proper that the provision should not be made to cease on the happening of that event.—SAVARY *v.* SAVARY (1898), 79 L. T. 607; 43 Sol. Jo. 170, C. A.

5720. Where wife guilty—General rule—Scale to which husband has accommodated mode of life—Although co-respondent obtains advantage through his adultery.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5641, *ante*.

5721. —— Wife's fund exceeding husband's fund—Provision for child.]—BENYON *v.* BENYON & O'CALLAGHAN, No. 5643, *ante*.

5722. —— —— No issue.]—FARRINGTON *v.* FARRINGTON & SCHOOLES, No. 5764, *post*.

5723. —— No property brought in by wife.]—SMITH *v.* SMITH & GRAVES, No. 5689, *ante*.

5724. Where husband guilty—Bulk of unsettled property squandered by husband.]—Where a resp., husband, had recently squandered the bulk of the property over which he had free control, the ct. awarded to petitioner more than one-third of the income from the property which had been brought into settlement by resp. upon the marriage, & further ordered that, after resp.'s death, the award should be increased to more than one-half of that income, but limited *dum sola vixerit*.—BASHALL *v.* BASHALL (1897), 76 L. T. 165.

5725. —— Expenses of joint establishment borne by wife.]—WOOTTON—ISAACSON *v.* WOOTTON-ISAACSON, No. 5742, *post*.

5726. Effect of separation deed—Whether parties precluded from asking for larger allowance.]—BENYON *v.* BENYON & O'CALLAGHAN, No. 5613, *ante*.

F. Review of Orders.

5727. Power of court—"In special circumstances."]—GLADSTONE *v.* GLADSTONE, No. 5422, *ante*.

5728. ——.]—The power given to the ct. by Matrimonial Causes Act, 1859 (c. 61), s. 5, of varying settlements after a final decree for dissolution of marriage is a power to be exercised once for all, & an order made under it is not liable to be varied on the ground of a change of circumstances since the date of the order.—BENYON *v.* BENYON (1890), 15 P. D. 54; 59 L. J. P. 39; 62 L. T. 381, C. A.

Annotations:—**Consd.** Arkwright *v.* Arkwright (1895), 73 L. T. 287. **Refd.** Allcard *v.* Walker (1896), 65 L. J. Ch. 660.

5729. —— Mistake.]—The ct., upon the application of the testamentary guardians of an infant child of the marriage of petitioner & resp., directed, after various references to the registrar, that an order made in 1886, upon the consent of petitioner, resp., & trustees of the marriage settlement, be amended by extinguishing resp.'s interest in a portion of the settled funds; & further directed that the costs of all parties be paid out of the said portion of the trust funds or the income thereof.

There is jurisdiction in this ct., where it is clear that there has been a mistake—a common mistake—of all parties in drawing up & making an order, to reconsider the matter (JEUNE, P.).—

Sect. 22.—Proceedings after decree: Sub-sect. 5, F.

ARKWRIGHT *v.* ARKWRIGHT (1895), 73 L. T. 287.

5730. —— —— Failure of order to carry out intention of court—Opportunity to parties to have matter reheard.]—After the decree dissolving the marriage of the parties had been made absolute, the ct. made an order under Matrimonial Causes Act, 1859 (c. 61), s. 5, varying the marriage settlements of the parties for the benefit of petitioner & his children. *Per incuriam* the terms of the order did not precisely carry out the intentions of the ct. The ct. held that, following the practice of the Ct. of Ch., it was competent to it to amend the order without making an entirely new order, but giving the parties an opportunity of having the matter re-heard if they desired.—CAVENDISH *v.* CAVENDISH & ROCHEFOUCAULD (1868), 38 L. J. P. & M. 13; 19 L. T. 497; 17 W. R. 263.

Annotation:—**Refd.** Arkwright *v.* Arkwright (1895), 73 L. T. 287.

5731. —— Rectification of deed under order—To comply with original direction—Removal of one of parties from jurisdiction.]—The ct. has power to order the rectification of a deed of settlement to comply with its original direction, although one of the parties by remarriage has in the meantime become domiciled without the jurisdiction.—REES *v.* REES & ROBERTSON (1908), 52 Sol. Jo. 445.

5732. What court will consider—Circumstances occurring after order.]—GLADSTONE *v.* GLADSTONE, No. 5422, *ante*.

5733. —— ——.]—BENYON *v.* BENYON, No. 5728, *ante*.

5734. —— Mistake.]—ARKWRIGHT *v.* ARKWRIGHT, No. 5729, *ante*.

5735. —— —— Order varied on terms. By a post-nuptial settlement, executed in 1877, & acknowledged by the wife under Fines & Recoveries Act, 1833 (c. 74), property of the wife was settled upon trusts for the benefit of the husband & wife & the issue of the marriage; & the husband & wife covenanted for the settlement of the wife's after acquired property. In Nov. 1893, the marriage was dissolved on the ground of the adultery of the wife. In Dec. 1893, the husband presented a petition for variation of the settlement, setting out the funds subject to the trusts thereof; & the wife by her answer admitted the same to be correct. On Apr. 24, 1894, a consent order was made on the petition varying the settlement by directing payment of certain annual sums to the husband & the only child of the marriage. The wife, having married co-resp., brought an action for a declaration that certain property which upon the petition for variation had been assumed by all parties to be bound by the settlement was not so bound. The ct. being of opinion that the property in question was not included in the settlement & that the terms of the order for variation had been agreed to by the parties under a common mistake, granted relief to pltf. but upon the terms that any application to the Divorce Ct. under Matrimonial Causes Act, 1857 (c. 85), s. 45, for a further settlement upon the husband & child of the marriage should be dealt with in all respects as if it had been made before Apr. 24, 1894, & was being considered by the ct. on that day.—ALLCARD *v.* WALKER, [1896] 2 Ch. 369; 65 L. J. Ch. 660; *sub nom.* ALLCARD *v.* WALKER, *Re* LUCAS, WALKER *v.* LUPTON, 74 L. T. 487; 44 W. R. 661; 40 Sol. Jo. 499.

Annotations:—**Mentd.** Tremayne *v.* Rashleigh, [1908] 1 Ch. 681; Carnell *v.* Harrison, [1916] 1 Ch. 328.

G. Practice and Procedure.

(a) The Application.

See Matrimonial Causes Rules, 1924, rr. 71, 72.

5736. How made—By separate petition—Though variation prayed in original petition.]—Where it is desired to obtain an order varying the marriage settlement, the petition for dissolution of marriage should contain a prayer respecting such settlement; & before the decree is made absolute, a separate petition, setting out the settlement, should be filed, & served on resp., with eight days' notice for appearance.—GIBBINGS *v.* GIBBINGS (1864), 10 Jur. N. S. 1037.

5737. Signature—Whether by petitioner's solicitor—Petitioner abroad.]—A petition for variation of settlements must usually be signed by petitioner, but the ct. will, under special circumstances, allow his solr. to sign it on his behalf.—ROSS *v.* ROSS (1882), 7 P. D. 20; 51 L. J. P. 22; 30 W. R. 384.

5738. Who may apply—After death of petitioner—Guardian of children.]—The ct. will make an order [after a final decree of dissolution of marriage] varying the trusts of a marriage settlement on the petition of the guardian of the children of the marriage after the death of petitioner.—LING *v.* LING & CROKER (1865), 4 Sw. & Tr. 99; 34 L. J. P. M. & A. 52; 13 L. T. 251; 164 E. R. 1453.

Annotations:—**Expld.** Stanhope *v.* Stanhope (1886), 11 P. D. 103. **Distd.** Thomson *v.* Thomson & Rodschinka, [1896] P. 263.

5739. —— —— ——.]—Petitioner, the husband, died after a decree absolute had been made to dissolve his marriage with resp. He executed a will by which he excluded some of his children from participation in certain property over which he had a power of appointment under his marriage settlement, but thereby he secured to them a reasonable maintenance out of his general estate. The ct. whilst it extinguished the resp.'s life interest in her husband's property, refused to compel her, out of her separate income & estate, which was not large, to increase the portions of such children, in order to place them more nearly on an equality with the other children. An exor. of a deceased petitioner cannot, as such, petition for an alteration of the settlements. The guardian of the minor children is the proper person to do so.—SMITHE *v.* SMITHE & ROUPELL (1868), L. R. 1 P. & D. 587.

Annotation:—**Distd.** Thomson *v.* Thomson & Rodschinka, [1896] P. 263.

5740. —— —— Personal representatives of petitioner.]—SMITHE *v.* SMITHE & ROUPELL, No. 5739, *ante*.

5741. —— —— ——.]—THOMSON *v.* THOMSON & RODSCHINKA, No. 5596, *ante*.

5742. —— Respondent—In dissolution suit.]—(1) *Semble:* the ct. has power to entertain a petition for variation of settlements at the instance of the party through whose misconduct the marriage has been dissolved.

(2) If a wife is in receipt of an allowance derived from funds settled by the husband, & if out of that allowance she keeps up their joint establishment, the husband is not entitled to a reduction of the wife's allowance after she has obtained a divorce by reason of his cruelty & adultery.—WOOTTON-ISAACSON *v.* WOOTTON-ISAACSON, [1902] P. 146; 71 L. J. P. 80; 87 L. T. 147; 18 T. L. R. 581.

5743. —— —— In nullity suit—By consent of petitioner in suit.]—The ct. made an order for variation of the marriage settlement at the instance of resp. in a nullity suit, petitioner in the suit being stated to be a consenting party to the order.—SUART *v.* SUART (OTHERWISE HODGSON), [1910] P. 246; 79 L. J. P. 86; 54 Sol. Jo. 636.

5744. Time for making—After decree nisi—Death of petitioner before decree made absolute.]—GRANT *v.* GRANT & BOWLES & PATTISON, No. 4565, *ante*.

5745. —— Six months after decree absolute.]—BENYON *v.* BENYON & O'CALLAGHAN, No. 5643, *ante*.

5746. —— Five years after decree.]—MARSH *v.* MARSH, No. 5627, *ante*.

5747. —— Nineteen years after decree—Jurisdiction of registrar.]—Where a successful petitioner in a divorce suit has, after a long lapse of time [nineteen years], obtained leave to present a petition to vary the terms of the marriage settlement, it is the duty of the registrar, notwithstanding the lapse of time, to hear & report upon the petition in accordance with Divorce Rules, r. 101. —NICOLAS *v.* NICOLAS & GRAHAM (1919), 89 L. J. P. 95, C. A.

Annontations :—**Consd.** Fyffe *v.* Fyffe, [1920] P. 310. **Refd.** Scott *v.* Scott, [1921] P. 107.

5748. Affidavit in support—Verifying terms of settlement.]—(1) On an application for an order as to settled property, the settlement should be brought before the ct. upon affidavit, & the ct. upon consideration of the facts proved at the trial will decide as to the order to be made.

(2) Resp. who is served with a copy of a petition for dissolution of marriage, praying also for an order as to the settled property, if he does not appear, is not entitled to notice of the application. —HORNE *v.* HORNE (1861), 30 L. J. P. M. & A. 200.

(*b*) *Service of Petition.*

See Matrimonial Causes Rules, 1924, r. 71.

5749. Dispensation with service—Respondent & surviving trustee uncertificated bankrupts.]—**Notice to official receiver.**]—The ct. dispensed with service of a petition to vary a marriage settlement in a case where resps. & the surviving trustee of the settlement were both uncertificated bkpts. & where notice of the application to dispense with service had been given to the Chief Official Receiver in bkpcy.—SNELLING *v.* SNELLING (1890), 63 L. T. 263.

5750. —— —— ——.]—The ct. dispensed with service of a petition to vary a settlement, made on a marriage now dissolved, in a case where resp. & one of the trustees were uncertificated bkpts. & the address of the trustee was not known, & where notice of the motion to dispense with service had been given to the chief official receiver in bkpcy.—GORDON *v.* GORDON, [1905] P. 96; 74 L. J. P. 39; 92 L. T. 176.

5751. —— On trustee abroad—Service on co-trustee—No beneficial interest.]—The ct., while refusing to allow substituted service of a petition for variation of settlements upon a trustee resident in Australia, dispensed with service upon him, it appearing that his co-trustee in England had been duly served, & that neither of the trustees was entitled to any beneficial interest in the settled property.—TAYLOR *v.* TAYLOR (1892), 66 L. T. 267.

(*c*) *The Answer.*

See Matrimonial Causes Rules, 1924, r. 71.

5752. Time for filing—Whether before or after decree absolute—Petition before decree absolute.]—(1) Petitioner who has obtained a decree *nisi* for dissolution of marriage cannot proceed with a petition to vary settlements until the decree has been made absolute; & nothing done between the time when the decree is made absolute & the hearing of the petition to vary can affect the power of the ct. to vary the settlements.

(2) Where the husband obtained a decree *nisi* for dissolution of the marriage & before the decree was made absolute filed a petition for variations of the settlements made on the marriage, under Matrimonial Causes Act, 1857 (c. 85), s. 5, the ct. ordered the wife to file an answer to the petition within one month after the decree *nisi* was made absolute & discharged the order directing her to file the answer before the decree *nisi* was made absolute.—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, [1904] P. 306; 73 L. J. P. 91; 91 L. T. 273; 20 T. L. R. 573; 48 Sol. Jo. 571, C. A.; *subsequent proceedings*, [1905] P. 253, C. A.

Annotations :—*As to* (1) **Expld.** Clarke *v.* Clarke & Lindsay, [1911] P. 186; Loraine *v.* Loraine & Murphy, [1912] P. 222. **Consd.** Morgan *v.* Morgan & Kirby, [1923] P. 1. **Refd.** Jagger *v.* Jagger (1926), 42 T. L. R. 315.

5753. -.]—CLARKE *v.* CLARKE & LINDSAY, No. 5766, *post*.

(*d*) *The Hearing.*

See Matrimonial Causes Rules, 1924, r. 71.

5754. Who may be heard—Trustee of settlement—In support of petition.]—The trustee of a marriage settlement cannot be heard in support of an application to alter the settlement, but he may be heard in opposition to such an application.—CORRANCE *v.* CORRANCE & LOWE (1868), L. R. 1 P. & D. 495; 37 L. J. P. & M. 44; 18 L. T. 535; 16 W. R. 893.

Annotations :—**Refd.** Graham *v.* Graham (1869), L. R. 1 P. & D. 711; Ansdell *v.* Ansdell (1880), 5 P. D. 138; Dormer *v.* Ward, [1901] P. 20. **Mentd.** *Re* Wombwell's Settlmt., Clerke *v.* Menzies (1922), 127 L. T. 295.

5755. —— —— To oppose petition.]—CORRANCE *v.* CORRANCE & LOWE, No. 5754, *ante*.

5756. —— —— ——.]—SMITH *v.* SMITH & GRAVES, No. 5689, *ante*.

5757. —— Infant beneficiary—Reversionary interest.]—DOUGLAS *v.* DOUGLAS, No. 5657, *ante*.

5758. —— Third person served with petition—Appearance & pleading—No order to dismiss from proceedings.]—Petitioner, having obtained a decree absolute for a divorce from his wife, presented a petition for variation of the settlement made on their marriage. By the settlement a fund brought into settlement by applt., the wife's mother, was settled upon trusts for the wife for life, & then for the husband for life, with the usual limitations in favour of children of the marriage, &, subject to the foregoing trusts, in trust for applt. There were two children of the marriage under age, of whom petitioner had the custody. The petition for variation of the settlement prayed that the ct. would direct the trustees to make to petitioner during the joint lives of himself & his former wife certain annual payments out of the income of the trust funds, & to make such further order in the matter as might be just. Petitioner caused to be served with the petition, among others, applt., who appeared thereto & put in an answer, to which petitioner put in a reply. Subsequently, when the matter came on for hearing before the registrar, petitioner applied to him that applt. should not be heard thereon, on the ground that she was not a person who had any legal or beneficial interest in the property in respect of which the application was made within Divorce Court Rules, r. 97. The registrar acceded to that application, & on appeal the judge affirmed his decision. On appeal against the judge's order :—*Held :* petitioner not having obtained any order dismissing applt. from the proceedings on the petition, she was, as having been made a party thereto, entitled to be heard, & the order was therefore wrong & must be rescinded.

Qu. : whether applt. was entitled to be made

Sect. 22.—*Proceedings after decree: Sub-sect.* 5, *G.* (*d*), (*e*), (*f*) & (*g*); *sub-sect.* 6, *A.*

a party to the petition.—*Re* VIVIAN (LORD) *v.* VIVIAN (LADY), [1909] P. 57; 78 L. J. P. 36; 100 L. T. 168; 25 T. L. R. 157, C. A.

Annotation:—**Refd.** Allport *v.* Allport (1909), 25 T. L. R. 588.

5759. Time for hearing—Whether before decree absolute.]—CONSTANTINIDI *v.* CONSTANTINIDI & LANCE, No. 5752, *ante.*

5760. Rights of petitioner to have petition heard—After leave given.]—FYFFE *v.* FYFFE, No. 5485, *ante.*

(*e*) *Inquiry as to Legitimacy of Children.*

5761. Whether ordered—Child born between decree nisi & decree absolute—Fourteen months after separation of parties.]—PRYOR *v.* PRYOR & SHELFORD, No. 5685, *ante.*

5762. —— ——.]—On a petition for variation of settlements after a decree for dissolution of marriage, where a child had been born between the date of the decree *nisi* & decree absolute, the paternity of which petitioner denied, the ct., on the application of petitioner, directed an issue to be tried to ascertain the status of the child, & postponed the further consideration of the variation of settlements until after the trial of the issue.—EVANS *v.* EVANS & BLYTH, [1904] P. 274; 73 L. J. P. 87; 91 L. T. 356; 20 T. L. R. 516.

5763. —— **Undefended suit—Allegation by respondent wife.**]—In the course of an undefended suit for dissolution of marriage presented by the husband, it appeared that resp. had made a written statement in the form of a letter to petitioner as to the paternity of the only child, with the object of retaining its custody. Upon petition for variation of the marriage settlement, it was urged on behalf of the trustees of the settlement that resp.'s statement was inadmissible, & that so important a matter as that of the legitimacy of the child ought not to be dealt with upon motion. The ct. thereupon adjourned the motion as to variation, & directed the official solr. to present, on behalf of the child, a petition for declaration of legitimacy.—DOUGLAS *v.* DOUGLAS & TREVOR (1897), 78 L. T. 88.

Annotation:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274.

Legitimacy proceedings.]—*See, generally*, BASTARDY, Vol. III., pp. 369 *et s*

(*f*) *The Order.*

See Matrimonial Causes Rules, 1924, r. 71.

5764. Motion to confirm registrar's report—Within what time.]—(1) The wife's income under a marriage settlement was about £1,050 a year. The husband's income was about £600 a year, a part of which was derived from property of the wife. There were no children of the marriage. The marriage was dissolved on the ground of the adultery of the wife, who afterwards married co-resp. The ct. varied the settlement by ordering the trustees to pay to the husband £300 a year during the joint lives of the husband & wife.

(2) A motion to confirm a registrar's report ordering a variation of a settlement after a decree for dissolution of the marriage need not be made within fourteen days after notice of the filing of the report in the registry by petitioner.—FARRINGTON *v.* FARRINGTON & SCHOOLES (1886), 11 P. D. 84; 55 L. J. P. 69.

Annotation:—*As to* (1) **Refd.** Dormer *v.* Ward, [1901] P. 20.

5765. Time for making order—After decree absolute.]—The ct. will not make an order as to the application of the settled property of the parties until after a decree *nisi* for dissolution of marriage has been made absolute.—HORNE *v.* HORNE (1861), 30 L. J. P. M. & A. 111.

5766. —— ——.]—The ct. has no jurisdiction either by itself or through its officers to hold any inquiry upon a petition to vary settlements until the decree for dissolution has been made absolute, & until that time resp. to the petition is under no obligation to answer it.—CLARKE *v.* CLARKE & LINDSAY, [1911] P. 186; 80 L. J. P. 135; 105 L. T. 1; 55 Sol. Jo. 535, C. A.

Annotation:—**Refd.** Morgan *v.* Morgan & Kirby, [1923] P. 1.

5767. Giving effect to—By action for amount—In what division brought.]—Probate Div. having made a decree absolute for the dissolution of a marriage on the husband's petition, made also an order that the trustees of the marriage settlement should pay an annual sum out of settled real property of the wife to the husband for the maintenance of the infant child of the marriage. The husband having died, whereupon the widow became absolutely entitled to the settled property, a further order directed that the settlement trustees should pay the annuity to the guardians of the infant, & that the settled property should stand charged with the annuity. There were, in fact, at that time no trustees of the settlement. The annuity was subsequently declared to be perpetual. The guardian brought an action in the Ch. Div. against the widow, whose whereabouts was then unknown, claiming an account of the annuity; a declaration that the same was a charge on the settled property, & that it might be raised by sale or mtge.; appointment of new trustees of the settlement; an order that deft. might execute all necessary instruments for giving effect to the charge; & a receiver. At the trial it appeared that the parties had agreed that deft. should execute a deed securing the annuity on the settled property, & pltfs. did not press for further relief. The ct. ordered execution of the deed, but under the circumstances allowed no costs on either side, as the order now made might have been obtained by summary process in the Probate Div.—BLACKETT *v.* BLACKETT (1884), 51 L. T. 427.

5768. —— **By vesting order.**]—Where a vesting order was required to carry into effect an order for variation of settlements, the ct. exercised jurisdiction under Trustee Act, 1893 (c. 53), s. 35, & made a vesting order.—STORER *v.* STORER (1891), 11 R. 618.

(*g*) *Costs.*

5769. When allowed—Proceedings brought in wrong division.]—BLACKETT *v.* BLACKETT, No. 5767, *ante.*

5770. Liability of co-respondent.]—When in a suit for dissolution of marriage co-resp. is condemned in costs, he is liable for the costs of petitioner & resp. incurred in obtaining an alteration of a marriage settlement.—GILL *v.* GILL & HOGG (1863), 3 Sw. & Tr. 359; 33 L. J. P. M. & A. 43; 10 L. T. 137; 12 W. R. 808; 164 E. R. 1314.

Annotations:—**Apld.** Irwin *v.* Irwin & Layard (1890), 59 L. J. P. 53. **Refd.** Blackhall *v.* Blackhall & Clark (1888), 4 T. L. R. 525.

5771. ——.]—STONE *v.* STONE & BROWNRIGG, No. 5551, *ante.*

5772. Whether paid out of corpus.]—A fund in ct. was settled to the separate use of a married lady for life, after her decease to her husband for life, with remainder to their children. The marriage was dissolved, & the ct. of Divorce made an order under Matrimonial Causes Act, 1859

(c. 61), s. 5, directing that the fund should be dealt with as if the wife were then dead. Upon petition of the husband, the ct. directed payment of the future dividends to him, but in the absence of the persons entitled in remainder they refused to order the costs of the application to be borne by the corpus. The ct. has no jurisdiction to order the costs of any application to the Divorce Ct. to be paid out of the fund.—PRATT *v.* JENNER, *Ex p.* JENNER (1866), 1 Ch. App. 493 ; 35 L. J. Ch. 682 ; 15 L. T. 138 ; 12 Jur. N. S. 557 ; 14 W. R. 852, L. JJ.

5773. Costs of suit—& petition for variation—Fund of petitioning wife.]—In a petition by the wife a decree was pronounced dissolving the marriage, & condemning resp. in costs. Resp. could not be found after the making of the decree, & there was no prospect of recovering the costs from him. Upon an application for variation of the marriage settlement, it appeared that the husband had brought nothing into the settlement : —*Held :* part of the funds included in the settlement might be applied to satisfy the balance still remaining unpaid of the costs of the suit & of the petition for the variation of settlements.—HIPWELL *v.* HIPWELL, [1892] P. 147 ; 61 L. J. P. 84 ; 67 L. T. 396.

Annotations :—**Folld.** Douglas *v.* Douglas (1896), 74 L. T. 384. **Refd.** Hartopp *v.* Hartopp & Akhurst, [1899] P. 65.

5774. —— Costs of petition for variation—By consent—Yearly allowance to children for life.]—The ct. sanctioned the payment, out of the corpus of the settled property, of costs of the petition for variation of settlements, in a case where a yearly allowance was to be made for each of the children during their lives, & where all parties, including the trustees of the settlement, consented. —HAMILTON *v.* HAMILTON & PRALORMO (1893), 68 L. T. 467 ; 1 R. 506.

5775. —— —— —— ——.]—DOUGLAS *v.* DOUGLAS, No. 5657, *ante*.

5776. —— Costs of petition & trustees—Fund of respondent husband — Nullity suit.]—ATTWOOD (OTHERWISE POMEROY) *v.* ATTWOOD, No. 5706, *ante*.

5777. —— Costs of trustees—One trustee not appearing — Whereabouts unascertainable.]—STORER *v.* STORER, No. 5717, *ante*.

5778. —— Costs of review—Occasioned by mistake.]—ARKWRIGHT *v.* ARKWRIGHT, No. 5729, *ante*.

SUB-SECT. 6.—CUSTODY, MAINTENANCE AND EDUCATION OF CHILDREN.

A. Custody.

(a) Jurisdiction of Court.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193 ; Matrimonial Causes Rules, 1924, r. 73.

5779. Child over sixteen.]—BLANDFORD *v.* BLANDFORD, No. 4234, *ante*.

5780. ——.]—The ct. has power to make orders in a divorce cause respecting the custody, maintenance & education of children during the whole period of their infancy, *i.e.* till they attain the age of twenty-one years.—THOMASSET *v.* THOMASSET, [1894] P. 295 ; 63 L. J. P. 140 ; 71 L. T. 148 ; 42 W. R. 658 ; 10 T. L. R. 591 ; 38 Sol. Jo. 630, C. A.

Annotations :—**Distd.** Stark *v.* Stark & Hitchins, [1910] P. 190. **Refd.** Bishop *v.* Bishop, Judkins *v.* Judkins, [1897] P. 138 ; *Re* Mathieson (1918), 87 L. J. Ch. 445 ; B. *v.* B., [1924] P. 176.

5781. —— Order against wishes of child.]—STARK *v.* STARK & HITCHINS, No. 4775, *ante*.

(b) To Whom given.

5782. Guilty father—Idiot child—Intention of mother to put child in asylum.]—The ct. refused to order that a wife who had obtained a decree of judicial separation should have the custody of an idiot child which was properly taken care of by the husband, where the custody was asked for, in order that it might be placed in an asylum for its own benefit, & not in order that the wife might have the solace of its society. *Semble :* an application for the custody of a child upon such a ground should be made to the Ct. of Ch.—COOKE *v.* COOKE (1863), 3 Sw. & Tr. 248 ; 32 L. J. P. M. & A. 180 ; 11 W. R. 957 ; 164 E. R. 1269.

5783. —— Leading respectable life after remarriage—Mother no longer a fit person.]—A decree for dissolution of marriage having been made on the wife's petition on the ground of the husband's adultery & cruelty, the custody of the children of the marriage was given to petitioner, & resp. was ordered to pay petitioner for her maintenance the sum of £75 a year. Petitioner took charge of one child, a girl of eleven years of age, but allowed resp. to retain the other, a boy of fifteen. Subsequently resp. applied to rescind or vary the order, & on an inquiry before the registrar it was shown that petitioner was no longer a fit person to have charge of her daughter. The ct. made an order transferring the custody of the daughter to the father, who had married again & was shown to be leading a respectable life but declined to reduce the amount of the wife's permanent maintenance on the ground that it had not before it sufficient evidence on which to act.—WITT *v.* WITT, [1891] P. 163 ; 60 L. J. P. 63 ; 64 L. T. 121 ; 55 J. P. 184 ; 39 W. R. 432.

5784. Innocent wife.]—In a case in which the wife had obtained a judicial separation by reason of the desertion of her husband, the ct. ordered that the children of the marriage under the age of sixteen years should remain in her custody until further orders.—MALLINSON *v.* MALLINSON (1866), L. R. 1 P. & D. 221 ; 35 L. J. P. & M. 84 ; 14 L. T. 636 ; 14 W. R. 973.

Annotations :—**Distd.** Thomasset *v.* Thomasset, [1894] P. 295. **Mentd.** *Re* Andrews (1873), L. R. 8 Q. B. 153.

5785. —— Intending to bring up children in religion other than that of husband.]—Although

PART XIII. SECT. 22, SUB-SECT. 6.—A. (a).

e. *Custody given to husband by decree of judicial separation—Child born after decree—Application by wife for custody of.*]—The decree in a suit for judicial separation gave the husband custody of the children of the marriage, naming them, & contained an undertaking by the wife not to claim at any time maintenance for herself so long as the parties remained judicially separated :—*Held :* the Divorce Ct. had jurisdiction to entertain, & the wife was not precluded by the decree from making a subsequent application for an order against the husband for the custody & maintenance of a child of the marriage born after the decree for which no provisions had been asked for in the suit or made in the decree.—BROWN *v.* BROWN (1906), 4 C. L. R. 595.—**AUS.**

f. *Death of petitioner before confirmation of decree nisi.*]—A wife, who had obtained a decree *nisi* for dissolution of her marriage, & also an order for the custody of the children of marriage, died before such decree had been confirmed by the High Ct. :—*Held :* the ct. had no jurisdiction in these proceedings to make any order as regards the custody of the children.—BUTTERFIELD *v.* BUTTERFIELD (1922), I. L. R. 50 Calc. 153.—**IND.**

PART XIII. SECT. 22, SUB-SECT. 6.—A. (b).

g. *Father—Primâ facie right.*]—The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children of

Sect. 22.—*Proceedings after decree: Sub-sect.* (*b*), (*c*),

the wife may have obtained a decree of judicial separation, the ct. will not give her the custody of the children if she intends to bring them up in a religion different from that of their father, & different from that in which they have been educated during the cohabitation of their parents.

A husband & wife having been Roman Catholics, the husband afterwards became Protestant, & placed the children at a Protestant school. The wife filed a petition for judicial separation, but withdrew it & returned to live with her husband on his promise that the children should be educated as Roman Catholics. He broke the promise, & she subsequently filed another petition & obtained a judicial separation. Upon an application by the wife for custody of the children that they might be educated as Roman Catholics, the ct. rejected the application, & gave the custody to a third person with full access by both parents.—D'ALTON *v.* D'ALTON (1878), 4 P. D. 87; 47 L. J. P. 59.

5786. Third party—Both parents unfit.]—(1) After a decree absolute had been pronounced for the dissolution of a marriage on the ground of the husband's adultery and cruelty, applications were made for the custody of the infant children of the marriage by their father & mother, & by third persons, who had been allowed to intervene for the benefit of the children. The ct. being of opinion that neither the father nor the mother were, according to the evidence given at the hearing of the cause, fit to be entrusted with the care & custody of the children, gave the custody of them to the interveners, relatives of the husband, but directed that the parents should be allowed reasonable access. (2) In making an order as to settled property under Matrimonial Causes Act, 1859 (c. 61), s. 5, the ct. will take into consideration the conduct of the parties, as well as their pecuniary position. A marriage having been dissolved by reason of the husband's adultery & cruelty, an application was made for an order as to the settled property, under the Matrimonial Causes Act, 1859 (c. 61), s. 5. The ct. estimated the total income of the husband at £1,159, part of it being derived from settled property, to which the wife had contributed £3,000. It ordered that £200 a year should be paid out of the settled property to the persons who were entrusted with the custody of the children of the marriage, for their maintenance & education; & taking into consideration that the wife was not free from blame, & that she had contracted debts to the amount of about £3,000 previous to the separation, for which the husband was liable, & also the expense he had incurred by reason of the suit for dissolution it ordered that £250 a year out of the settled property should be paid, during resp.'s life, to petitioner, *dum casta et sola vixerit*.—CHETWYND *v.* CHETWYND (1865), L. R. 1 P. & D. 39; 35 L. J. P. & M. 21; 13 L. T. 474; 11 Jur. N. S. 958; 14 W. R. 184.

Annotations:—*As to* (1) **Distd.** Hamilton *v.* Hector (1871), 40 L. J. Ch. 692. *As to* (2) **Apprvd.** Constantinidi *v.* Constantinidi & Lance, [1905] P. 253. **Refd.** Gladstone *v.* Gladstone (1876), 1 P. D. 442. *Generally*, **Mentd.** Collins *v.* Collins (1910), 26 T. L. R. 600.

5787. —— Differences between spouses as to religion.]—D'ALTON *v.* D'ALTON, No. 5785, *ante*.

5788. —— Death of parent having custody.]—Upon the death of the parent of a child who is entitled to the custody of it under a decree for judicial separation, the ct. has no jurisdiction under Matrimonial Causes Act, 1859 (c. 61), s. 4, to entertain an application by a stranger for the custody of the child.—DAVIS *v.* DAVIS (1889), 14 P. D. 162; 58 L. J. P. 88.

Compare Sect. 9, sub-sect. 3, A. (*b*), *ante*.

Change of custody.]—*See* Sub-sect. 6, A. (*d*), *post*.

(*c*) *What Court will Consider.*

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 1.

5789. Evidence of cruelty—Return of finding of jury on trial of issues at assizes.]—The issues joined in a petition for a dissolution of marriage having been tried before a judge of assize, a certificate of the finding of the jury was returned into this ct., & thereupon a decree of dissolution was pronounced. The ct. refused to receive the return as evidence of resp.'s cruelty to the children of the marriage in support of an application by petitioner for their custody, & was of opinion that it ought to have been confined to the finding of the jury upon the issues joined. No affidavits or other evidence being produced in support of the application for the custody of the children, the ct. declined to make an order.—DAVIES *v.* DAVIES (1859), 23 J. P. 551.

5790. Effect of bringing up children in different custodies.]—Where, upon an application by a wife, who had obtained a sentence of divorce against her husband, for the custody of her children, the conduct of her husband appeared to be such as clearly to render it improper that he should have the custody of the eldest child, a girl of eleven years old, the ct. made an order for the delivery of all the children (two of whom were under seven years of age) to the mother, holding it unnecessary to consider whether it would have made the same order with respect to the second child, who was a boy of nine years old, if his case had stood alone, as the effect of the children being brought up in different custodies would be likely to create factions in the family.

The object of Custody of Infants Amendment Act, 1839 (c. 54), was to enable married women, who should be ill-treated by their husbands, to assert their rights as wives, without being restrained by the fear of being separated from their children: for which purpose the Ct. of Ch. is invested by the Act with a discretionary power, which, by its inherent jurisdiction, it did not possess, of interfering with the common law right of a father to the custody of his children, such power varying in extent according as the children are under or above seven years of age.—WARDE *v.* WARDE (1849), 2 Ph. 786; 12 L. T. O. S. 549; 41 E. R. 1147, L. C.

Annotations:—**Consd.** *Re* Winscom (1865), 2 Hem. & M. 540; Smart *v.* Smart, [1892] A. C. 425. **Refd.** *Re* Halliday's Estate, *Ex p.* Woodward (1852), 21 L. T. O. S. 17; *Re* Taylor (1876), 4 Ch. D. 157; R. *v.* Gyngall, [1893] 2 Q. B. 232.

5791. Interests of children—& parents.]—SUGGATE *v.* SUGGATE, No. 3203, *ante*.

5792. —— Public policy—Application by alien father out of jurisdiction—Children British subjects whatever age.—*Re* HOLMES (1862), 1 Hyde, 99.—**IND.**

h. —— ——.]—To justify the ct. in giving the custody of children to a guilty wife very exceptional circumstances must be shown. In this case the ct. declined to deprive a husband petitioner, who had divorced his wife for adultery, of his *primâ facie* right to the custody of the children.—VAN DER VEEN *v.* VAN DER VEEN, [1923] N. Z. L. R. 794.—**N.Z.**

PART XIII. SECT. 22, SUB-SECT. 6.—A. (c).

k. *Interests of children.*]—The interests of the children are the first consideration in determining who is to have charge of them.—ATKINSON *v.*

by birth.]—Petitioner in a divorce suit, having obtained a decree for divorce against his wife, resp., on account of her misconduct, applied to have the custody of the two infant children of the marriage, a girl aged seventeen years, & a boy aged fourteen years. Petitioner was a German subject, who had resided in, & carried on business for many years in, England, & resp. was a lady of Dutch extraction. The children were born in England. The father had, since the outbreak of war, been repatriated:—*Held:* the children, being British subjects, should not be sent out of the jurisdiction, both on the ground of their interests & on considerations of public policy.—UHLIG *v.* UHLIG (1916), 86 L. J. P. 90; 115 L. T. 647; 33 T. L. R. 63; 61 Sol. Jo. 70, C. A.

Compare Sect. 9, sub-sect. 3, A. (*c*), *ante*.

(*d*) *Change of Custody.*

5793. Change of custody—Who may apply—Third party—On behalf of children.]—(1) The ct. views with disfavour an attempt to get up a charge of adultery against a husband, who has obtained a decree dissolving his marriage, by tracking him from place to place with a view to obtain an order depriving him of the custody of his children.

(2) Where relations intervene in an application for the custody of a child, they do so at the peril of being condemned in costs, if their intervention is unsuccessful.

(3) *Semble:* where a petitioner, the father, after a decree dissolving his marriage, is shown to be leading a notoriously dissolute life, the ct. will hold him disqualified to have the custody of his child.

(4) An application for the dismissal of an appeal by applt. should be made to the full ct. & not to the judge ordinary.—MARCH *v.* MARCH & PALUMBO (1867), L. R. 1 P. & D. 437; 36 L. J. P. & M. 28; 15 L. T. 363; *subsequent proceedings*, L. R. 1 P. & D. 440.

5794. —— —— —— Relations.]—After a decree of judicial separation in favour of the party in whose custody children of the marriage have been placed, the ct. may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody.—GODRICH *v.* GODRICH (1873), L. R. 3 P. & D. 134; 43 L. J. P. & M. 2; 22 W. R. 71; *sub nom.* GODERICH *v.* GODERICH, 29 L. T. 465.

5795. —— Subsequent misconduct of father—Search for evidence with a view to deprivation of custody.]—MARCH *v.* MARCH & PALUMBO, No. 5793, *ante*.

5796. —— Mother no longer a fit person.]—WITT *v.* WITT, No. 5783, *ante*.

(*e*) *Practice and Procedure.*

5797. To what court application made—Custody of idiot child—Chancery Division.]—COOKE *v.* COOKE, No. 5782, *ante*.

5798. Who may be heard—Third parties—For benefit of children.]—CHETWYND *v.* CHETWYND, No. 5786, *ante*.

5799. Interim orders—On petition only.]—STACEY *v.* STACEY, No. 2322, *ante*.

5800. —— Presence of both parties.]—STACEY *v.* STACEY, No. 2322, *ante*.

5801. Effect of order—Subsequent order in another suit—Whether retrospective.]—Where the ct. granted a wife the custody of her children without limitation as to age, & subsequently in another suit defined the age of custody from sixteen to twenty-one:—*Held:* in a subsequent order for maintenance the judgment of the ct. was retrospective, & applied to the original order for custody.—JEFFRIES *v.* JEFFRIES (1907), 51 Sol. Jo. 468.

Enforcement of orders.]—*See* Sect. 23, *post*.

5802. Appeals—To what court.]—An appeal from an order as to the custody of children made under Matrimonial Causes Act, 1859 (c. 61), s. 4, after a final decree for the dissolution of the marriage of the parents, must be brought to the full Ct. of Divorce, & not to the Ct. of Appeal.

It appears to me that Matrimonial Causes Act, 1859 (c. 61), s. 4, was intended to enable the ct. to make after final decree an order as to children which should have the same effect & be subject to the same rules as if it had been made before the final decree (MELLISH, L.J.).—GLADSTONE *v.* GLADSTONE (1877), 2 P. D. 143; 25 W. R. 387, C. A.

(*f*) *Costs.*

5803. Liability—Third parties intervening on behalf of children.]—When a petition for the custody of children after a final decree of dissolution is before the ct., persons, other than the parents, may intervene & bring before the ct. such facts as in their opinion the interests of the children may require. The form of such intervention will be by petition, & the interveners act at their own risk as to costs.—CHETWYND *v.* CHETWYND (1865), 4 Sw. & Tr. 151; 34 L. J. P. M. & A. 130; 13 L. T. 197; 11 Jur. N. S. 958; 14 W. R. 184; 164 E. R. 1471; *subsequent proceedings*, L. R. 1 P. & D. 39.

Annotation:—**Refd.** Godrich *v.* Godrich (1873), L. R. 3 P. & D. 134.

5804. —— —— Unsuccessful intervention.]—MARCH *v.* MARCH & PALUMBO, No. 5793, *ante*.

(*g*) *Enforcement of Order.*

Attachment & committal.]—*See* Nos. 5934-5936, *post*.

Peremptory order.]—*See* No. 5909, *post*.

B. Access.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193; Matrimonial Causes Rules, 1924, r. 73.

5805. Jurisdiction of court to order—Divorce court—Petition for dissolution dismissed.]—SEDDON *v.* SEDDON & DOYLE, No. 4991, *ante*.

5806. —— ——.]—A divorce decree was made upon the petition of the husband on the ground of the wife's adultery; & by the decree *nisi* it was ordered that the infant child should remain in the custody of petitioner until further order. A

ATKINSON (No. 3) (1891), 10 N. Z. L. R. 385.—**N.Z.**

l. ——.]—SOLER *v.* SOLER (1898), 17 N. Z. L. R. 49.—**N.Z.**

m. ——.]—SALAMAN *v.* SALAMAN, [1923] N. Z. L. R. 454.—**N.Z.**

PART XIII. SECT. 22, SUB-SECT. 6.—A. (*f*).

n. *Liability — Husband petitioner—Obstructive conduct of wife.*]—A petition by a husband for custody of his child was opposed by his wife, who refused to deliver up the child. The wife was possessed of large independent means, & her obstructive conduct of the case resulted in her retaining the custody of the child during five months while the petition was in ct.:—*Held:* petitioner was entitled to expenses against resp.—CAMPBELL *v.* CAMPBELL, [1920] S. C. (J.) 31.—**SCOT.**

PART XIII. SECT. 22, SUB-SECT. 6.—B.

o. *Jurisdiction of court to order—Question decided by court of parents' domicil.*]—The marriage of two domiciled Danes was dissolved by decree under the law of Denmark. By this decree the custody of a son of the marriage was awarded to the father & access to the child by the mother was refused. Thereafter both parents being resident in Scotland, the mother

Sect. 22.—Proceedings after decree: Sub-sect. 6, B. & C.; sub-sect. 7, A.]

summons was taken out by the mother in the Ch. Div. asking for an order under the Guardianship of Infants Act, 1886 (c. 27), that she might be allowed access to the child:—*Held:* the Divorce Ct. had full power to make orders as to access, &, whether there was also a discretionary power in the Ch. Div. or not, it would not be exercised in a case in which an order dealing with the matter had already been made by the Divorce Ct.—MANDERS *v.* MANDERS (1890), 63 L. T. 627; 7 T. L. R. 149.

5807. —— Chancery Division—When exercised.]—MANDERS *v.* MANDERS, No. 5806, *ante*.

5808. To whom granted — Guilty mother—General rule.]—CLOUT *v.* CLOUT & HOLLEBONE, No. 4805, *ante*.

5809. —— —— —— Whether rule invariable.]—Where a decree for dissolution of marriage has been made on the ground of the adultery of the wife, & the infant children of the marriage have been given into the custody of the husband, the ct. is not precluded from making an order giving the divorced wife access to them, but as a general rule such an order will not be made.—HANDLEY *v.* HANDLEY, [1891] P. 124; 55 J. P. 293; 39 W. R. 97; 7 T. L. R. 74; *sub nom.* DAVENPORT HANDLEY *v.* DAVENPORT HANDLEY & WROUGHTON, 63 L. T. 535, C. A.

Annotations:—**Consd.** B. *v.* B., [1921] P. 176. **Refd.** Manders *v.* Manders (1890), 63 L. T. 627; Clarke *v.* Clarke & Lindsay (No. 1) (1913), 57 Sol. Jo. 641.

5810. —— —— —— —— Daughter under sixteen.]—STARK *v.* STARK & HITCHINS, No. 4775, *ante*.

5811. —— —— —— ——.]—Adultery by the wife ought not to be regarded for all time & under all circumstances as sufficient to disentitle her to access to or even to the custody of her daughter, who is under sixteen.

In dealing with such matters the ct. will have regard to the particular circumstances of each case, always bearing in mind that the benefit & interest of the infant is the paramount consideration, & not the punishment of the guilty spouse.

Where a mother, guilty of adultery, had been divorced, & the custody of the only child of the marriage, a girl of eleven years of age, was given to the father, limited access to her daughter was given to the mother, the ct. being of opinion that in the circumstances of the particular case such an order was for the benefit & interest of the infant.—B. *v.* B., [1924] P. 176; 93 L. J. P. 84; 130 L. T. 754; 40 T. L. R. 349; 68 Sol. Jo. 457, C. A.

5812. —— —— Mother living in adultery—Boy of eight.]—Although the former rule that a guilty mother who has been divorced by her husband cannot be allowed access to the child of the marriage against the husband's wish is no longer the law, the ct. has a discretion to permit such access. Where the child was a boy eight years of age, about to be sent to school, & the mother was living in adultery with co-resp., the ct. refused to order that she should be allowed access.—CLARKE *v.* CLARKE & LINDSAY (No. 1) (1913), 57 Sol. Jo. 644, C. A.; *previous proceedings*, [1911] P. 186, C. A.

5813. After marriage with co-respondent.]—A divorced wife, resp. in a suit for dissolution of marriage, applied by summons for access to the children of the marriage. Custody had been entrusted by the ct. to the father, who refused access to the mother. She had, since the decree was made absolute, married co-resp., & it was urged on her behalf that this removed the objection there might otherwise have been in the interests of the children to her being allowed access:—*Held:* the father's refusal of access could not be said to be otherwise than in the interests of the children & must be upheld.—B—— *v.* B—— & T—— (1921), 126 L. T. 109; 37 T. L. R. 868.

5814. —— Guilty father.]—POPE *v.* POPE (1902), 46 Sol. Jo. 762.

5815. —— Both parents—Custody given to third party—Reasonable access.]—CHETWYND *v.* CHETWYND, No. 5786, *ante*.

5816. —— —— —— Full access.]—D'ALTON *v.* D'ALTON, No. 5785, *ante*.

5817. What court will consider—Interests of children.]—B—— *v.* B—— & T—— (1921), No. 5813, *ante*.

5818. —— ——.]—B. *v.* B. (1924), No. 5811, *ante*.

5819. Costs of application—No previous refusal by parent having custody.]—Where the ct. had decreed a judicial separation in favour of the husband on the ground of cruelty, & the wife afterwards applied on motion for access to some of the children of the marriage, & an order for access was made:—*Held:* the wife was not entitled to have the costs of the motion taxed against her husband, as he had not refused her access to the children since the date of the decree.—BACON *v.* BACON (1866), L. R. 1 P. & D. 167.

Compare Sect. 9, sub-sect. 3, C., *ante*.

Provision for access in separation deed.]—*See* No. 2134, *ante*.

C. Maintenance and Education.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193; Matrimonial Causes Rules, 1924, r. 73.

5820. Form of order—Payment "so long as child remains in custody of payee."]—MARCH *v.* MARCH & PALUMBO, No. 5576, *ante*.

5821. Security for maintenance—Power of court to order—Judicial separation.]—Upon a decree for judicial separation when the ct. has ordered a provision to be made for the children it has no power to order also that resp. shall secure the payment.—HUNT *v.* HUNT (1883), 8 P. D. 161; 52 L. J. P. 98, 31 W. R. 724.

Annotation:—**Consd.** Twentyman *v.* Twentyman, [1903] P. 82.

5822. Interim order—Pending inquiry as to respondent's means—Respondent abroad.]—MOORE *v.* MOORE (1897), 41 Sol. Jo. 737; *previous proceedings* (1896), 12 T. L. R. 221, C. A.

5823. Matters affecting order—Separation deed—Covenant by wife not to sue for increased allowance.]—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, No. 5371, *ante*.

5824. —— Nullity suit—Previous separation—Education of child by husband.]—Petitioner in 1890 went through a form of marriage with resp., presented a petition to the Scottish cts. for access to the child "in respect of her natural rights as his mother":—*Held:* the question of access having been determined by the ct. of the parent's domicil, the Scottish cts. had no jurisdiction to entertain an application based on such grounds.—WESTERGAARD *v.* WESTERGAARD, [1914] S. C. 977. **SCOT.**

p. *To whom granted—Guilty mother.*]—Circumstances in which the ct. refused to ordain the father of a boy seven years of age to allow the mother, who had been divorced from the father for adultery, access to the boy, on the ground that it might be prejudicial to the boy.—C. D. *v.* A. B., [1908] S. C. 737.—**SCOT.**

PART XIII. SECT. 22, SUB-SECT. 6.—C.

q. *Dissolution suit by husband—Custody given to wife—Liability of*

who had previously been married to petitioner's brother, whom she had divorced. The parties lived together for some years, & a child was born of the union, whom petitioner was educating. In 1892 a deed was entered into by which resp. was provided for:—*Held:* (1) a decree of nullity should be granted; (2) the case was not one in which any conditions as to securing an allowance for resp. & the child should be attached to the decree; (3) resp. was not entitled to costs.—D'ETCHEGOYEN *v.* D'ETCHEGOYEN (1908), 25 T. L. R. 85.

5825. For what children orders will be made—Children under sixteen.]—BLANDFORD *v.* BLANDFORD, No. 4234, *ante*.

5826. —— Children under twenty-one.]—THOMASSET *v.* THOMASSET, No. 5780, *ante*.

5827. Duration of order—Whether after majority of child.]—SAVARY *v.* SAVARY, No. 5719, *ante*.

Compare Sect. 9, sub-sect. 3, B., *ante*.

SUB-SECT. 7.—APPORTIONMENT OF DAMAGES.

A. How Apportioned.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189 (3).

5828. To petitioner—Whole damages—In lieu of settlement on wife.]—BENT *v.* BENT & FOOTMAN, No. 5394, *ante*.

5829. —— —— No issue—Respondent living with co-respondent.]—EVANS *v.* EVANS & BIRD, No. 5850, *post*.

5830. —— —— To enforce recovery from co-respondent—Undertaking to pay into court.]—The ct. having ordered damages to be paid into the registry, & proceedings in default being impracticable, as there was no one to institute them, the ct. ordered the damages to be paid to petitioner, he undertaking to pay them into ct.—GYTE *v.* GYTE & MULLINEAUX (1885), 10 P. D. 185; 34 W. R. 47.

5831. —— Part of damages.]—The ct. directed the £5,000 damages awarded in this case to be paid to petitioner's solr.; £1,000 to be paid by him to petitioner; out of the residue an annuity of £120 to be purchased for resp.'s life, to be paid to her "*dum casta vixerit*," with remainder to two of her daughters; & the remainder to be invested in an annuity for these two daughters.—FORSTER *v.* FORSTER & BERRIDGE (1863), 3 Sw. & Tr. 158; 9 L. T. 150; 164 E. R. 1231.

5832. —— ——.]—A sum of £5,000 damages was apportioned by the ct. as follows: £1,500 was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; £1,500 was given to petitioner & also his costs of the suit in addition to those which had been taxed against co-resp.; the balance was invested in the purchase of a life-annuity for resp., to be paid to her as long as she lived chastely & did not become the wife of co-resp.; & in the event of her breaking either of those conditions, to be paid to petitioner.—MEYERN *v.* MEYERN & MYERS (1876), 2 P. D. 254; 46 L. J. P. 5; 35 L. T. 909; 25 W. R. 115.

5833. —— Indemnity for costs.]—In a suit by a husband for dissolution of marriage a jury assessed the damages against co-resp. at £1,000, & co-resp. was condemned in costs. The ct. ordered the damages to be paid to petitioner in trust to pay thereout such costs as should not be recovered against co-resp., & to the residue in trust for the children of the marriage in equal shares, to be paid to them on attaining twenty-one.—SPEDDING *v.* SPEDDING & LANDER (1862), 1 New Rep. 109; 32 L. J. P. M. & A. 31.

5834. —— ——.]—In a suit by a husband for dissolution of marriage, the ct. refused to order any part of the damages assessed to be settled on the wife, but directed them to be applied, first, to the payment of such part of petitioner's costs as he could not recover from co-resp., & subject thereto, to be settled upon the issue of the marriage.—TAYLOR *v.* TAYLOR & WOLTERS (1870), 39 L. J. P. & M. 23; 22 L. T. 140.

Annotation:—**Refd.** Handley *v.* Handley, [1891] P. 124.

5835. —— ——.]—NARRACOTT *v.* NARRACOTT & HESKETH, No. 4749, *ante*.

5836. —— ——.]—MEYERN *v.* MEYERN & MYERS, No. 5832, *ante*.

5837. Settlement on wife—Whole damages—In lieu of maintenance—Dissolution of marriage.]—LATHAM *v.* LATHAM & GETHIN, No. 5368, *ante*.

5838. —— Part of damages—Dum casta vixerit.]—FORSTER *v.* FORSTER & BERRIDGE, No. 5831, *ante*.

5839. —— —— —— Or until marriage with co-respondent.]—MEYERN *v.* MEYERN & MYERS, No. 5832, *ante*.

5840. —— —— ——.]—NARRACOTT *v.* NARRACOTT & HESKETH, No. 4749, *ante*.

5841. Settlement on issue—Whole damages—Reversion to petitioner.]—C. obtained a decree *nisi* for dissolution of marriage & damages assessed at £250. On motion to make the decree *nisi* absolute & to direct application of damages, the ct. directed all petitioner's interest in the damages to be assigned by him to a trustee for the use of the only child of the marriage, & in case of the child's death under twenty-one & unmarried, for the use of petitioner, & suspended the decree till such assignment should be made.—CLARK *v.* CLARK & BOUCK (1861), 2 Sw. & Tr. 520; 31 L. J. P. M. & A. 61; 6 L. T. 659; 10 W. R. 810; 164 E. R. 1038.

5842. —— —— After payment of petitioner's costs.]—SPEDDING *v.* SPEDDING & LANDER, No. 5833, *ante*.

5843. —— —— ——.]—TAYLOR *v.* TAYLOR & WOLTERS, No. 5834, *ante*.

husband for maintenance.]—A husband who has obtained a decree *nisi* for the dissolution of his marriage on the ground that his wife has not complied with a prior decree for restitution of conjugal rights, may be ordered to make payments for the maintenance of the children of the marriage the custody of whom has by the decree for dissolution of marriage been given to the wife.—HUNTER *v.* HUNTER (1915), 20 C. L. R. 47.—**AUS.**

PART XIII. SECT. 22, SUB-SECT. 7.—A.

r. *Settlement on wife—& illegitimate child—Whole damages—After payment of petitioner's costs.*]—Petitioner recovered from the co-respondent in the suit the sum of £1,000 damages & costs. There was one child of the marriage, a girl, & resp. gave birth to a male child 3 months after the decree *nisi* was pronounced. The jury recommended that the major portion of the damages should be paid to resp. & her unborn child. On a motion by resp. for allocation of the damages petitioner asked that they be allotted between & the child of the marriage *-Held:* after payment of petitioner's costs, less the amount of costs recovered from co-respondent, & payment of resp. & costs of the motion, & certain maternity & other expenses the residue of the fund should be paid to the Public Trustee to be invested in N. Z. Government inscribed stock, & the net income derived therefrom should be paid to resp., she maintaining thereout her illegitimate child until in the judgment of the Public Trustee he was able to earn his own living, but not beyond the age of 21 years; & after the determination of such trust should be paid to resp. for her own exclusive use till her death, & after her death the capital as well as the income of the fund should be paid to the son. Power was reserved to the Public Trustee to apply from time to

Sect. 22.—*Proceedings after decree: Sub-sect.* 7, *A., B., C. & D.; sub-sect.* 8, *A. & B.*]

5844. Part of damages.]—MEYERN *v.* MEYERN & MYERS, No. 5832, *ante.*

5845. —— —— Annuity.]—FORSTER *v.* FORSTER & BERRIDGE, No. 5831, *ante.*

B. Variation of Order.

See Matrimonial Causes Act, 1857 (c. 85), s. 33.

5846. Petitioner put to expense after order—Petitioner's share increased.]—After an order made for application of damages the ct. will not sanction any agreement between petitioner & co-resp., whereby the latter would be relieved from any part of what was due from him; but where, after such an order, petitioner was put to further expense by appeals & other litigation, the ct. varied the original order so as to allow petitioner to take a larger share of the damages, on the ground that the main intent of the original order had been to reimburse petitioner the whole expense to which he had been put.—FORSTER *v.* FORSTER & BERRIDGE (1865), 4 Sw. & Tr. 131; 34 L. J. P. M. & A. 88; 12 L. T. 504; 11 Jur. N. S. 512; 164 E. R. 1466.

Annotations:—**Consd.** Dale *v.* Dale & Macdonell (1867), 15 L. T. 595. **Refd.** Blandford *v.* Blandford (1892), 67 L. T. 392.

5847. After decree absolute—Income to wife dum casta—Application to insert et sola.]—Where the ct., on pronouncing the decree *nisi*, had directed the damages to be invested, & the annual income arising from them to be paid to resp. *dum casta vixerit*, & the decree had been made absolute:—*Held:* it was too late afterwards to apply to the ct. to amend the order by inserting in it, after the words "*dum casta*," the words "*et sola*."—NARRACOTT *v.* NARRACOTT & HESKETH (1865), 4 Sw. & Tr. 76; 34 L. J. P. M. & A. 51; 11 L. T. 750; 13 W. R. 506; 164 E. R. 1444.

Annotation:—**Consd.** Gladstone *v.* Gladstone (1876), 1 P. D. 442.

C. Practice and Procedure.

5848. Time for application—Six months after decree nisi—By leave.]—MONSELL *v.* MONSELL & CAIN, No. 4571, *ante.*

5849. Time for making order—On decree nisi.]—NARRACOTT *v.* NARRACOTT & HESKETH, No. 5847, *ante.*

5850. —— —— No issue—Respondent living with co-respondent.]—Where it was proved on the hearing of a petition, that there had been no issue of the marriage, & that at the time of the hearing resp. was living with co-resp., the ct. made the order for the payment to petitioner of the damages assessed against co-resp. part of the decree *nisi*, instead of postponing it until the decree absolute.—EVANS *v.* EVANS & BIRD (1865), L. R. 1 P. & D. 36.

5851. —— After decree absolute.]—It is competent to the ct. to make an order for the settlement of damages, after the decree *nisi* has been made absolute.—BELLINGAY *v.* BELLINGAY & THOMAS (1866), L. R. 1 P. & D. 168.

5852. —— ——.]—MONSELL *v.* MONSELL & CAIN, No. 4571, *ante.*

5853. Notice of application—To co-respondent—Whether necessary.]—MONSELL *v.* MONSELL & CAIN, No. 4571, *ante.*

5854. Who may be heard on application—Assignee of petitioner's interest in damages.]—Petitioner in a divorce suit having recovered damages against co-resp., a person claiming to be the assignee of petitioner's interest in the damages applied at chambers for leave to intervene:—*Held:* the application must be refused.—HUNT *v.* HUNT & COOPER, [1894] P. 247; 63 L. J. P. 136; 6 R. 659.

5855. —— Infant children—On undertaking as to costs.]—MONSELL *v.* MONSELL & CAIN, No. 4571, *ante.*

D. Costs.

5856. Costs in the cause.]—MEYERN *v.* MEYERN & MYERS, No. 5832, *ante.*

5857. —— Co-respondent condemned in costs—Application for apportionment after damages paid.]—Payment by a co-resp. of the damages found against him does not relieve him from liability for costs necessarily incurred afterwards in allocating the damages in view of a variation of the settlements.—IRWIN *v.* IRWIN & LAYARD (1890), 59 L. J. P. 53; 62 L. T. 612; 6 T. L. R. 200.

5858. Costs of infants—Undertaking by solicitor—As condition precedent to being heard.]—MONSELL *v.* MONSELL & CAIN, No. 4571, *ante.*

SUB-SECT. 8.—TAXATION OF COSTS.

A. In General.

See Matrimonial Causes Act, 1858 (c. 108), s. 13; Matrimonial Causes Rules, 1924, rr. 84–90.

5859. Principles of taxation—Against husband—Generally same as in other cases.]—The general principles of taxing costs against a husband in matrimonial cases are the same as in other causes. The rule of the Ecclesiastical Cts. not to allow more than two counsel on taxation is not applicable where the evidence is oral in open ct. Where a London attorney conducts the suit, no expenses of a local attorney will be allowed on taxation against the husband.

The costs in a divorce suit are to be taxed as between party & party, not as between attorney & client; the costs of sending close copies of proceedings to the country attorney are not to be allowed; the expense of sending the managing clerk of a country attorney to London to take care of the witnesses is not to be allowed.—SUGGATE *v.* SUGGATE (1859), 1 Sw. & Tr. 497; 1 L. T. 306; 23 J. P. 776; 8 W. R. 178; 164 E. R. 830.

5860. —— Between party & party.]—SUGGATE *v.* SUGGATE, No. 5859, *ante.*

5861. —— —— Not entirely as at common law.]—Costs of wife in a matrimonial suit are taxed as between party & party, but not in all respects on the same principles as a taxation at common law between party & party. Thus, though certain issues may have been found against the wife whose costs are being taxed, the expenses incurred by them will be allowed unless the registrar should think that they were wantonly & vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; & a reasonable amount of expense incurred in investigating & acquiring information as to the circumstances of the case should be allowed.—ALLEN *v.* ALLEN

time with the consent in writing of resp., the capital of the fund or any part thereof towards the education, maintenance, or advancement in life of the son. Power was also reserved to the ct. on the application of the Public Trustee, the resp., or a guardian *ad litem* of the infant son, to revoke any of the above trusts, & to declare other & further trusts.—RANDOLPH *v.* RANDOLPH & CASEY, [1920] N. Z. L. R. 809.—**N.Z.**

& D'ARCY (1860), 2 Sw. & Tr. 107 ; 30 L. J. P. M. & A. 9 ; 3 L. T. 480 ; 7 Jur. N. S. 103 ; 9 W. R. 389 ; 164 E. R. 933.

Annotations :—**Distd.** Ellyatt *v.* Ellyatt, Taylor & Halse (1864), 3 Sw. & Tr. 503. **Consd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393.

5862. Function of registrar.]—JINKS *v.* JINKS, No. 4609, *ante*.

5863. When costs will be taxed—Effect of delay.]—CHEALE *v.* CHEALE, No. 4821, *ante*.

5864. —— Co-respondent out of jurisdiction when decree made—Return after six years.]—HAWKS *v.* HAWKS & FENWICK, No. 4567, *ante*.

5865. —— Security for wife's costs given pendente lite—No order for costs at hearing.]—When money is paid into ct. by a husband petitioner as security for the wife's costs & no order as to her costs is made at the hearing, no application can be made after decree absolute for the taxation of the wife's costs or their payment out of the fund in ct.—BEETON *v.* BEETON & ROBERTSON [1921] P. 417 ; 90 L. J. P. 351 ; 126 L. T. 114 ; 37 T. L. R. 902.

5866. Suspension of taxation—Pending appeal to House of Lords.]—A petition by a wife for restitution of conjugal rights, & a counterclaim by her husband for judicial separation were both dismissed with costs by the Ct. of Appeal, the costs of the one to be set off against the costs of the other in the ct. below, & no costs of the appeal being allowed. The husband having subsequently presented an appeal to the House of Lords, the Ct. of Appeal ordered that the taxation of the costs should be suspended until after his appeal was determined, on his undertaking to duly prosecute it.—RUSSELL *v.* RUSSELL (No. 2) (1895), 73 L. T. 569, C. A.

5867. Who may be heard on taxation—Executor of husband dying before hearing.]—Where the husband had paid a sum into the registry to meet the wife's costs of the hearing of the petition, & had died shortly before the time appointed for the hearing, the ct. made an order for the taxation of the costs incurred for the hearing by the wife's solrs., & the payment to them of such taxed costs out of the fund in the registry, with leave to the solrs. of the husband's exor. to attend the taxation.—HALL *v.* HALL (1864), 3 Sw. & Tr. 390 ; 164 E. R. 1326.

5868. —— Respondent—Although no appearance entered.]—In a suit for dissolution of marriage the husband, having no defence, did not enter an appearance, & a decree *nisi* was made against him. The ct. gave him permission to attend before the registrar on the taxation of his wife's costs.—LETTS *v.* LETTS (1869), L. R. 2 P. & D. 16.

5869. Form of order—Fund paid into registry—Death of husband before trial—Payment to wife's solicitors of taxed costs out of fund.]—HALL *v.* HALL, No. 5867, *ante*.

B. What Costs May be Allowed.

5870. Costs of country solicitor—Case conducted by London solicitor.]—SUGGATE *v.* SUGGATE, No. 5859, *ante*.

5871. Number of counsel—Two allowed to wife—Where husband had one—Practice of Ecclesiastical Courts.]—In a matrimonial suit, the husband retained one counsel only, & the wife's proctor, conceiving she could not claim the privilege of two, also retained one only, but for the hearing was induced to retain a second. The costs thereof being allowed upon taxation, the proctor for the husband objected to the registrar's report :—*Held* : the ordinary practice of the ct. was to have two counsel on each side ; a wife was *primâ facie* therefore entitled thereto ; & the special circumstances of the present case did not afford sufficient ground for exception.

Wife is entitled to necessaries ; & if law proceedings are necessary for her protection, the husband is liable for the proper & necessary costs thereof.

The wife is not to be barred of her right to two counsel by reason of what has passed between the two proctors out of ct.—MONEY *v.* MONEY (1853), 1 Ecc. & Ad. 177 ; 18 Jur. 179 ; 164 E. R. 68.

5872. —— Whether limited to two—Where evidence oral in open court.]—SUGGATE *v.* SUGGATE, No. 5859, *ante*.

5873. —— —— According to circumstances of case.]—CAMPBELL *v.* CAMPBELL (1887), 3 T. L. R. 558 ; 31 Sol. Jo. 378, C. A.

Annotation :—**Refd.** Dashwood *v.* Magniac (1892), 8 T. L. R. 445.

5874. —— —— Complex case.]—On the taxation of the costs of co-resp. to a petition for divorce which was dismissed with costs, the trial having lasted fourteen days, the registrar only allowed the costs of two counsel. The judge allowed the costs of three counsel on account of the complexity of the case, & the Ct. of Appeal refused to interfere with his discretion.—HARTOPP *v.* HARTOPP & COWLEY (1904), 20 T. L. R. 216, C. A.

5875. Affidavit in support of petition—Disallowance for irrelevance.]—FORSTER *v.* FORSTER & EVANS, No. 3671, *ante*.

5876. Costs incurred before proceedings started.]—On taxation of wife's costs in a petition for judicial separation pending suit, the registrar disallowed all costs incurred before actual proceedings taken against the husband, & various items charged for attendance on the wife's father in connection with her case. On cause shown against a rule *nisi* for a review of taxation, the ct. affirmed the registrar's taxation as being in accordance with the practice of both the common law & ecclesiastical cts.—DICKENS *v.* DICKENS (1859), 2 Sw. & Tr. 103 ; 28 L. J. P. & M. 94 ; 33 L. T. O. S. 77 ; 23 J. P. 181 ; 164 E. R. 931.

Annotation :—**Refd.** Ottaway *v.* Hamilton (1878), 3 C. P. D. 393.

5877. Proceedings for dissolution—Abatement of cause by return to cohabitation—Suit subsequently revived.]—In a suit against the husband, the wife returned to cohabitation after the cause was set down for hearing, but the cause was not dismissed. The proctor porrected his bill for costs, & subsequently the wife, on alleged fresh misconduct of the husband, again left him, & instructed her proctor to bring in additional articles pleading such misconduct :—*Held* : the proctor was entitled to have his bill taxed, & the additional articles might be brought in.—HAMPDEN *v.* HAMPDEN (1850), 14 Jur. 750.

5878. Attendance on father of petitioner.]—DICKENS *v.* DICKENS, No. 5876, *ante*.

5879. Costs of close copies sent to country solicitor.]—SUGGATE *v.* SUGGATE, No. 5859, *ante*.

5880. Unsuccessful issues.]—ALLEN *v.* ALLEN & D'ARCY, No. 5861, *ante*.

5881. Witnesses—To prove plea not in issue—Bearing on rest of case.]—ALLEN *v.* ALLEN & D'ARCY, No. 5861, *ante*.

PART XIII. SECT. 22, SUB-SECT. 8.—B.

s. Husband successful—Wife having separate estate—Costs on party & party scale.]—Where a wife possessed of separate estate has been divorced & has been found liable in personal expenses to her husband, these expenses fall to be taxed, not on the higher or matrimonial scale, but only as between party & party.—A. B. *v.* C. B., [1918] S. C. 19 ; 55 Sc. L. R. 31.—**SCOT.**

Sect. 22.—*Proceedings after decree: Sub-sect.* 8, *B. & C. Sect.* 23: *Sub-sects.* 1, 2 & 3, *A. & B.* (*a*).]

5882. Wife—When not a competent witness.]—In a suit by the wife for dissolution of marriage on the ground of adultery & cruelty in which she herself was examined as a witness in support of the latter charge, a decree of judicial separation was pronounced instead at her request. Subsequently the ct. was moved to order a review of taxation of the wife's costs by disallowing all the charges therein as to proof of resp.'s adultery.

The ct. refused the application on the ground that it should have been made at the time of the trial, but disallowed the costs connected with petitioner herself being a witness, her evidence being inadmissible in the suit in the form which it ultimately assumed.—DENT *v.* DENT (1866), L. R. 1 P. & D. 125; 35 L. J. P. & M. 61; 14 L. T. 137: 14 W. R. 544.

5883. —— Not called owing to withdrawal of defence.]—In a suit for dissolution resp.'s counsel withdrew their opposition after a few witnesses had been called. The registrar in taxing the costs disallowed the costs of several witnesses who were in attendance but not called, & also disallowed maintenance money for the witnesses on whom the proof of the wife's case chiefly depended. On motion the ct. confirmed the registrar's report on the latter point, but on the ground that the case was one which from the circumstances required to be well proved, allowed the expenses of the witnesses who were not called.—FINNEY *v.* FINNEY (1870), 21 L. T. 597.

5884. —— Maintenance money—Principal witnesses for respondent—Defence withdrawn.]—FINNEY *v.* FINNEY, No. 5883, *ante*.

5885. Expenses of sending managing clerk of country solicitor to London—To take care of witnesses.]—SUGGATE *v.* SUGGATE, No. 5859, *ante*.

5886. Investigation into case.]—ALLEN *v.* ALLEN & D'ARCY, No. 5861, *ante*.

5887. Advice on answer—If not mere traverse.]—HEPWORTH *v.* HEPWORTH, No. 4269, *ante*.

5888. Term refresher fees.]—Term refresher fees will be allowed on the taxation of costs.—STOATE *v.* STOATE (1861), 30 L. J. P. M. & A. 214.

5889. Particulars of adultery—Order obtained by motion in open court.]—HIGGS *v.* HIGGS & HOPKINS, No. 3968, *ante*.

5890. Interlocutory applications—Extension of time to plead.]—HARDING *v.* HARDING & LANCE, No. 4223, *ante*.

5891. "Costs incurred in proving adultery"—Expenses incidental to filing & prosecution of petition—So far as relating to adultery of co-respondent.]—At the hearing, the adultery of resp. with co-resp. was proved, but as the adultery of petitioner was also proved, the petition was dismissed, & an order made condemning co-resp. in the costs incurred by petitioner in proving his adultery with resp.:—*Held:* this order comprised all the expenses incidental to the filing & prosecution of the petition so far as they related to the adultery of co-resp.—BAKER *v.* BAKER & GRIGG (1867), 36 L. J. P. & M. 119.

Party admitted to take or defend proceedings as poor person.]—*See, now*, R. S. C., 1925, Ord. 16, r. 31B.

C. Review of Taxation and Appeals.

5892. Time for application to review.]—DENT *v.* DENT, No. 5882, *ante*.

5893. Appeal—To judge—When registrar's decision will be reviewed—Taxation on erroneous principle.]—The ct. will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded on an erroneous principle.—COOKE *v.* COOKE (1864), 3 Sw. & Tr. 374; 33 L. J. P. M. & A. 79; 10 L. T. 141; 164 E. R. 1320.

5894. —— —— —— On question of amount.]—CAMPBELL *v.* CAMPBELL (1887), 3 T. L. R. 558; 31 Sol. Jo. 378, C. A.

Annotation:—**Refd.** Dashwood *v.* Magniac (1892), 8 T. L. R. 445.

5895. —— To court of appeal—From decision of judge—Whether competent.]—CAMPBELL *v.* CAMPBELL (1887), 3 T. L. R. 558; 31 Sol. Jo. 378, C. A.

Annotation:—**Refd.** Dashwood *v.* Magniac (1892), 8 T. L. R. 445.

5896. —— —— —— When court of appeal will review decision of judge.]—CAMPBELL *v.* CAMPBELL (1887), 3 T. L. R. 558; 31 Sol. Jo. 378, C. A.

Annotation:—**Refd.** Dashwood *v.* Magniac (1892), 8 T. L. R.

SECT. 23.—ENFORCING ORDERS AND AUTHORITY OF COURT.

SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 1–5, 21, 36–41; Matrimonial Causes Rules, 1924, rr. 77–79.

5897. When court will enforce—Applicant in contempt of King's Bench.]—The ct. will not withhold the enforcement of its order, by reason that the party obtaining such order is in contempt of the Ct. of K. B., & is resident out of the country, in order to evade the process of that ct.—GREENHILL *v.* GREENHILL (1836), 1 Curt. 462; 163 E. R. 162.

Annotations:—**Apld.** Morse *v.* Morse (1846), 5 Notes of Cases, 49. **Refd.** Hope *v.* Hope (1854), 18 Jur. 1086.

5898. Decree for permanent alimony—Whether registered under Judgments Act, 1838 (c. 110).]—A wife, having obtained against her husband a decree for dissolution of marriage, & being also adjudged permanent alimony at the rate of £100 a year, payable by monthly instalments, registered the decree, under above Act, in the Ct. of C. P., the effect being to prevent the husband from mortgaging or selling any part of his real estate. On motion to expunge the entry from the register, the ct. refused to interfere, remitting the husband for remedy if, any, to the Ct. of Ch.—*Re* HOLDEN, *Ex p.* HOLDEN (1863), 13 C. B. N. S. 641; 1 New Rep. 361; 32 L. J. C. P. 111; 7 L. T. 791; 9 Jur. N. S. 948; 143 E. R. 254; *sub nom.* HOLDEN *v.* HOLDEN, 11 W. R. 437; *previous proceedings, sub nom. Re* HOLDBY (1862), 7 L. T. 386.

5899. Order under Matrimonial Causes Act, 1884 (c. 68)—Personal order.]—TANGYE *v.* TANGYE, No. 5515, *ante*.

SUB-SECT. 2.—AGAINST WHOM ENFORCED.

5900. Representative—Of respondent—Insolvent estate of husband—Wife's maintenance.]—*Re* TATHAM, BENSAUDE *v.* HASTINGS (1892), 37 Sol. Jo. 27.

PART XIII. SECT. 23, SUB-SECT. 1.

t. *Decree cannot be varied.*]—Where a decree in unconditional terms ordered maintenance to be paid by a husband to a wife:—*Held:* on an application by her for execution of the decree, an objection by the husband that she had by her conduct forfeited her right to maintenance could not be entertained.—RANMALSANGJI BHAGWATSANGJI *v.* BAI SHRI KUNDANKUWAR (1902), I. L. R. 26 Bom. 707.—**IND.**

5901. Arrears of permanent alimony.]—Where an order has been made against a husband for judicial separation & for payment of alimony, his widow may recover against his estate, if solvent, any arrears of alimony due at his death. *Qu.:* whether the arrears are recoverable if the husband's estate is insolvent.—*Re* STILLWELL, BRODRICK *v.* STILLWELL, [1916] 1 Ch. 365; 85 L. J. Ch. 314; 114 L. T. 604; 32 T. L. R. 285; 60 Sol. Jo. 322.

Annotations:—**Folld.** Firman *v.* Royal, [1925] 1 K. B. 681. **Refd.** Maconachie *v.* Maconachie, Maconachie *v.* Maconachie & Blake (1916), 33 T. L. R. 50; *Re* Naters, Ainger *v.* Naters (1919), 88 L. J. Ch. 521.

5902. —— —— Solvent estate of husband—Arrears of permanent alimony.]—*Re* STILLWELL, BRODRICK *v.* STILLWELL, No. 5901, *ante*.

5903. —— —— Wife's costs—Power of divorce court to enforce order.]—COLEMAN *v.* COLEMAN & SIMPSON, No. 4579, *ante*.

5904. —— Of co-respondent—Damages—Power of divorce court to enforce order.]—On the hearing of a petition for divorce by a husband against his wife the jury assessed damages against co-resp. at £1,500, a decree *nisi* was pronounced, & co-resp. was ordered "within one month from the service of the order to lodge in ct. the said sum of £1,500." Within a month of the order co-resp. died without having paid the money into ct. On an application by petitioner for an order against the exor. of co-resp. to pay the damages & costs out of the assets of his testator:—*Held:* there was no provision in the Divorce Acts or Rules enabling the exor. of a co-resp. to be brought before the ct., the action was a personal action & the cause of the action did not survive, & there was no remedy against the exor. in the Divorce Ct., & no order for payment could be enforced against the exor. in that ct.—BRYDGES *v.* BRYDGES & WOOD, [1909] P. 187; 78 L. J. P. 97; 100 L. T. 744; 25 T. L. R. 505, C. A.

Annotations:—**Consd.** Coleman *v.* Coleman & Simpson, [1920] P. 71. **Refd.** Ranson *v.* Platt, [1911] 2 K. B. 291.

SUB-SECT. 3.—HOW ENFORCED.

A. In General.

5905. Execution—Immediate execution—Damages against co-respondent.]—The ct. has no power to order immediate execution for the recovery of damages awarded against co-resp., & ordered to be paid to petitioner, nor to order that such damages be paid into ct.—POUNSFORD *v.* POUNSFORD & BULPIN (1861), 2 Sw. & Tr. 389; 30 L. J. P. M. & A. 188; 5 L. T. 139; 164 E. R. 1046.

5906. —— Leave to issue after six years—Costs against co-respondent.]—Where a decree *nisi* for dissolution of marriage has been made with costs against co-resp., & no steps have been taken for upwards of six years to enforce the order for costs, application should be made to the ct. for an order that petitioner be at liberty to issue execution against co-resp.—GOODWIN *v.* GOODWIN, [1897] P. 87; 66 L. J. P. 107; 45 W. R. 656.

5907. Payment into court—Damages against co-respondent.]—POUNSFORD *v.* POUNSFORD & BULPIN, No. 5905, *ante*.

5908. —— ——.]—The ct. has no power to order a co-resp. to pay into ct. the amount of the damages assessed against him.—FORSTER *v.* FORSTER & BERRIDGE (1863), 32 L. J. P. M. & A. 133; *subsequent proceedings*, 3 Sw. & Tr. 158.

——.]—*See, further*, Sub-sect. 3, C.–H., *post*.

5909. Peremptory order—Custody of children.]—The judge ordinary having granted a decree dissolving the marriage between the parties, on the petition of the wife, further ordered that on certain conditions, & after due notice, she should have access to her children. Resp. for a time removed himself & one child beyond the jurisdiction of the ct., & on his return denied to petitioner access to the child on the terms laid down by the ct. On the suggestion that he was again about to leave this country, & in consideration of the approaching vacation, the ct. ordered that the child should be delivered up to its mother forthwith, & that she should have the custody of it until the fifth day of the following term.—PORTUGAL *v.* PORTUGAL (1866), 35 L. J. P. & M. 103; 15 W. R. 9.

5910. —— Arrears of alimony.]—The ct., contrary to the usual practice, made an order for the payment of arrears of alimony, specifying the amount, where it appeared probable that the husband, who was an officer serving in India, would be compelled by the India Office to obey such an order.—LOUIS *v.* LOUIS (1871), 41 L. J. P. & M. 19; 25 L. T. 856; 20 W. R. 215.

B. Attachment and Committal.

(a) In What Cases granted.

See Matrimonial Causes Rules, 1924, rr. 77–78; Contempt of Court generally, *see* CONTEMPT OF COURT, Vol. XVI., pp. 6 *et seq.*

5911. Alimony—Non-payment of—Poverty of husband.]—A contempt which had arisen from the inability of a husband to pay alimony & costs, suspended.—FITZGERALD *v.* FITZGERALD (LADY) (1756), 2 Lee, 263; 161 E. R. 335.

5912. —— ——.]—The husband pronounced in contempt for non-obedience to a monition for payment of alimony.—FRANKFORT *v.* FRANKFORT (1850), 7 Notes of Cases, 533.

5913. —— —— Debtors Act, 1869 (c. 62)—

PART XIII. SECT. 23, SUB-SECT. 3.—A.

a. *Execution.*]—Where a reference is directed to the master to ascertain & state the amount of alimony which deft. should pay, execution may be issued for the amount found by his report before confirmation thereof.—BOECK *v.* BOECK (1894), 16 P. R. 313.—**CAN.**

b. ——.]—An order for *interim* alimony payable monthly was made:—*Held:* the order for payment could only be enforced by execution & not by attachment for contempt.—GALLEY *v.* GALLEY (1905), 1 W. L. R. 155.—**CAN.**

c. ——.]—The payment of alimony due under a decree of divorce may be enforced in the ct. for Divorce & Matrimonial Causes by writ of execution issued out of such Ct.—HALLIDAY *v.* HALLIDAY (1911), 10 E. L. R. 293.—**CAN.**

d. *Arrears of alimony—Order for sale of lands.*]—COWIE *v.* COWIE (1912), 23 O. W. R. 237; 4 O. W. N. 224; 6 D. L. R. 886.—**CAN.**

e. —— *Discretion of court.*]—There is a discretion in the ct. as to enforcing payment of arrears of alimony.—HEAD-PATRICK *v.* PATRICK, [1922] 1 W. W. R. 825; 63 D. L. R. 158; 15 Sask. L. R. 304.—**CAN.**

f. *Attaching order.*]—A judgment in an action under Divorce & Matrimonial Causes Act is, by Judgments Act, 1838 (Imperial), s. 18, enforceable by an attaching order issued under Attachment of Debts Act.—MCLEOD *v.* MCLEOD (1919), 25 B. C. R. 430.—**CAN.**

PART XIII. SECT. 23, SUB-SECT. 3.—B. (a).

5912 i. *Alimony—Nonpayment of.*]—Although 22 Vict. c. 33, s. 2, authorises the arrest of a deft. for two years' allowance for future alimony & arrears, still, if the ct. has obtained funds of deft. through any default of his, it may refuse payment of them to him without first securing the future payment of alimony.—GOTT *v.* GOTT (1864), 10 Gr. 543.—**CAN.**

5912 ii. —— ——.]—CAPELL *v.* CAPELL (1865), Peters P. E. I. 183.—**CAN.**

5912 iii. —— — —.]—A decree for alimony & maintenance made by a British Columbia ct. cannot be enforced by attachment or committal even though resp. be in contempt.—JENNS *v.* JENNS, [1921] 3 W. W. R. 226.—**CAN.**

Sect. 23.—*Enforcing orders and authority of court: Sub-sect.* 3, *B.* (*a*) & (*b*).]

Bankruptcy of husband.]—A liability to pay alimony in weekly sums by an order made in divorce under 29 & 30 Vict. c. 32, s. 1, is not a "future debt or liability" provable in bkpcy. under Bankruptcy Act, 1883 (c. 52), s. 37 (3); &, notwithstanding the bkpcy. of the person liable, payment may be enforced as of a debt due in pursuance of an order of a competent ct. under Debtors Act, 1869 (c. 62), s. 5.—LINTON *v.* LINTON (1885), 15 Q. B. D. 239; 54 L. J. Q. B. 529; *sub nom. Re* LINTON, *Ex p.* LINTON, 52 L. T. 782; 49 J. P. 597; 33 W. R. 714; 2 Morr 179, C. A.

Annotations:—**Expld.** *Re* Hinks, *Ex p.* Verdi (1886), 3 Morr. 218; Morgan *v.* Hardy (1887), 18 Q. B. D. 646. **Distd.** *Re* Tatham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27. **Consd.** *Re* Hawkins, *Ex p.* Hawkins, [1894] 1 Q. B. 25; Watkins *v.* Watkins, [1896] P. 222; Kerr *v.* Kerr, [1897] 2 Q. B. 439; Victor *v.* Victor, [1912] 1 K. B. 247; *Re* Stillwell, Brodrick *v.* Stillwell, [1916] 1 Ch. 365. **Refd.** *Re* Fryer, *Ex p.* Fryer (1886), 17 Q. B. D. 718; Haddon *v.* Haddon (1887), 18 Q. B. D. 778; *Re* Henderson, *Ex p.* Henderson (1888), 20 Q. B. D. 509; *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885; Tangye *v.* Tangye, [1914] P. 201. **Mentd.** Buckley *v.* Crawford, [1893] 1 Q. B. 105; Campbell *v.* Campbell, [1922] P. 187.

5914. —— —— —— ——.]—Arrears of alimony under an order of the Divorce Ct. which have accrued before a receiving order has been made against the husband do not constitute a debt provable in bkpcy. by the wife, & as such arrears constitute a debt enforceable under sect. 5 of above Act, a committal order on proof of means is good.—KERR *v.* KERR, [1897] 2 Q. B. 439; 66 L. J. Q. B. 838; 77 L. T. 29; 46 W. R. 46; 13 T. L. R. 534; 41 Sol. Jo. 679; 4 Mans. 207, D. C.

5915. -.]—Non-compliance with orders of the Divorce Div. for the payment of costs & alimony is still a contempt of ct., although since Debtors Act, 1869 (c. 62), the orders cannot be enforced by attachment. After such non-compliance it is a matter for the discretion of the ct. whether the party in contempt should be permitted to take a further proceeding in the litigation; & it is material to the exercise of that discretion to consider whether the non-compliance is due to the fault or the misfortune of the party in contempt.

Where a husband, resp. to a petition for restitution of conjugal rights, failed to comply with orders for costs & alimony, & whilst in default took out a summons, under Divorce Rules, r. 176, to stay the suit, the ct., not being satisfied that resp was unable to comply with the orders, refused to permit him to proceed.—LEAVIS *v.* LEAVIS, [1921] P. 299; 90 L. J. P. 302; 125 L. T. 28; 37 T. L. R. 578; 65 Sol. Jo. 456.

See, generally, BANKRUPTCY, Vol. V., p. 1034, Nos. 8459, 8460.

5916. —— **Failure to attend to be examined as to means.**]—A husband, who had filed no answer to his wife's petition for alimony, was subpœnaed by her to attend at the hearing, & to be examined in support of the petition. He did not answer to his subpœna, & on the service being proved, the ct. made an order that he should attend on the next motion day, & that an attachment should issue in the event of his non-attendance.—JENNINGS *v.* JENNINGS (1865), L. R. 1 P. & D. 35; L. J. P. & M. 12.

Annotation:—**Refd.** Carew *v.* Carew (1891), 65 L. T. 167.

5917. Permanent maintenance—Non-payment of arrears.]—A decree having been made absolute for a divorce on the wife's petition, the husband, as part of the final order, was directed to pay a permanent maintenance to his wife at the rate of £200 a year:—*Held:* the ct. had no power to grant an attachment against the husband for non-payment of arrears of the annuity due under the order.—DE LOSSY *v.* DE LOSSY (1890), 15 P. D. 115; 62 L. T. 704; 38 W. R. 511.

5918. Costs—Non-payment of—Poverty of husband.]—FITZGERALD *v.* FITZGERALD (LADY), No. 5911, *ante*.

5919. —— —— ——.]—Resp. having been ordered to pay the taxed costs of his wife, who was petitioning for a judicial separation, alleged that he was without the means of obeying the order, because he had paid the greater part of his last quarter's salary to creditors, & was unable to raise any money:—*Held:* this was not a valid excuse for his disobedience to the order, & the ct. directed an attachment to be issued against him.—DICKENS *v.* DICKENS (1859), 23 J. P. 359; *previous proceedings*, 2 Sw. & Tr. 103.

5920. —— —— ——.]—WARD *v.* WARD, No. 4288, *ante*.

5921. —— —— ——.]—The ct. refused to grant an attachment against a husband for non-payment of certain costs incurred on behalf of the wife in a suit instituted by her for judicial separation on the ground of his alleged cruelty, where, on his uncontradicted answer, it appeared that the husband had been compelled to separate from her several months before the institution of the suit in consequence of her drunkenness & violence, & had not the present means of complying with the order for payment.—HOLLAND *v.* HOLLAND (1865), 4 Sw. & Tr. 78; 34 L. J. P. M. & A. 65; 11 L. T. 750; 13 W. R. 505; 164 E. R. 1445.

5922. —— ——.]—WILLIAMS *v.* WILLIAMS, No. 4295, *ante*.

5923. -.]—LEAVIS *v.* LEAVIS, No. 5915, *ante*.

5924. Failure to provide security.]—HEPWORTH *v.* HEPWORTH, No. 4542, *ante*.

5925. —— ——.]—In a husband's suit for divorce, where the wife in her answer also prayed for a dissolution of the marriage, petitioner had been ordered to deposit in the registry or to give security for, the sum of £80, to cover the wife's costs of the hearing. On his neglecting to comply with this order the ct. declined to issue a writ of attachment against him, but ordered him to attend to be cross-examined as to his faculties.—SULLIVAN *v.* SULLIVAN, LEAHAY, MADDEN & SLANEY (1875), 33 L. T. 706.

5926. —— —— **Debtors Act, 1869 (c. 62).**]—Notwithstanding the provisions of above Act, a husband is liable to attachment if he does not find security for his wife's costs of suit.—LYNCH *v.* LYNCH (1885), 10 P. D. 183; 54 L. J. P. 93; 34 W. R. 47.

Annotations:—**Refd.** Bates *v.* Bates (1888), 14 P. D. 17; Rutter *v.* Rutter (1921), 124 L. T. 796.

5927. —— —— ——.]—In a wife's petition for judicial separation the husband was ordered to pay a sum of money into ct. as security for her costs. He made default in payment:—*Held:* this was not "default in payment of a sum of money" within sect. 4 of above Act, & he was liable to attachment for disobeying the order of the ct.—BATES *v.* BATES (1888), 14 P. D. 17; 58

5917 i. *Permanent maintenance—Non payment of arrears.*]—RUBIE *v.* RUBIE (1911), 13 C. L. R. 351.—**AUS.**

g. *Disobedience to order for restitution of conjugal rights.*]—Disobedience of a judgment for restitution of conjugal rights may in Alberta be punished by imprisonment for contempt.

In most cases the ct. would refuse to enforce the judgment by attachment & would enforce it only indirectly by awarding alimony.—

L. J. P. 85; 60 L. T. 125; 37 W. R. 230; 5 T. L. R. 155, C. A.

Annotations :—**Distd.** Clarke *v.* Clarke, [1891] P. 278. **Apld.** Shine *v.* Shine, [1893] P. 289. **Refd.** Ivimey *v.* Ivimey, [1908] 2 K. B. 260.

5928. —— —— Poverty of husband.]—(1) The ct. refused to attach a petitioner, who had not complied with an order to secure a sum for his wife's costs, on his showing want of means as the reason for non-compliance.

(2) *Semble :* the proper course under such circumstances would be for the wife to move to dismiss the petition.—CLARKE *v.* CLARKE, [1891] P. 278; 60 L. J. P. 97.

Annotation :— **Dbtd. & N.F.** Jones *v.* Jones, [1912] P. 295.

5929. —— —— Bankruptcy of husband.]—Resp. the husband, in a suit for divorce was an undischarged bkpt., but was shown to be in receipt of a weekly salary of £30, which was not under the control of the trustee in bkpcy. An order had been made by the ct., & duly served on him, to pay into ct. or give security for the sum of £40, to cover the wife's costs of the hearing of her petition; but although nearly two years had elapsed from the date of such order he had failed to comply with it :—*Held :* the fact that resp. had been adjudged bkpt. did not preclude the ct. from issuing an attachment & the ct. made an order accordingly.—SHINE *v.* SHINE, [1893] P. 289; 63 L. J. P. 60; 69 L. T. 500; 6 R. 663.

5930. —— —— Cross-charge by wife.]—In a petition by a husband praying for a judicial separation on the ground of cruelty, to which the wife filed an answer denying the cruelty, countercharging the husband with adultery, & praying for judicial separation the husband had been ordered to pay or secure the wife's costs of the hearing as estimated by one of the registrars, but had failed to comply with this order :—*Held :* the wife's cross-claim for relief constituted her a petitioner, & it was open to her to move for a writ of attachment against her husband in respect of his failure to find security pursuant to the order.—JONES *v.* JONES, [1912] P. 295; 82 L. J. P. 16; 107 L. T. 590; 29 T. L. R. 22; 57 Sol. Jo. 10.

5931. Disobedience to order for restitution of conjugal rights—Effect of Matrimonial Causes Act, 1884 (c. 68), s. 2.]—Above sect. is retrospective, & therefore where an order for the issue of a writ of attachment had been made previously to the passing of above Act, but the issue of it had been suspended until further order of the ct., & was so suspended at the date of the passing, the ct. could not after the Act make any further order directing the writ to issue.

How did matters stand in the present case on Aug. 14, 1884? Mr. W. had been declared contumacious & an order had been made that a writ of attachment should issue, but that issue had been suspended till the further order of the ct. Nothing could be done without an order of the ct. authorising the issue of that writ. Would not an order directing an issue of the writ have been an enforcing of a decree of restitution of conjugal rights by attachment? In my opinion it would, & it was the evident object of the Act of Parliament to prevent such a proceeding (FRY, L.J.).—WELDON *v.* WELDON (1885), 54 L. J. P. 60; 52 L. T. 233; 49 J. P. 517; 33 W. R. 427, C. A.; *affg.* 10 P. D. 72.

See, now, Matrimonial Causes Act, 1884 (c. 68), s. 2.

5932. Nullity—Refusal to obey order for inspection.]—B. *v.* L. (FALSELY CALLED B.) (1869), No. 4339, *ante.*

5933. Molestation—After decree of judicial separation.]—Where a husband had obtained a decree of judicial separation against his wife, & after such decree, the wife molested her husband :—*Held :* the ct. had no jurisdiction to attach her for contempt for such molestation.—SMITH *v.* SMITH (1889), 59 L. J. P. 15.

5934. Custody of children — Disobedience to order.]—An order was made in a divorce suit that the child, issue of the marriage between petitioner & resp., be forthwith delivered up to & remain in the custody of petitioner until further order of the ct., but that such child be not removed out of the jurisdiction of the ct. without its sanction. This order was brought to the knowledge of resp., who took the child out of the jurisdiction & retained its custody. Legal service was not effected upon him. The ct., upon *ex parte* application by petitioner, ordered a writ of attachment to issue against resp.—FAVARD *v.* FAVARD (1896), 75 L. T. 664.

Annotation :—**Folld.** Gordon *v.* Gordon, [1903] P. 141.

5935. —— ——.]—Upon the authority of *Favard* v. *Favard*, No. 5934, *ante*, a writ of attachment & a committal order were directed to be issued, upon the *ex p.* application of petitioner, against resp., who had taken the child out of the jurisdiction.—GORDON *v.* GORDON, [1903] P. 141; 72 L. J. P. 33; 89 L. T. 73; *subsequent proceedings*, [1904] P. 163.

Annotations :— **Consd.** R. *v.* Wigand, *Re* Wigand (1913), 82 L. J. K. B. 735. **Mentd.** Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612; *Re* Wingfield & Blew, [1904] 2 Ch. 665 Russell *v.* Russell, [1921] A. C. 687; Warren *v.* Warren, [1925] P. 107.

5936. —— ——.]—BJORKMAN *v.* BJORKMAN (1910), *Times*, Sept. 8.

Contempt in procedure.] *See* CONTEMPT OF COURT, Vol. XVI., pp. 8, 28, 34, 35, Nos. 11, 256, 257, 337, 343, 346.

(*b*) *Practice.*

See Matrimonial Causes Rules, 1924, rr. 77, 78, 83.

Evidence & procedure on application for attachment or committal generally, *see* CONTEMPT OF COURT, Vol. XVI., pp. 49 *et seq.*

5937. Jurisdiction to order—After final decree.]—(1) Where there was a balance due from petitioner, the husband, for alimony & costs, & there had been an arrangement between the parties that the balance should be paid by monthly instalments of £20 & that an attachment should be granted against him to remain in the registry until he made default in payment of one of the instalments, the ct. dismissed the petition, & decreed an attachment on the terms arranged.

(2) The ct. has power to enforce an attachment after the suit has been dismissed.

(3) Where co-resp., is found to have been guilty of adultery, he is not, as a matter of course, relieved from payment of the costs of that issue, merely by reason of the husband having been guilty of such adultery as to induce the ct. to dismiss the petition.—BREMNER *v.* BREMNER & BRETT (1864), 3 Sw. & Tr. 378; 33 L. J. P. M. & A. 202; 10 L. T. 99; 12 W. R. 444; 164 E. R. 1321.

Annotations :—*As to* (3) **Folld.** Baker *v.* Baker & Grigg (1867), 36 L. J. P. & M. 119. **Consd.** Waudby *v.* Waudby

O'LEARY *v.* O'LEARY, [1923] 1 D. L. R. 949; 19 Alta. L. R. 224, [1923] 1 W. W. R. 501; *revsg.* 69 D. L. R. 53. —**CAN.**

PART XIII. SECT. 23, SUB-SECT. 3.—B. (b).

h. *Order not made before judgment.*]—An order for attachment before judgment will not be made in divorce proceedings.—PHILLIPS *v.* PHILLIPS (1910), I. L. R. 37 Calc. 613. —**IND.**

Sect. 23.—*Enforcing orders and authority of court: Sub-sect.* 3, *B.* (*b*), *& C., D. & E.*

& Bowland, [1902] P. 85. **Folld.** Quartermaine *v.* Quartermaine & Glenister (1911), 105 L. T. 80. **Refd.** Yowell *v.* Yowell, Serrash & Burleigh (1875), 24 W. R. 59.

5938. —— Not on judge of King's Bench Division.]—A judge of the Q. B. D. has no jurisdiction to order a writ of attachment to issue against a resp. for disobeying an order made against him in a suit in the Divorce Ct.—COOK *v.* COOK (1885), 2 T. L. R. 10, D. C.

5939. How application made—Non-payment of alimony & costs—On one motion.]—An application for an attachment against a husband for non-payment of alimony & costs should be made in one motion. The costs for two motions will not be allowed against the husband.—WATTS *v.* WATTS (1861), 4 Sw. & Tr. 274; 31 L. J. P. M. & A. 29; 164 E. R. 1521.

5940. —— Ex parte.]—FAVARD *v.* FAVARD, No. 5934, *ante*.

5941. Service of order—Whether personal service necessary.]—ALLEN *v.* ALLEN & D'ARCY, No. 3826, *ante*.

5942. —— —— Order for costs.]—Service of an order for payment of costs is effected by leaving an office copy of the order with the party chargeable & at the same time producing the original order. Unless the original be produced the attachment for non-payment of costs will not be granted.—DAVIES *v.* DAVIES & DALBY (1862), 2 Sw. & Tr. 437; 31 L. J. P. M. & A. 104; 6 L. T. 163; 10 W. R. 447; 164 E. R. 1065.

Annotation:—**Distd.** Parr *v.* Parr & White (1863), 4 Sw. & Tr. 229.

5943. Order for alimony.]—Service of an order for the payment of alimony is effected by showing to the party to be served an office copy of the order & by leaving with him a copy of it.—PARR *v.* PARR & WHITE (1863), 4 Sw. & Tr. 229; 32 L. J. P. M. & A. 91; 11 W. R. 550; 164 E. R. 1504.

5944. —— —— Knowledge of order aliunde.]—FAVARD *v.* FAVARD, No. 5934, *ante*.

5945. —— Copy of order attached to affidavit of service.]—An attachment will not be granted for non-payment of costs pursuant to an order, unless a copy of the order be annexed to the affidavit of service.—BUSBY *v.* BUSBY & VINE (1861), 2 Sw. & Tr. 383; 30 L. J. P. M. & A. 172; 5 L. T. 137; 164 E. R. 1044.

5946. —— Indorsement of amount on writ.]—On May 8, 1861, an order was made for attachment to issue against respt. for non-payment of taxed costs, & respt. was subsequently confined in Chester gaol under the attachment:—*Held:* it was too late, in Jan. 1862, to move to set aside the attachment on the ground that the amount of costs to be paid was not indorsed on the writ, the *allocatur* & order for payment having been previously served upon resp.—PEARSON *v.* PEARSON (1862), 2 Sw. & Tr. 546; 31 L. J. P. M. & A. 102; 5 L. T. 772; 8 Jur. N. S. 158; 10 W. R. 410; 164 E. R. 1109.

5947. —— ——.]—By virtue of Matrimonial Causes Act, 1857 (c. 85), s. 52, all decrees & orders of the Ct. of Divorce are to be enforced in the same manner as orders, etc., in Chancery. Therefore, in spite of R. S. C., Ord. 68, r. 1, which exempts divorce proceedings from the operation of the Rules & Orders of the Supreme Ct., before a motion can be successfully made for disobedience to an order made in a divorce proceeding, it must be shown that the order it is sought to enforce was indorsed as required by R. S. C., Ord. 41, r. 5.—PACE *v.* PACE (1891), 61 L. J. P. 114; 67 L. T. 383.

5948. Affidavit of service—Time for filing.]—An affidavit of non-payment of taxed costs & alimony to the person to whom they are ordered to be paid cannot be read on a motion for an attachment if filed subsequently to the notice of motion.—SYMONS *v.* SYMONS & PIKE (1861), 30 L. J. P. M. & A. 215.

5949. Necessity for personal demand.]—The ct. made an order for the payment of the wife's costs to her proctor in a suit for judicial separation.

A demand for payment of these costs having been personally made on resp. by a person on behalf of petitioner's proctor, a receipt for the costs, signed by the proctor, being at the same time shown to resp.:—*Held:* such demand for payment to be sufficient to found an order for attachment.—THOMAS *v.* THOMAS (1860), 2 Sw. & Tr. 64; 2 L. T. 390; 8 W. R. 476; 164 E. R. 915.

5950. ——.]—An attachment for non-payment of costs ordered to be paid within a specified time will be granted through there has not been a personal demand.—NICHOLLS *v.* NICHOLLS (1862), 2 Sw. & Tr. 637; 31 L. J. P. M. & A. 115; 7 L. T. 221; 164 E. R. 1145.

5951. Service of notice of motion to attach—Substituted service.]—The jurisdiction given by Jud. Act, 1884 (c. 61), s. 14, when any person neglects or refuses to comply with an order directing him to execute any instrument, to order the execution of the instrument by some person nominated by the ct. to do so, may be exercised by the Probate Div. of the High Ct. of Justice; & the order may be made upon a motion for attachment for non-compliance without formal service of a fresh notice of motion, provided the person to be affected by the order has by himself or his solr. received notice that the application to the ct. will be made in the alternative form. In the Probate Div. when personal service of notice of motion to attach for non-compliance with an order cannot be effected & the original order has been duly served, substituted service, by analogy to the practice in the other Divisions of the High Ct., is sufficient.—HOWARTH *v.* HOWARTH (1886), 11 P. D. 95; 55 L. J. P. 49; 55 L. T. 303; 50 J. P. 376; 34 W. R. 633; 2 T. L. R. 705, C. A.

Annotation:—**Refd.** *Re* Evans, Evans *v.* Noton, [1893] 1 Ch.

5952. Effect of misspelling of name in proceedings.]—After a decree for dissolution of marriage with costs against co-reps., & an order for the payment of such costs, an attachment was issued against co-resp. for their non-payment. The person who had been cited and served with the process and notices as co-resp. throughout the suit, moved to set aside the attachment on the ground that his surname was misspelt & one of his Christian names omitted in the citation, & process, & notices:—*Held:* co-resp. having taken no step to set the mistake right in the course of the suit, could not at the last moment take advantage of it to invalidate the proceedings, & the order for an attachment must stand.—CHURCHILL *v.* CHURCHILL & ABBOTT (1868), L. R. 1 P. & D. 485; 37 L. J. P. & M. 41; 17 L. T. 619.

5953. Order to attend for examination—Whether conduct money must be tendered.]—Where after a decree absolute for dissolution of marriage upon the wife's petition an order is made for the husband to attend before the registrar to be examined as to his means for the purposes of the assessment of permanent alimony for the wife, conduct money is payable to the husband & in default thereof an order of committal cannot be made against him for not attending.—TOWNEND *v.* TOWNEND (1905), [1907] P. 239, n.; 21 T. L. R. 657; 69 J. P. Jo.

340; *subsequent proceedings*, 22 T. L. R. 50, C. A.

Annotations:—**Distd.** Jeffries *v.* Jeffries (1907), 51 Sol. Jo. 572. **Refd.** *In the Estate of* Harvey, [1907] P. 239.

5954. —— ——.]—Where resp. was ordered to produce books relating to his income at his place of business for inspection by petitioner's solr., on motion to attach for non-compliance with the order:—*Held:* he was not entitled to conduct money to appear on the hearing of the motion.—JEFFRIES *v.* JEFFRIES (1907), 51 Sol. Jo. 572.

5955. Discharge of order—After obedience—Payment of costs not condition precedent.]—Where a husband who has been attached & imprisoned for contempt of ct. in failing to obey an order of the ct. to pay or secure a sum of money for his wife's costs in a suit brought by her for judicial separation, has afterwards obeyed the order, he is entitled to be released from custody. The ct. will order him to pay all his wife's costs, incurred with respect to the motions for attachment & release, but will not make the payment of such costs a condition precedent to his release.—AYRES *v.* AYRES (1901), 71 L. J. P. 18; 85 L. T. 648; 18 T. L. R. 2.

C. Sequestration.

See Matrimonial Causes Rules, 1924, r. 79.

Sequestration generally, *see* EXECUTION, Vol. XXI., pp. 591 *et seq.*

5956. In what cases issued—Arrears of alimony.]—Costs & alimony, decreed in a matrimonial suit, not being paid by the husband, who had gone to reside beyond the sea, the ct. pronounced him in contempt, & decreed the same to be signified, in order to sequestration, under 2 & 3 Will. 4, c. 4, without personal service of the monition.—MORSE *v.* MORSE (1846), 5 Notes of Cases 49.

5957. —— ——.]—On non-payment of certain sums due by way of alimony & costs, a writ of sequestration issued against resp.'s property, & an order was made on K. to pay into ct. a sum of money awarded in an action in the Q. B. to be paid by K. to resp. On motion on behalf of petitioner to order such sum to be paid out in part satisfaction of her attorney's taxed costs & her own alimony, the ct. refused to make such order, H. & F. resp.'s attorneys in the action in the Q. B., having satisfied the ct., on affidavit, that they had a lien for costs in that cause exceeding the sum so paid into ct.—MUNT *v.* MUNT (1862), 2 Sw. & Tr. 661; 31 L. J. P. M. & A. 134; 7 L. T. 438; 164 E. R. 1155.

5958. —— **Non-payment of costs.**]—MORSE *v.* MORSE, No. 5956, *ante*.

5959. —— ——.]—MUNT *v.* MUNT, No. 5957, *ante*.

5960. What property liable—Fund liable to solicitor's lien.]—MUNT *v.* MUNT, No. 5957, *ante*.

D. Writ of fieri facias.

See Matrimonial Causes Rules, 1924, r. 79.

Writ of *fi. fa.* generally, *see* EXECUTION, Vol. XXI., pp. 470 *et seq.*

5961. When writ issued—Non-payment of damages.]—When damages & costs are not paid pursuant to an order of the ct., leave will be granted to issue a *fi. fa.* under Matrimonial Causes Act, 1857 (c. 85), s. 52.—REED *v.* REED & DAVIS (1859), 29 L. J. P. M. & A. 158; 23 J. P. 359.

5962. —— ——.]—PRITCHARD *v.* PRITCHARD & BEAN, No. 4815, *ante*.

5963. —— **Non-payment of costs.**]—REED *v.* REED & DAVIS, No. 5961, *ante*.

5964. —— ——.]—WARD *v.* WARD, No. 4288, *ante*.

5965. —— **Non-payment of maintenance.**]—A wife having obtained a decree *nisi* for the dissolution of her marriage, an order was made under Matrimonial Causes Act, 1866 (c. 32), that from the date of the decree absolute the husband should pay her £40 a year by monthly payments. The decree was made absolute, & she married again. Subsequently she & her second husband, by writing, not under seal, agreed with the late husband, in consideration of £10 paid to them by him, to give up all claims in respect of the payments directed by the order. At this time £16 was due to the wife for arrears. Subsequently she issued a writ of *fi. fa.* to enforce payment of £80 arrears of the allowance for maintenance. The ct. set aside the writ on the ground that it had been issued in contravention of the agreement:—*Held:* the agreement being for the release of all claims in respect of the maintenance order in consideration of the payment of a sum less than the amount which was at the time due & payable under such order, was invalid for want of consideration, & did not prevent the wife from enforcing payment of the £80.—UNDERWOOD *v.* UNDERWOOD, [1894] P. 204, 63 L. J. P. 109; 70 L. T. 390; 42 W. R. 372; 10 T. L. R. 352; 38 Sol. Jo. 325; 6 R. 604, C. A.

Annotation:—**Refd.** Watkins *v.* Watkins, [1896] P. 222.

5966. Personal service of order—When dispensed with—Removal of property by debtor—Evasion of service of order.]—PRITCHARD *v.* PRITCHARD & BEAN, No. 4815, *ante*.

E. Writ of elegit.

See Matrimonial Causes Rules, 1924, r. 79.

Writ of elegit generally, *see* EXECUTION, Vol. XXI., pp. 556 *et seq.*

5967. When writ issued—Non-payment of costs.]—The husband, resp. in divorce proceedings, obtained in the Q. B. Div. a *mandamus*, directing his wife to deliver up certain title deeds. The property comprised in these deeds constituted, practically, his whole means. Upon the husband failing to comply with an order of this ct. for costs of the divorce suit, the wife sued out a writ of *elegit*, & the sheriff took possession of the property in virtue thereof. Upon motion by the husband to set aside the writ of *elegit* until the wife should comply with the *mandamus* & deliver up the deeds of the property which he had, meanwhile, agreed to sell. The ct., refused to set aside the writ of

PART XIII. SECT. 23, SUB-SECT. 3.—C.

5956 i. *In what cases issued—Arrears of alimony.*]—The ct. has jurisdiction, under R. 549, to award a writ of sequestration in an action for alimony where *interim* alimony has been ordered to be paid at a definite time, & has not been paid.—CUDMORE *v.* CUDMORE (1921), 64 D. L. R. 556; 50 O. L. R. 489.—**CAN.**

PART XIII. SECT. 23, SUB-SECT. 3.—D.

k. *When writ issued—Non-payment of alimony.*]—In a suit for alimony a decree was obtained & writs of *fi. fa.* against the goods of deft. were issued.—FORRESTER *v.* FORRESTER (1882), 9 P. R. 338.—**CAN.**

PART XIII. SECT. 23, SUB-SECT. 3.—E.

l. *Non-payment of alimony.*]—Where after the recovery & registration of judgment in an alimony action the wife on default being made in payment of two of the instalments:—*Held:* entitled to the usual order for the sale of the husband's lands for the realisation of the alimony.—LEE *v.* LEE (1895), 27 O. R. 193.—**CAN.**

m. ——.]—Pltf., who had an unsatisfied claim for *interim* alimony & alimony, on presenting a petition to the ct. was granted an order that lands owned by deft. be sold to satisfy the judgment.—FERGUSON *v.* FERGUSON (1916), 34 W. L. R. 804, 836.—**CAN.**

n. ——.]—ANCELLE *v.* ANCELLE, [1919] 1 W. W. R. 875.—**CAN.**

Sect. 23.—*Enforcing orders and authority of court: Sub-sect.* 3, *E., F., G., H., I., J., K. & L.*]

elegit, but put the wife upon terms as to the receipts arising from the property.—KIPPAX *v.* KIPPAX (1891), 67 L. T. 382.

F. Charging Orders.

Charging orders generally, *see* EXECUTION, Vol. XXI., pp. 647 *et seq.*

5968. Power of court to make—Matrimonial Causes Act, 1857 (c. 85), s. 52—Payment of alimony.]—(1) The order of the Ecclesiastical Ct. for permanent alimony was an order for payment of a certain part of the husband's actual income, the amount of which might be varied according to his change of means, & the nature of this order is not altered, as regards alimony on judicial separation, by above Act.

(2) The Divorce Ct. refused to make an order on the husband to execute a deed charging stock with a yearly sum equal to the amount of permanent alimony allotted.

(3) The Divorce Ct. has more extensive powers of enforcing its decrees than the Ecclesiastical Ct. had.—HYDE *v.* HYDE (1865), 4 Sw. & Tr. 80; 34 L. J. P. M. & A. 63; 12 L. T. 235; 13 W. R. 545; 164 E. R. 1445.

Annotations:—*As to* (2) **Refd.** Clarke *v.* Clarke & Clarke (1873), L. R. 3 P. & D. 57; Carter *v.* Carter, [1896] P. 35.

5969. —— ——.]—Sect. 52 of above Act does not transfer to the ct. for Divorce the powers of the Ct. of Chancery, which are ancillary to the enforcement of its decrees, but only those powers which are necessary for the direct enforcement of them, such as writs of execution & process in contempt. Hence the power given to the Ct. of Chancery by Judgments Act, 1838 (c. 110), ss. 14, 18, on the application of a judgment creditor to make a charging order on stock standing in the name of, or beneficially belonging to, the judgment debtor, cannot be exercised by the judge of the Ct. for Divorce.—CLARKE *v.* CLARKE & CLARKE (1873), L. R. 3 P. & D. 57; 42 L. J. P. & M. 72; 28 L. T. 911; 21 W. R. 777.

Annotations:—**Refd.** Heath *v.* Heath (1874), 22 W. R. 266; Oliver *v.* Lowther (1880), 42 L. T. 47.

See, now, Supreme Court of Judicature (Consolidation), Act, 1925 (c. 49), ss. 18–51.

5970. Enforcement of order—Foreclosure. RICKETTS *v.* RICKETTS, [1891] W. N. 29.

5971. Solicitors charging order—Solicitors Act, 1860 (c. 127), s. 28—Intention to bind separate estate.]—A decree for dissolution of marriage having been made on the wife's petition, an order was made under Matrimonial Causes Act, 1857 (c. 85), s. 32, directing her husband to secure to her for life the annual sum of £130. Upon application by the solrs. who had acted for the wife under the petition for an order under Solicitors Act, 1860 (c. 127), s. 28, charging their costs upon such annual sum of £130:—*Held:* such annual sum was property recovered or preserved by the solrs., & therefore liable to a charging order under sect. 28; but the ct., refused, in the exercise of its discretion, to make the order, on the ground that upon the facts it could not be presumed that the wife had entered into a contract with the solrs. so as to bind her separate property; the husband was therefore *primâ facie* responsible, & for anything that appeared the costs could be recovered from him.—HARRISON *v.* HARRISON (1888), 13 P. D. 180; 58 L. J. P. 28; 60 L. T. 39; 36 W. R. 748; 4 T. L. R. 646, C. A.

Annotations:—**Consd.** Watkins *v.* Watkins, [1896] P. 222. **Refd.** *Re* Tatham, Bensaude *v.* Hastings (1892), 37 Sol. Jo. 27; Hood Barrs *v.* Cathcart, [1894] 2 Q. B. 559; Maclurcan *v.* Maclurcan (1897), 77 L. T. 474; *Re* Wingfield & Blew, [1904] 2 Ch. 665. **Mentd.** Leak *v.* Driffield (1889), 24 Q. B. D. 98; Bonner *v.* Lyon (1890), 38 W. R. 541; Braumstein *v.* Lewis (1891), 7 T. L. R. 246; Everett *v.* Paxton (1891), 65 L. T. 383; Pelton *v.* Harrison, [1891] 2 Q. B. 422; *Re* Fieldwick, Johnson *v.* Adamson (1908), 78 L. J. Ch. 153.

See, now, Married Women's Property Act, 1893 (c. 63), s. 1 (*a*).

——.]—*See, generally*, SOLICITORS.

G. Garnishee Orders.

Attachment of debts generally, *see* EXECUTION, Vol. XXI., pp. 617 *et seq.*

5972. Jurisdiction of court.]—Under Judicature Act, 1873 (c. 66), s. 25 (8), the Ct. of Divorce has power to attach a debt due to a resp. in order to compel obedience to an order of that Ct. for payment of costs.

Where a resp. in a divorce suit had failed to obey an order for payment of costs, the ct. granted an order *nisi* attaching a debt due to resp. & also an order *nisi* for a receiver.—WHITTAKER *v.* WHITTAKER (1881), 7 P. D. 15; 51 L. J. P. 80; 47 L. T. 131; 30 W. R. 431.

Annotations:—**Refd.** Manchester & Liverpool District Banking Co. *v.* Parkinson (1888), 22 Q. B. D. 173; Holmes *v.* Millage, [1893] 1 Q. B. 551; Edmunds *v.* Edmunds, [1904] P. 362.

5973. What may be attached—Pay of naval officer.]—The full pay of an officer in the Royal Navy cannot be attached for the payment of his wife's costs of a suit in the Divorce Ct.—APTHORPE *v.* APTHORPE (1887), 12 P. D. 192; 57 L. T. 518; 35 W. R. 728; 3 T. L. R. 619, C. A.

5974. —— **Fees of registrar of births & deaths—Due or accruing due.**]—(1) Garnishee orders *nisi* in respect of sums due or accruing due to resp., a medical man, on contracts in respect of his position as public vaccinator, & as registrar of births & deaths made absolute for payment of sums due to petitioner, his wife, under orders of the Divorce Ct. for her support & for costs of proceedings in that Ct. A public vaccinator earned fees under a contract which specified that he should perform certain ministerial acts before becoming entitled to payment of his fees:—*Held:* the fees were debts accruing due so as to be attachable as soon as the work was performed, even though the contract specified a future date for actual payment.

(2) The Registration Acts prescribe that the accounts of registrars are to be vouched by the superintendent registrar of births & deaths:—*Held:* the fees earned by a registrar in respect of births & deaths actually registered were debts accruing due so as to be attachable before the accounts had been vouched or time for payment had arrived.—EDMUNDS *v.* EDMUNDS, [1904] P. 362; 73 L. J. P. 97; 91 L. T. 568.

Annotations:—*Generally*, **Mentd.** Glegg *v.* Bromley (1911), 81 L. J. K. B. 334; Wells *v.* Wells (1914), 30 T. L. R. 437.

5975. —— **Fees of public vaccinator—Due or**

PART XIII. SECT. 23, SUB-SECT. 3.—F.

o. *Power of court to make—Payment of alimony.*]—A judgment for arrears of alimony having been registered under Ont. Jud. Act, s. 35, establishes a statutory charge upon lands belonging to the husband.—ABBOTT *v.* ABBOTT (1912), 21 O. W. R. 281; 3 O. W. N. 683; 1 D. L. R. 697.—**CAN.**

p. ——.]—Petitioner obtained a decree for dissolution of marriage from her husband, resp., & for the purpose of recovering the costs of the suit issued a charging order *nisi* against a fund in the hands of the New Zealand Government standing to the credit of resp., & being deferred pay earned by him as an Imperial soldier in the South African War:—*Held:* the order could not be made absolute, by reason of The Army Act, 1881 (Imperial), s. 141.—ALLEN *v.* ALLEN (1906), 26 N. Z. L. R. 74.—**N.Z.**

accruing due.]—EDMUNDS *v.* EDMUNDS, No. 5974, *ante.*

5976. In what cases order made—Non-payment of costs.]—WHITTAKER *v.* WHITTAKER, No. 5972, *ante.*

5977. —— Non-payment of maintenance.]—EDMUNDS *v.* EDMUNDS, No. 5974, *ante.*

H. Appointment of Receiver.

Receivers generally, *see* RECEIVERS.

Appointment of receiver by way of equitable execution, *see* EXECUTION, Vol. XXI., pp. 664 *et seq.*

5978. Jurisdiction of Divorce Court to appoint.]—GORDON *v.* GORDON (1912), *Times*, Nov. 26.

5979. Grounds for appointing—After decree absolute—Order for maintenance—Husband dissipating property.]—SIDNEY *v.* SIDNEY, No. 5446, *ante.*

5980. —— —— Arrears of maintenance—Action in Chancery Division.]—The Probate & Divorce Div. ordered a husband against whom it granted a divorce to pay alimony. The divorced wife brought an action in the Ch. Div. against her late husband & the trustees of a post-nuptial settlement made by him during the continuance of a former marriage, to enforce payment of arrears & recurring payments of alimony by the appointment of a receiver of his life interest under such settlement:—*Held:* she was entitled to the appointment of a receiver, & the ct. would not take into consideration the injury done to the children of the former marriage by depriving their father of his power to consent to their advancement out of the settlement funds.—OLIVER *v.* LOWTHER (1880), 42 L. T. 47; 28 W. R. 381.

5981. —— —— —— Bill of sale granted by husband.]—The ct., upon an *ex p.* application by petitioner, wife, made an order for a receiver, until the next motion day, limited to receiving from resp.'s bankers the amount due to petitioner from resp. or alimony & costs, petitioner undertaking to be liable in damages, in case the receivership should be set aside.

Where money was due to the wife for arrears of alimony & taxed costs, & her husband had a bill of sale on his furniture, the ct., on an *ex p.* application, appointed a receiver of the amount said to be standing in the husband's name at his bank over the next motion day, & limited to the amount stated in the affidavits.—ANGLISS *v.* ANGLISS (1893), 69 L. T. 462; 1 R. 532.

5982. —— Non-payment of costs.]—WHITTAKER *v.* WHITTAKER, No. 5972, *ante.*

5983. —— ——.]—In a petition by a husband for divorce, a decree absolute had been pronounced & co-resp. condemned in the costs of the petition. An arrangement was subsequently made by which co-resp. undertook to pay the amount of the costs by instalments; but he died intestate before the whole of such instalments had been paid. Immediately after his death an order was made restraining his widow from dealing with his estate. The ct., under R. S. C., Ord. 17, r. 4, & Ord. 42, r. 28, appointed petitioner receiver of co-resp.'s estate, but directed that the order should not be drawn up for a week, in order that the widow of co-resp. might decide whether she would take out administration & give security for the debt.—WADDELL *v.* WADDELL & CRAIG, [1892] P. 226; 61 L. J. P. 110; 67 L. T. 389.

5984. —— —— —— Bill of sale granted by husband.]—ANGLISS *v.* ANGLISS, No. 5981, *ante.*

5985. —— Enforcement of security for costs.]—GORDON *v.* GORDON (1912), *Times*, Nov. 26.

5986. How application made—Ex parte—Interim order.]—ANGLISS *v.* ANGLISS, No. 5981, *ante.*

5987. Who will be appointed—Petitioner.]—WADDELL *v.* WADDELL & CRAIG, No. 5983, *ante.*

5988. Discharge of receiver—Receiver of reversionary interest—Subject to defeasance clause.]—The fact that a contingent reversionary interest to an estate under a will was subject to a forfeiture clause upon the reversioner charging the same, or upon becoming bkpt., is not sufficient ground for discharging a receiver appointed in respect of the reversioner's interest, & such appointment does not, of itself, constitute a charge within the clause.—CAMPBELL *v.* CAMPBELL & DAVIS (1895), 72 L. T. 294.

I. Writ ne exeat regno.

Ne exeat regno generally, *see* EQUITY, Vol. XX., pp. 541 *et seq.*

Enforcement of alimony.]—*See* EQUITY, Vol. XX., p. 545, No. 2656.

J. By Injunction.

See Sect. 24, *post.*

K. By Stay of Proceedings.

See Part XIII., Sect. 14, *ante.*

L. By Action in King's Bench Division.

See Matrimonial Causes Rules, 1924, r. 97; R. S. C. Ord. 42, r. 24.

5989. No action lies—Alimony pendente lite.]—An order to sign final judgment under R. S. C., Ord. 14, r. 1, will not be made where the action is for arrears of alimony *pendente lite*, payable under an order of the Probate & Divorce Division.—BAILEY *v.* BAILEY (1884), 13 Q. B. D. 855; 53 L. J. Q. B. 583, C. A.

Annotations:—**Apld.** Robins *v.* Robins, [1907] 2 K. B. 13; Ivimey *v.* Ivimey, [1908] 2 K. B. 260. **Distd.** Beatty *v.* Beatty, [1924] 1 K. B. 807. **Refd.** Linton *v.* Linton (1885), 15 Q. B. D. 239; Chalk, Webb *v.* Tennent (1887), 57 L. T. 598; *Re* Otway, *Ex p.* Otway (1888), 58 L. T. 885; Norton *v.* Gregory (1895), 73 L. T. 10; Leavis *v.* Leavis, [1921] P. 299. **Mentd.** Westmoreland Green & Blue Slate Co. *v.* Feilden, [1891] 3 Ch. 15; Watkins *v.* Watkins (1896), 12 T. L. R. 165; Seldon *v.* Wilde, [1910] 2 K. B. 9.

5990. —— Permanent alimony.]—No action will lie in the K. B. Div. to recover arrears of permanent alimony payable under an order of the Probate & Divorce Div., such an order not being a final & conclusive judgment upon which an action of debt to enforce it may be maintained.—ROBINS *v.* ROBINS, [1907] 2 K. B. 13; 76 L. J. K. B. 649; 96 L. T. 787; 23 T. L. R. 428.

Annotation:—**Distd.** Beatty *v.* Beatty, [1924] 1 K. B. 807.

5991. —— Costs.]—An action in the K. B. Div. will not lie to recover a sum payable for costs

PART XIII. SECT. 23, SUB-SECT. 3.—H.

5978 i. *Jurisdiction of Divorce Court to appoint.*]—On motion for the appointment of a receiver of co-resp.'s business after judgment in a divorce action, & after an adjournment of the motion at the instance of co-resp. for further material; co-resp. at a further hearing raised the preliminary objection that he was entitled to relief under the War Relief Act:—*Held:* there had been waiver, & the objection must be overruled.—SHORTING *v.* SHORTING (1919), 25 B. C. R. 351.—**CAN.**

PART XIII. SECT. 23, SUB-SECT. 3.—L.

5990 i. *No action lies—Permanent alimony.*]—Arrears of permanent alimony payable under an order of the High Ct. of Justice in Ireland, K. B. D., Matrimonial, cannot be recovered by action.—KEYS *v.* KEYS, [1919] 2 I. R. 160; 53 I. L. T. 190.—**IR.**

q. *Judgment for arrears of alimony.*]—Pltf., in 1891, recovered a consent judgment against deft. in Ontario for alimony & maintenance, the judgment being a confirmation, subject to certain provisions, of an

Sect. 23.—*Enforcing orders and authority of court: Sub-sect.* 3, *L. & M. Sect.* 24 : *Sub-sects* 1 & 2. *Sect.* 25 : *Sub-sect.* 1, *A.*]

under an order of the Divorce Ct., but such order can only be enforced by the methods prescribed by the Divorce Rules & Regulations.—IVIMEY *v.* IVIMEY, [1908] 2 K. B. 260 ; 77 L. J. K. B. 714 ; 99 L. T. 75 ; 52 Sol. Jo. 482, C. A.

Annotation :—**Refd.** Leavis *v.* Leavis, [1921] P. 299.

M. By Proceedings in Bankruptcy.

In respect of what debts petitions may be presented—Order for damages.]—*See* BANKRUPTCY, Vol. IV., p. 124, Nos. 1127, 1128.

—— **Costs.**]—*See* BANKRUPTCY, Vol. IV., p. 124, Nos. 1133—1134.

What is act of bankruptcy—Final judgment—Alimony pendente lite.]—*See* BANKRUPTCY, Vol. IV., p. 91, No. 819.

—— —— **Decree nisi for dissolution.**]—*See* BANKRUPTCY, Vol. IV., p. 92, No. 830.

Who may prove—Second husband of divorced woman.]—*See* BANKRUPTCY, Vol. IV., p. 245, No. 2318.

What debts may be proved—Alimony.]—*See* BANKRUPTCY, Vol. IV., p. 300, Nos. 2809–2816.

—— **Damages & costs.**]—*See* BANKRUPTCY, Vol. IV., pp. 314, 316, Nos. 2937, 2953, 2954.

Receiving orders.]—*See* BANKRUPTCY, Vol. IV., pp. 153, 154, Nos. 1445, 1449.

Committal under Debtors Act, 1869 (c. 62).]—*See* BANKRUPTCY, Vol. V., pp. 1034, 1035, Nos. 8459, 8160, 8465.

SECT. 24.—INJUNCTIONS.

SUB-SECT. 1.—IN GENERAL.

Injunction generally, *see* INJUNCTION.

5992. As to what matters granted—Restraint from receipt of legacy—Until payment of costs.]—GILLET *v.* GILLET, No. 4306, *ante*.

5993. —— —— —— **Respondent out of jurisdiction.**]—A wife instituted proceedings in the Divorce Ct. against her husband, obtained a decree of judicial separation, & also obtained an order against her husband for the payment of alimony. The husband went out of the jurisdiction & paid nothing. Subsequently the wife petitioned for a divorce, & incurred a bill of costs which was taxed against the husband. In the meantime the husband became entitled to a legacy, & gave a power of attorney to a solr. to receive it on his behalf :—*Held :* under the circumstances the ct. would grant an injunction restraining the trustees from paying & the husband or his agents receiving the legacy.—BULLUS *v.* BULLUS (1910), 102 L. T. 399 ; 26 T. L. R. 330 ; 54 Sol. Jo. 343.

Annotation :—**Mentd.** Myers *v.* Myers, Carpendale, Radford & Thom, [1918] P. 260.

5994. —— —— **Until payment of alimony.**]—BULLUS *v.* BULLUS, No. 5993, *ante*.

5995. —— —— **Non compliance with magistrate's order.**]—GILLET *v.* GILLET, No. 4306, *ante*.

5996. —— **Restraint from molestation.**]—The ct. granted an injunction to restrain resp. in a divorce suit from molesting petitioner by going to & remaining in petitioner's house, contrary to the expressed wish of petitioner.—NORTHLEDGE *v.* NORTHLEDGE (1894), 70 L. T. 815 ; 6 R. 660.

5997. —PHILLIPS *v.* PHILLIPS (1905), 49 Sol. Jo. 724.

5998. —— ——.]—Petitioner, a farmer, temporarily left the matrimonial home, a farm-house, where his wife continued to reside, & he presented a petition for divorce. On proof that it was necessary for him to resort to the farm-house daily to carry on the business of the farm, & that he had been molested in his use of the premises, the ct. ordered that petitioner should have the exclusive use, between stated hours, of two rooms in the farm-house, & restrained the wife by injunction from molesting him in the use of them.—CALLABY *v.* CALLABY & PEROWNE (1920), 37 T. L. R. 241.

—— **Exclusion of respondent from petitioner's house.**]—In a matrimonial suit, pending decision of the merits, there is no clear & absolute right of either party to remain in the matrimonial home apart from the right of property in that home. Each case raising such matter must be dealt with on its individual facts. In a case where the home belonged to the husband who defended the suit of the wife for restitution of conjugal rights, asserting that her drunken habits rendered married life impossible & had given her peremptory notice to quit the premises, together with the offer of an allowance which appeared to be reasonable, the application of the wife for an injunction restraining the husband from preventing her from remaining pending suit was dismissed.—WILLMOTT *v.* WILLMOTT, [1921] P. 143 ; 90 L. J. P. 206 ; 125 L. T. 27 ; 37 T. L. R. 429 ; 65 Sol. Jo. 358.

6000. —— **Restraint from proceeding under separation deed—Order for maintenance made on basis of deed—Application for variation.**]—REID *v.* REID, No. 5384, *ante*.

—— **Restraint of foreign proceedings.**]—*See* CONFLICT OF LAWS, Vol. XI., p. 482, Nos. 1314 *et seq.*

SUB-SECT. 2.—RESTRAINT ON DEALING WITH PROPERTY.

6001. Whether granted—Against sale or incumbrance of settled property—Pending variation of settlement.]—A post-nuptial settlement made by a husband in favour of his wife & children contained a recital that it was made in accordance with an ante-nuptial agreement. The wife obtained a decree for a divorce on the ground of her husband's cruelty & adultery. While an inquiry was going on before the registrar under Matrimonial Causes Act, 1859 (c. 61), s. 5, as to the settlement in question with a view to making provision for the wife, the husband advertised part of the real estate comprised in the settlement for sale by auction. The President granted an injunction restraining the husband from selling or incumbering the settled property. On appeal by the husband :—*Held :* varying the order of the President, without deciding whether or no the husband had a right to sell the settled property, the ct. would restrain him from doing so whilst the inquiry was pending, & an injunction until further order was granted.—WATTS *v.* WATTS (1876), 24 W. R. 623, C. A.

6002. —— —— ——.]—NOAKES *v.* NOAKES & HILL, No. 5582, *ante*.

6003. -.]—In a suit at the instance of

agreement previously made for the maintenance of the wife & children :—*Held :* an action lay on the judgment for arrears of alimony & maintenance.—HADDEN *v.* HADDEN (1899), 6 B. C. R. 340.—**CAN.**

PART XIII. SECT. 24, SUB-SECT. 1.

r. *Not granted—To reinstate wife.*]—A husband having required his wife to leave his house, without assigning any reason, the ct. refused to interpose by an interdict, to keep her in possession.—COLQUHOUN *v.* COLQUHOUN (1804), 13 Fac. Coll. 347.—**SCOT.**

the wife for divorce an order was made on the husband to pay a certain sum in respect of the wife's costs, & to give security for a further sum. The order was served on the husband's solr., but it was not possible to serve the husband himself as he had gone out of the jurisdiction. The husband had no property in this country on which execution could be levied to pay those costs, but he had a reversionary interest under his father's will which he had partially charged & which he had expressed his intention of further charging. On an application by the wife to restrain the trustees of the husband's father's will from paying over, & the husband & his agents from receiving, charging, or dealing with the property in question: —*Held:* an injunction should be granted.—DOOLEY *v.* DOOLEY (1911), 28 T. L. R. 113; 56 Sol. Jo. 207.

Annotation:—**Mentd.** Myers *v.* Myers, Carpendale, Radford & Thom. [1918] P. 260.

6004. —— To secure alimony—Respondent dissipating property.]—SIDNEY *v.* SIDNEY, No. 5446, *ante*.

6005. —— —— Before order made.]—The ct. will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the ct. before an order for alimony has been made.—NEWTON *v.* NEWTON (1885), 11 P. D. 11; 55 L. J. P. 13; 34 W. R. 123.

Annotations:—**Expld. & Folld.** Burmester *v.* Burmester, [1913] P. 76. **Consd.** Jagger *v.* Jagger (1926), 42 T. L. R. 315. **Refd.** Brewis *v.* Brewis, [1893] W. N. 6; Waterhouse *v.* Waterhouse, [1893] P. 284; Carter *v.* Carter (1895), 12 T. L. R. 37; Bullus *v.* Bullus (1910), 102 L. T. 399. **Mentd.** Armytage *v.* Armytage, [1898] P. 178.

6006. —— ——.]—Where, in a suit by a wife for judicial separation, an order for alimony *pendente lite* had been made against the husband, the ct. refused to restrain the husband from dealing with certain of his property.—CARTER *v.* CARTER, [1896] P. 35; 65 L. J. P. 48; 44 W. R. 100; 12 T. L. R. 37.

6007. —— To secure maintenance—Before order made.]—BURMESTER *v.* BURMESTER, No. 5449, *ante*.

6008. —— —— Pending provision of security.]—WATERHOUSE *v.* WATERHOUSE, No. 5447, *ante*.

6009. —— —— ——.]—NEWTON *v.* NEWTON, No. 5448, *ante*.

6010. —— Respondent in contempt—& out of jurisdiction.]—The ct., in the absence of authority, refused, upon an *ex p.* application, to restrain resp., who was in contempt, from removing property out of the country, the object of the application being to put pressure upon resp. in respect of the decree which had been disobeyed, & which could not be enforced owing to resp. being now outside the ct.'s jurisdiction.—WALLIS *v.* WALLIS (1891), 65 L. T. 796.

6011. —— To secure payment of costs.]—Where the resp. in a suit for judicial separation who had been unsuccessful in the suit, & had been condemned in costs had not complied with an order made during the hearing to secure a further sum of £75 for petitioner's costs, the ct. issued an injunction restraining him from parting with specific property until petitioner had the opportunity of enforcing the order.—BREWIS *v.* BREWIS, [1893] W. N. 6.

6012. —— ——.]—GORDON *v.* GORDON (1912), *Times*, Nov. 26.

6013. Discharge of injunction—Upon reconciliation.]—A judicial separation having been pronounced by this ct. at the suit of the wife, an *interim* injunction was obtained against him [the husband] to restrain him from dealing with certain of his property. Subsequently a reconciliation took place between the husband & wife. The solr. who had been acting for the wife now applied to have that injunction continued until a receiver of the property should be appointed, or until the balance of his costs should be paid.

The ct. refused to continue the injunction, or to appoint a receiver.—HAWES *v.* HAWES (1886), 57 L. T. 374.

SECT. 25.—DECREES ABSOLUTE.

1.—POWER OF COURT.

A. As to Time within which to Make Decree.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183; Matrimonial Causes Rules, 1924, r. 56.

6014. General rule—No power to make absolute decree—Until three months from decree nisi.]—29 & 30 Vict. c. 32, s. 3, which extends the time for making decrees *nisi* absolute from three to six months, applies to suits pending at the time when the Act came into operation. But where decrees *nisi* had been pronounced before the Act came into operation, whereby three months had been fixed as the time at the expiration of which they were to be made absolute, the ct. held that it was at liberty under the proviso to the sect. "unless the ct. shall, under the power now vested in it, fix a shorter time," to make them absolute at the end of the three months.

[A decree] cannot be made absolute before the three months, but it may be made absolute at any later time . . . the proviso [in 23 & 24 Vict. (c. 144), s. 7] gives the Ct. power, notwithstanding the prohibition contained in the first branch of the section, to fix a shorter time than six months (but not shorter than three months) for making decrees absolute. 'Although a suitor may have a vested right to a decree, the mode & method in which he is to approach the ct. in order to obtain it, & the time within which that or any other step in the cause is to be taken, are merely auxiliary to that right, & may be changed . . . without any infringement of the right itself (*per* CUR.). —WATTON *v.* WATTON, DOW *v.* DOW, DAVIES *v.* DAVIES (1866), L. R. 1 P. & D. 227; 35 L. J. P. & M. 95; 14 L. T. 742; 15 W. R. 288.

Annotation:—**Mentd.** Langworthy *v.* Langworthy (1886), 55 L. J. P. 33.

6015. —— —— —— —.]—FITZGERALD *v.* FITZGERALD, No. 6021, *post*.

6016. Discretion to abridge statutory interval—From six to three months—In special circumstances.]—The ct. will not, except in very special circumstances, abridge the interval between the decree *nisi* & decree absolute fixed by Matrimonial Causes Act, 1866 (c. 32).—SHELTON *v.* SHELTON & CAMPBELL (1869), 38 L. J. P. & M. 34; 20 L. T. 232; 17 W. R. 401.

Annotation:—**Refd.** Biedermann *v.* Biedermann (1896), 12 T. L. R. 209.

6017. —— —— ——.]—M. *v.* B. (1874), No. 6020, *post*.

6018. —.]—In a wife's suit for a decree of nullity of marriage on the ground of her husband's impotency, the ct. pronounced a decree

Sect. 25.—*Decrees absolute: Sub-sect.* 1, *A. & B.; sub-sect.* 2, *A., B. & C. (a) & (b); sub-sect.* 3.]

nisi, & subsequently refused a motion to make the decree *nisi* absolute before interval of six months had expired.—MEYNELL (FALSELY CALLED BULL) *v.* BULL (1874), 30 L. T. 345.

6019. —— —— ——.]—FITZGERALD *v.* FITZGERALD, No. 6021, *post*.

6020. Sufficiency of special grounds—Application in Chancery affecting settlement—Before long vacation.]—The ct. will not, unless there be peculiar circumstances in the case, abridge the time within which the decree *nisi* may be made absolute in suits for nullity.

In a contested suit for a declaration of nullity of marriage by reason of the impotency of the husband, the wife obtained on Jan. 24, 1874, a decree *nisi*, which was to be made absolute in six months. The ct. declined to abridge the time by substituting in the decree *nisi* three for six months, to enable an application to be made, before the long vacation, to the Ct. of Ch. to cancel the settlements made in consideration of the marriage.—M. *v.* B. (1874), L. R. 3 P. & D. 200; 43 L. J. P. & M. 42; 30 L. T. 910; 22 W. R. 556.

6021. —— **Decree nisi after three petitions.**]—The ct. has power to shorten the period within which a decree *nisi* may be made absolute, so that the time be not less than three months, & will vary the decree *nisi* for that purpose.

The wife obtained a decree *nisi* for dissolution of her marriage, on the ground of adultery & desertion, the decree to be made absolute at the expiration of six months. It was the third petition filed by her. The Queen's Proctor intervened on the hearing, & the facts as to the previous suits were fully laid before the ct. Under these circumstances, the ct. shortened the period within which the decree *nisi* might be made absolute, & varied the decree itself by substituting "three" for "six" months.—FITZGERALD *v.* FITZGERALD (1874), L. R. 3 P. & D. 136; 43 L. J. P. & M. 13; 31 L. T. 270; 22 W. R. 267.

Annotations:—**Expld.** M. *v.* B. (1874), L. R. 3 P. & D. 200. **Consd.** Meynell (falsely called Bull) *v.* Bull (1874), 30 L. T. 345. **Apld.** Rogers *v.* Rogers (1894), 6 R. 589. **Refd.** Rippingall *v.* Rippingall & Lockhart (1882), 48 L. T. 126; Brennan (otherwise Roberts) *v.* Brennan (1902), 86 L. T. 599; Kay *v.* Kay, [1904] P. 382.

6022. —— **New trial after decree nisi—Second decree nisi.**]—A husband obtained a decree *nisi* for the dissolution of his marriage, but the ct. afterwards directed a new trial. More than six months after the original decree *nisi* the case was tried a second time, & the ct. again pronounced a decree *nisi*.

After the expiration of the period for moving for a new trial, the Queen's Proctor having stated that he did not think it necessary to intervene, & notice of the application having been given to resp's solr., the ct. made the original decree absolute, without waiting till the expiration of six months from the date of the second trial, but directed that both decrees *nisi* should be recited in the order.—SHEFFIELD *v.* SHEFFIELD & PAICE (1881), 29 W. R. 523.

6023. —— **Delay caused by court not sitting.**]—In the absence of special circumstances the ct. will not shorten the interval between the decree *nisi* & the decree absolute even by a few days, although such refusal should have the effect of delaying the decree absolute for three months, & the application may have only been rendered necessary from the fact that during a whole term the ct. had been unable to sit to take cases in the list in which the suit had been entered.—RIPPINGALL *v.* RIPPINGALL & LOCKHART (1882), 48 L. T. 126.

6024. —— **Dissolution of first decree nisi—Subsequent decree obtained.**]—A decree *nisi* having been dissolved on the intervention of the Queen's Proctor, on the ground of collusion, a fresh decree *nisi* was obtained on the ground that the original misconduct had been revived by subsequent adultery, & the ct. held that there were "special circumstances" in the case, & allowed the time to be reduced for making the decree absolute.—ROGERS *v.* ROGERS (1894), 6 R. 589.

6025. —— **Ill-health due to litigation.**]—The ct. in its discretion refused to make absolute a decree *nisi* before the expiration of six months, though the ground of the application was petitioner was in ill-health & suffering from the excitement of the litigation.—BIEDERMANN *v.* BIEDERMANN (1896), 12 T. L. R. 209.

6026. —— **Bigamy committed by respondent.**]—Although there is no *primâ facie* necessity for a petitioner to seek the relief of the ct. in a suit of this kind, where resp. has committed bigamy, the ct. will not consider it a case of so exceptional a character as to justify it in exercising its discretion in shortening the period of six months which must elapse between the dates of the decree *nisi* & the decree absolute.—BRENNAN (OTHERWISE ROBERTS) *v.* BRENNAN (1902), 86 L. T. 599; 18 T. L. R. 467.

Annotations:—**Mentd.** Ogden *v.* Ogden, [1908] P. 46; Graham *v.* Graham, [1923] P. 31; Mitford *v.* Mitford, [1923] P. 130.

6027. —— **Judgment reserved on decree nisi—Time for decree absolute from date of hearing.**]—HOUGHTON *v.* HOUGHTON, No. 3274, *ante*.

Effect of delay in applying.]—*See* Sub-sect. 2, C. (*b*), *post*.

B. To Impose Terms before Making Decree.

See Sub-sect. 4, *post*.

SUB-SECT. 2.—APPLICATION FOR DECREE.

A. In General.

Matrimonial Causes Rules, 1924, r. 56.

6028. Copy of decree nisi—Necessity to file.]—Upon a motion to make a decree of dissolution of marriage absolute, a copy of the decree *nisi* should be filed.—FOWLER *v.* FOWLER (1861), 31 L. J. P. M. & A. 31.

6029. Who may apply—Petitioner only.]—(1) Although there are many points on which a guilty resp. may be heard after decree *nisi*, petitioner is the only party to a suit entitled to move to make the decree absolute.

Semble: (2) if a petitioner, after obtaining a decree *nisi*, neglects or declines to take the further step of moving to make it absolute, the proper course for resp. to take is to move to reverse the decree *nisi* & to dismiss the petition for want of prosecution; (3) the ct. has power to dismiss a petition after decree *nisi* for non-prosecution.—OUSEY *v.* OUSEY & ATKINSON (1875), 1 P. D. 56; 45 L. J. P. 33; 33 L. T. 789; 24 W. R. 436.

Annotations:—*As to* (1) **Apld.** Halfen *v.* Boddington (1881), 6 P. D. 13. *As to* (2) & (3) **Refd.** Lewis *v.* Lewis, [1892] P. 212; Rutter *v.* Rutter (No. 2), [1921] P. 421.

PART XIII. SECT. 25, SUB-SECT. 2.—A.

t. *Who may apply—Petitioner or his solicitor.*]—*Held:* the Registrar may issue the decree on a request in writing signed by petitioner's solr.—BOYD *v.* BOYD (1900), 18 N. Z. L. R. 826.—**N.Z.**

6030. —— Not respondent.]—In a suit for nullity the wife obtained a decree *nisi*, but was unwilling to proceed further. The ct. declined to make the decree absolute on the application of resp.—HALFEN (OTHERWISE BODDINGTON) *v.* BODDINGTON (1881), 6 P. D. 13; *sub nom.* HALPEN (OTHERWISE BODDINGTON) *v.* BODDINGTON, 50 L. J. P. 61; 44 L. T. 252; 29 W. R. 444.
Annotation :— **Consd.** Lewis *v.* Lewis, [1892] P. 212.

6031. —— Not representatives of deceased petitioner.]—STANHOPE *v.* STANHOPE, No. 4566, *ante*.

Who may oppose application.]—*See* Sect. 20, *ante*.

B. Affidavit in Support.

See Matrimonial Causes Rules, 1924, r. 56, Appendix 9.

6032. What must be shown—Search for appearance or non-appearance.]—An application to make absolute a decree *nisi* for dissolution of marriage should be supported by affidavits of search for appearance by any person & of non-appearance, & if an appearance has been entered, that no affidavits in opposition to the decree have been filed.—BODDY *v.* BODDY & GROVER (1861), 30 L. J. P. M. & A. 95.

6033. —— —— In registry of recent date.]—The affidavit to found a motion to make absolute a decree *nisi* for dissolution of marriage, should show that search was made in the registry at a recent date. The ct. refused to make a decree absolute on Nov. 4 upon an affidavit of search on Oct. 1.—STONE *v.* STONE & BROWNRIGG (1862), 3 Sw. & Tr. 113; 32 L. J. P. M. & A. 7; 7 L. T. 757; 164 E. R. 1215.

6034. —— Where pending appeal withdrawn—Fact of withdrawal.]—When a petition of appeal for the reversal of a decree *nisi* has been presented to the House of Lords, & the ct. is afterwards moved to make the decree absolute, the appeal having been withdrawn, that fact should appear by affidavit. Where such an affidavit had not been filed, but deft.'s counsel admitted that the fact was so, the ct. made the decree absolute.—BAILY *v.* BAILY & DELLA ROCCA (1862), 31 L. J. P. M. & A. 163.

C. Time for Making.

(a) In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (1).

Not before three months from date of decree nisi.]—*See* Nos. 6014, 6015, *ante*.

Before six months from date of decree nisi—Under special circumstances.]—*See* Nos. 6016–6026, *ante*.

6035. After six months from date of decree nisi—Reasonable time.]—PARSONS *v.* PARSONS, No. 3735, *ante*.

(b) Effect of Delay.

See Matrimonial Causes Rules, 1924, r. 56.

6036. Liability to dismissal of petition—Whether subsequent petition barred—On same facts.]—(1) Where a decree *nisi* for the dissolution of a marriage has been pronounced the ct. has power to dismiss the petition as for want of prosecution, unless petitioner move to have the decree made absolute within a reasonable time.

(2) *Semble :* if a petition be dismissed for want of prosecution a fresh petition upon the same facts may be brought at a subsequent time.—POLLACK *v.* POLLACK, DEANE & MACNAMARA (1868), 16 W. R. 1130.

6037. Power of court.]—OUSEY *v.* OUSEY & ATKINSON, No. 6029, *ante*.

6038. —— Delay for one year.]—In a suit by the wife for dissolution of marriage, petitioner obtained a decree *nisi*, but allowed more than a year to elapse without taking any further step to make such decree absolute. On an application by resp. to make the decree absolute or to dismiss the petition for want of prosecution :—*Held :* the petitioner must be dismissed unless within a week petitioner applied to make decree absolute.—LEWIS *v.* LEWIS, [1892] P. 212; 61 L. J. P. 95; 67 L. T. 358; 8 T. L. R. 489.

6039. —— ——.]—DUNSTAN *v.* DUNSTAN (1897), 13 T. L. R. 480.

6040. —— Unless delay justified—Proceedings for maintenance pending.]—SOUTHERN *v.* SOUTHERN, No. 4601, *ante*.

6041. —— —— Mistake of law.]—G. obtained a decree *nisi* of nullity of marriage on Apr. 12, 1904. For family reasons & being under the impression that a decree absolute could be obtained at any time petitioner delayed applying until June, 1913. On the application it was submitted that the court had no discretion in the matter. The ct. made the decree *nisi* absolute. Delay in applying to have the decree *nisi* made absolute is, in the absence of other reasons, no ground for refusal of the application, where the only result would be to put petitioner to the further expenses of commencing proceedings afresh & filing another petition.—GRANT (FALSELY CALLED GIANNETTI) *v.* GIANNETTI, [1913] P. 137; 82 L. J. P. 111; 108 L. T. 1037; 29 T. L. R. 654; 57 Sol. Jo. 774.

6042. —— Petition praying alternative relief—Judicial separation.]—A wife petitioned for a divorce, & in the alternative for a judicial separation. In 1909 a decree *nisi* was pronounced. No application was made as to a decree absolute. In 1912 the husband, resp., applied by summons for the decree *nisi* to be rescinded, & the petition dismissed for want of prosecution. Petitioner opposed the application & prayed that the decree *nisi* might be rescinded & a decree of judicial separation substituted for it :—*Held :* the decree *nisi* should be rescinded & a decree of judicial separation pronounced.—GRIFFITHS *v.* GRIFFITHS (1912), 106 L. T. 646; 28 T. L. R. 281; 56 Sol. Jo. 364.

6043. Inquiry by King's Proctor—No application on expiry of six months.]—PRACTICE NOTE (1920), 150 L. T. Jo. 74.

Whether respondent entitled to apply—For dismissal of petition.]—*See* Nos. 4601, 6038, *ante*.

SUB-SECT. 3.—GROUNDS FOR REFUSING DECREE.

6044. Affidavit by King's Proctor—Of grounds for intervention.]—The ct. will refuse to make a decree *nisi* absolute, after the expiration of three months from the time when it was pronounced, in order to enable the Queen's Proctor to make inquiries, & to lay a case before the A.-G. for his directions, upon an affidavit being filed by the Queen's Proctor, to the effect that he had received information of material facts, & that he intends to take the directions of the A.-G.—PALMER *v.* PALMER (1865), 4 Sw. & Tr. 143; 34 L. J. P. M. & A. 110; 164 E. R. 1471.
Annotation :— **Refd.** Langworthy *v.* Langworthy (1886), 55 L. J. P. 33.

6045. —— ——.]—The ct. refused to make a

Sect. 25.—*Decrees absolute: Sub-sects.* 3, 4, 5 & 6, *A., B., C. & D. Sect.* 26: *Sub-sect.* 1.]

decree *nisi* absolute although the six months had expired, where the Queen's Proctor applied for postponement on affidavits that he had a case for intervention but had not yet been able to take the directions of the A.-G.—HAMILTON *v.* HAMILTON & RIDING (1875), 33 L. T. 462.

Intervention by King's Proctor.]—*See* Sects. 19, 20, *ante.*

6046. Alimony pendente lite—In arrears.]—LATHAM *v.* LATHAM & GETHIN, No. 4184, *ante.*

6047. —— No order made.]—FODEN *v.* FODEN, No. 4101, *ante.*

6048. Securing allowance to wife.]—BENT *v.* BENT & FOOTMAN, No. 5394, *ante.*

6049. ——.]—A husband sued for a judicial separation on the ground of his wife's cruelty, & established his case. Since cessation of cohabitation the husband had made his wife an allowance, & at the hearing said he would continue it. The ct. intimated that the allowance should be secured to the wife by deed, &, on the husband objecting suspended the decree until its suggestion should be carried out.—PHILLIP *v.* PHILLIP (1873), 21 W. R. 392.

6050. ——.]—WILTON *v.* WILTON & GAMBIER (1881), 71 L. J. P. 126, n.

6051. Death of party— Petitioner.]—GRANT *v.* GRANT & BOWLES & PATTISON, No. 4565, *ante.*

6052. —— Respondent.]—DERING *v.* DERING & BLAKELEY, No. 5146, *ante.*

6053. Non-payment of costs—By petitioner—Not valid ground.]—The ct. cannot, after the time limited by the statute, suspend a decree absolute on the ground that petitioner had not paid his proctor's taxed costs.—PATTERSON *v.* PATTERSON & GRAHAM (1870), L. R. 2 P. & D. 192; 40 L. J. P. & M. 4; 23 L. T. 631; 19 W. R. 233.

6054. Appeal pending—Against decree nisi.]—Resp. appealed from a decree *nisi* to the House of Lords, on the ground that it was against the weight of evidence. While the appeal was still undisposed of, the decree *nisi* was, after the requisite lapse of time, pronounced absolute, notwithstanding the appeal. The latter being an improper course, could not be allowed to operate as a stay of the proceedings in the ct. below.—ROBERTSON *v.* ROBERTSON & FAVAGROSSA (1881), 44 L. T. 253.

6055. Delay in application for decree.]—GRANT (FALSELY CALLED GIANNETTI) *v.* GIANNETTI, No. 6041, *ante.*

——.]—*See, also,* Sub-sect. 2, C. (*b*), *ante.*

SUB-SECT. 4.—SUSPENSION OF DECREE.

6056. Pending provision for issue.]—CLARK *v.* CLARK & BOUCK, No. 5841, *ante.*

6057. —— Nullity suit.]—A decree *nisi* was made declaring a *de facto* marriage void, as not having been solemnised according to law. Shortly before the expiration of the period of six months, a petition was presented for a provision for the child of the marriage. On a motion to make the decree absolute, the judge held that a provision for the child ought to be inserted in the final decree, & refused to make the decree absolute until materials were furnished for deciding what provision ought to be made:—*Held:* under Matrimonial Causes Act, 1860 (c. 144), s. 7, there is no absolute right to have a decree made absolute at the end of the six months, & although the judge might have made a provision after the decree absolute, he had jurisdiction to suspend the making the decree absolute for the purpose of inserting in it the provision which he considered necessary, & the ct. would not interfere with his discretion, there being nothing to show that he had exercised it unreasonably. Matrimonial Causes Act, 1857 (c. 85), s. 35, enables the ct. to order a provision to be made for the children of a marriage which the ct. has declared to be void.—LANGWORTHY *v.* LANGWORTHY (1886), 11 P. D. 85; 55 L. J. P. 33; 54 L. T. 776; 34 W. R. 356; 2 T. L. R. 373, C. A.

Annotation:—**Refd.** Foden *v.* Foden, [1894] P. 307.

6058. Pending time for appeal—From verdict or intervention by King's Proctor.]—DERING *v.* DERING & BLAKELEY, No. 5146, *ante.*

6059. Pending inquiry by registrar as to settlements.]—SOWDON *v.* SOWDON, No. 5506, *ante.*

6060. Pending provision for wife.]—WILTON *v.* WILTON & GAMBIER (1881), 71 L. J. P. 126, n.

6061. —— Dum sola et casta clause.]—Petitioner obtained a decree *nisi* on the ground of his wife's adultery, but, at the time of pronouncing that decree, the judge intimated that an allowance must be made by petitioner to his wife. The solrs. for petitioner & resp. settled an agreement, which was signed by both the parties. One of the terms in the agreement was that the allowance should continue so long as resp. should remain chaste & unmarried. The ct., while expressing disfavour with the *dum casta* clause, made the decree absolute.—WELLER *v.* WELLER, FUNNELL & CASS (1890), 63 L. T. 263.

6062. —— ——.]—LANDER *v.* LANDER, No. 5427, *ante.*

6063. —— ——.]—EDWARDS *v.* EDWARDS & FRANCIS, No. 3412, *ante.*

6064. —— ——.]—ASHCROFT *v.* ASHCROFT & ROBERTS, No. 5360, *ante.*

6065. ——.]—PARRY *v.* PARRY, No. 3433, *ante.*

6066. —— Nullity suit.]—(1) Where a petition is brought for a declaration that a marriage ceremony is null & void on the ground that resp. had a husband living at the time of the ceremony, the ct. cannot ordinarily make it a term of granting a decree that petitioner shall make provision for resp.

(2) A petitioner is entitled *ex debito justitiæ* to a declaration of nullity of marriage when resp.'s husband was alive at the time of the second marriage, & the ct. has no discretion as to withholding relief.—BATEMAN *v.* BATEMAN (OTHERWISE HARRISON) (1898), 78 L. T. 472.

6067. ——.]—FREEMAN *v* FREEMAN & FREEMAN, No. 3623, *ante.*

PART XIII. SECT. 25, SUB-SECT. 3.

6046 i. *Alimony pendente lite—In arrears.*]—The ct. refused to make decree *nisi* absolute until arrears of alimony *pendente lite* were paid.—DE BRETTON *v.* DE BRETTON (1882), I. L. R. 4 All. 295.—**IND.**

6051 i. *Death of party—Petitioner.*]—A wife, who had obtained a decree *nisi*, died before such decree had been confirmed by the High Ct.:—*Held:* the ct. had no jurisdiction in these proceedings to confirm the decree for dissolution of the marriage.—BUTTERFIELD *v.* BUTTERFIELD (1922), I. L. R. 50 Calc. 153.—**IND.**

a. *Notice of decree nisi not served on respondent & co-respondent.*]—When an application was made by petitioner to make absolute a rule *nisi* for dissolution of his marriage with resp., & it appeared he had tried in vain to discover resp. & co-resp. so as to serve them with notice of the decree *nisi* the ct. made the decree absolute without such service.—WARDEN *v.* WARDEN (1872), 9 B. L. R. App. 39.—**IND.**

SUB-SECT. 5.—FORM AND AMENDMENT.

6068. Amendment—Marriages in registry & church—Second marriage only referred to.]—Petitioner & resp., after having been married in a registrar's office, went through the form of marriage in a parish church. In a petition for dissolution of marriage, & in the decrees *nisi* & absolute pronounced thereon, the second marriage only was referred to. Upon affidavit of service of notice of motion upon resp., the ct. ordered that the petition & decrees be amended by inserting therein the date of the first marriage.—HAMPSON *v.* HAMPSON, [1908] P. 355; 77 L. J. P. 148; 99 L. T. 882; 24 T. L. R. 868; 52 Sol. Jo. 729.

SUB-SECT. 6.—EFFECT.

A. In General.

6069. Retrospective effect—From date of decree nisi.]—An absolute decree for the dissolution of marriage takes effect from the date of the decree *nisi*, unless anything be done in the interval between the two to alter it; & any dealing in the interval with a chose in action of the wife, is subject to the contingency of the decree *nisi* becoming absolute.

A *feme covert*, who, at the time of her marriage, was entitled to part of a fund in ct., joined her husband in mortgaging her share, which was subsequently ordered to be carried to the account of her & her husband, with a direction that it should not be transferred or disposed of without notice to the mtgee. A decree *nisi*, which in six months' time became an absolute decree, having been afterwards made for the dissolution of the marriage, the mtgee. in the interval before the decree became absolute, obtained on petition, an order for payment of his mtge. debt out of the sum in ct. standing to the credit of the husband & wife. Nothing else had been done either by the husband or by the mtgee. towards reducing the wife's interest into possession. The order was reversed, on appeal.—PROLE *v.* SOADY (1868), 3 Ch. App. 220; 37 L. J. Ch. 246; 32 J. P. 279; 16 W. R. 445, L. J.

Annotations:—**Consd.** Hulse *v.* Hulse & Tavernor (1871), L. R. 2 P. & D. 259. **Expld. & Distd.** Norman *v.* Villars (1877), 2 Ex. D. 359. **Distd.** Stanhope *v.* Stanhope & Adye (1886), 54 L. T. 906. **Consd.** Sinclair *v.* Fell, [1913] 1 Ch. 155. **Refd.** Allcard *v.* Walker, [1896] 2 Ch. 369; Tremayne *v.* Rashleigh, [1908] 1 Ch. 681. **Mentd.** Haly *v.* Barry (1868), 16 W. R. 654; Widgery *v.* Tepper (1877), 5 Ch. D. 516; *Re* Emery's Trusts (1884), 50 L. T. 197; Langworthy *v.* Langworthy (1886), 55 L. J. P. 33.

6070. Removal of disabilities of coverture.]—NORMAN *v.* VILLARS, No. 4759, *ante*.

6071. Marriage severed.]—ELLIS *v.* ELLIS, No. 4185, *ante*.

6072. Jurisdiction of court ousted—To review decree nisi & verdict.]—After decree absolute the ct. has no jurisdiction at the instance of a co-resp., upon motion made for that purpose, to rescind that decree & the decree *nisi* or to set aside the verdict of a jury against co-resp. which these decrees have followed, although fraud is alleged by him in the obtaining of that verdict & decree *nisi*, co-resp. having had time & opportunity for applying for a new trial after the decree *nisi* & having failed to do so.—KEMP-WELCH *v.* KEMP-WELCH & CRYMES, [1912] P. 82; 81 L. J. P. 25; 106 L. T. 643; 28 T. L. R. 185.

B. On Right to Remarry.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 184.

6073. Re-marriage within time limit for appeal—Second marriage void.]—Where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by Matrimonial Causes Act, 1857 (c. 85), s. 57, & during the lifetime of the other party to the marriage, the ct. held the latter *de facto* marriage to be null & void in law.—CHICHESTER *v.* MURE (FALSELY CALLED CHICHESTER) (1863), 3 Sw. & Tr. 223; 2 New Rep. 493; 32 L. J. P. M. & A. 146; 8 L. T. 676; 9 Jur. N. S. 779; 11 W. R. 990; 164 E. R. 1259.

C. Wife's Right to Husband's Name after Divorce.

6074. General rule.]—Marriage confers a name upon a woman. The name so conferred becomes her actual name, & continues to be so even after a decree of divorce, until she has acquired by repute some other name which, so to speak, obliterates it.—FENDALL (OTHERWISE GOLDSMID) *v.* GOLDSMID (1877), 2 P. D. 263; 46 L. J. P. 70.

Annotation:—**Refd.** Cowley *v.* Cowley, [1901] A. C. 150.

6075. Wife of peer—Remarriage with commoner.]—An injunction will not be granted to restrain the former wife of a peer, whose marriage with him has been dissolved, & who has subsequently married a commoner, from using her former title. The peer by such user suffers no legal wrong or damage.—COWLEY (EARL) *v.* COWLEY (COUNTESS), [1901] A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, H. L.

Annotations:—**Refd.** Pryce *v.* Pioneer Press (1925), 42 T. L. R. 29. **Mentd.** *Re* Greenwood, Goodhart *v.* Woodhead, [1902] 2 Ch. 198; *Re* Croxon (otherwise Croxton), Croxon (otherwise Croxton) *v.* Ferrers (1901), 89 L. T. 733.

D. On Rights to Property.

See Part V., Sect. 1, *ante*.

SECT. 26.—**EFFECT OF DECREES IN SUITS OTHER THAN DIVORCE.**

SUB-SECT. 1.—JUDICIAL SEPARATION.

6076. No right to remarry.]—RYE *v.* FULIAMBE (1602), Moore, K. B. 683; 72 E. R. 838.

Annotation:—**Mentd.** Napier *v.* Napier (otherwise Goodban), [1915] P. 184.

6077. Decree in England—Subsequent dissolution decree abroad—Effect on alimony & custody.]—W. *v.* W. (1908), Halsbury's Laws of England, cited in Vol. XVI., p. 595.

6078. Whether status of parties altered.]—*Semble:* a decree for judicial separation does not affect the status of the parties.—ANGHINELLI *v.*

PART XIII. SECT. 25, SUB-SECT. 6.—A.

b. *Retrospective effect.*]—After a decree absolute has been made for the dissolution of a marriage the wife cannot sue the husband for a personal injury committed by him in the interval between the decree *nisi* & the decree absolute.—SALAMAN *v.* SALAMAN, [1923] N. Z. L. R. 300.—**N.Z.**

PART XIII. SECT. 25, SUB-SECT. 6.—B.

c. *Remarriage within six months.*]—Divorce Act, IV. of 1869, s. 57, expressly prohibits remarriage within six months of the making of the decree absolute.—BATTIE *v.* BROWN (1913), I. L. R. 38 Mad. 152.—**IND.**

d. ———.]—A successful petition in a suit for dissolution of marriage entered into a second marriage within six months from the decree for dissolution of marriage becoming absolute:—*Held:* the second marriage was null & void.—TURNER *v.* TURNER (1921), I. L. R. 48 Calc. 636.—**IND.**

PART XIII. SECT. 26, SUB-SECT. 1.

6078 i. *Whether status of parties altered.*]—The marriage remains in

Sect. 26.—*Effect of decrees in suits other than divorce: Sub-sects.* 1, 2 & 3. *Sect.* 27: *Sub-sects.* 1 & 2,

ANGHINELLI, [1918] P. 247; 87 L. J. P. 175; 119 L. T. 227; 34 T. L. R. 438; 62 Sol. Jo. 548, C. A.

Annotations:—**Mentd.** Graham *v.* Graham, [1923] . 31 Mitford *v.* Mitford & Von Kuhlmann, [1923] P 130 Eustace *v.* Eustace, [1924] P. 45.

SUB-SECT. 2.—NULLITY OF MARRIAGE.

6079. Marriage never solemnised — Settlement conditional on marriage being solemnised.]—By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his exors. would, within twelve months from his death, pay £25,000 to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his exors. were directed to pay & did pay over the £25,000, being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Ct. declaring the marriage to have been & to be absolutely null & void on the ground of the impotence of the husband:—*Held:* inasmuch as the marriage had been declared null *ab initio*, it had never been "solemnised"; consequently the covenant to pay the £25,000 never became operative, & the money in question must be repaid to the exors. of testator.—*Re* GARNETT, RICHARDSON *v.* GREENEP (1905), 74 L. J. Ch. 570; 93 L. T. 117.

Annotation:—**Folld.** *Re* Wombwell's Settlmt., Clerke *v.* Menzies, [1922] 2 Ch. 298.

See, further, SETTLEMENTS.

Effect on issue born of second marriage—First annulled on ground of impotence.]—*See* Nos. 2336–2338, *ante*.

SUB-SECT. 3.—JACTITATION OF MARRIAGE.

6080. How far decree evidence—On indictment for bigamy.]—A sentence of jactitation is not conclusive evidence against an indictment of bigamy; for its validity may be impeached, as having been obtained by fraud.—KINGSTON'S (DUCHESS) CASE (1776), 1 Leach, 146; 1 East, P. C. 468; 20 State Tr. 355; 168 E. R. 175.

Annotations:—**Apld.** Bandon *v.* Becher (1835), 9 Bli. N. S. 532. **Consd.** Barrs *v.* Jackson (1845), 1 Ph. 582. **Apld.** Abouloff *v.* Oppenheimer (1882), 10 Q. B. D. 295. **Distd.** Boswell *v.* Coaks (No. 2) (1894), 86 L. T. 365, n. **Refd.** Galbraith *v.* Neville (1789), 1 Doug. K. B. 6, n.; Meddowcroft *v.* Huguenin (1844), 4 Moo. P. C. C. 386; Shedden *v.* Patrick (1854), 23 L. T. O. S. 194. **Mentd.** Wilson *v.* Rastall (1792), 4 Term Rep. 753; Kennell *v.* Abbott (1799), 4 Ves. 802; White *v.* Hall (1806), 12 Ves. 321; R. *v.* Knaptoft (1824), 2 B. & C. 883; Stafford *v.* Clark (1824), 9 Moore, C. P. 724; Bland *v.* Lynam (1827), 5 L. J. O. S. C. P. 87; Martin *v.* Nicolls (1830), 3 Sim. 458; Thompson *v.* Blackhurst (1833), 1 Nev. & M. K. B. 266; Doe d. Peter *v.* Watkins (1837), 3 Bing. N. C. 421; R. *v.* Wye (1838), 7 Ad. & El. 761; R. *v.* Caley (1841), 5 Jur. 709; Hill *v.* Barry (1842), 7 Jur. 10; R. *v.* Sow (1843), 4 Q. B. 93; Robertson *v.* Struth (1844), Dav. & Mer. 772; Tarry *v.* Newman (1846), 15 M. & W. 645; Bailey *v.* Harris (1849), 13 Jur. 341; R. *v.* Smith O'Brien (1849), 7 State Tr. N. S. 1; Bank of Australasia *v.* Nias (1851), 16 Q. B. 717; R. *v.* Blakemore (1852), 2 Den. 410; R. *v.* Haughton (1853), 1 E. & B. 501; R. *v.* Hartington Middle Quarter (1855), 4 E. & B. 780; Liverpool Bank *v.* Foggo (1860), 2 L. T. 594; Routledge *v.* Hislop (1860), 2 E. & E. 549; Hunter *v.* Stewart (1861), 4 De G. F. & J. 168; The Justyn (1862), 6 L. T. 553; Rogers *v.* Hadley (1863), 9 Jur. N. S. 898; Nawab Sidhee Nuzur Ally Khan *v.* Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540; R. *v.* Fanning (1866), 10 Cox, C. C. 411; Patch *v.* Ward (1867), 3 Ch. App. 203; Finney *v.* Finney (1868), L. R. 1 P. & D. 483; Ochsenbein *v.* Papelier (1873), 8 Ch. App. 695; Flitters *v.* Allfrey (1874), L. R. 10 C. P. 29; Dover *v.* Child (1876), 34 L. T. 737; R. *v.* Hutchings (1881), 6 Q. B. D. 300; Priestman *v.* Thomas (1884), 9 P. D. 70; A.-G. for Trinidad & Tobago *v.* Eriché, [1893] A. C. 518; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455; Dalton *v.* Fitzgerald (1897), 66 L. J. Ch. 604; N. E. Ry. *v.* Dalton Overseers, [1898] 2 Q. B. 66; Turley *v.* Daw (1906), 94 L. T. 216; Hill *v.* Clifford, Clifford *v.* Timms, [1907] 2 Ch. 236; Burdett *v.* Horne (1911), 27 T. L. R. 402; *In the Estate of* Crippen, [1911] P. 108; Bedford *v.* Cowtan, [1916] 1 K. B. 980; C. (otherwise H.) *v.* C., [1921] P. 399; Ord *v.* Ord, [1923] 2 K. B. 432.

SECT. 27.—**SUMMARY JURISDICTION.**

SUB-SECT. 1.—JURISDICTION OF COURT.

6081. What court has jurisdiction—Desertion—Protection order—Husband & wife living in different districts.]—A married woman applied to the justices of the borough of P. for a protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21. Since her desertion she had lived outside the borough of P., while her husband resided within the borough. The borough justices declined to make an order, on the ground that the county justices were the proper justices to make it. Upon a rule for a *mandamus* to the borough justices to hear the application:—*Held:* the jurisdiction was in the county justices.—R. *v.* PLYMOUTH JJ. (1880), 44 J. P. Jo. 168.

6082. —— —— Separation order—Custody & maintenance.]—BROWN *v.* BROWN, No. 6218, *post*.

6083. .]—COBB *v.* COBB, No. 6201, *post*.

6084. In the metropolis—Maintenance order.] FROUD *v.* FROUD (1920), 123 L. T. 176; 36 T. L. R. 505; 26 Cox, C. C. 605, D. C.

6085. Magistrates hearing summons for assault—Jurisdiction to order separation & maintenance at same hearing—Matrimonial Causes Act, 1878, c. 19.]—POWELL *v.* POWELL, No. 6281, *post*.

See, now, Summary Jurisdiction (Married Women) Act. 1895 (c. 39), ss. 4, 5.

6086. Essentials for jurisdiction—Cohabitation of parties—Broken by act of husband.]—In order to give jurisdiction to justices under so much of Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, as provides that any married woman, whose husband shall have deserted her, or been guilty of wilful neglect to provide reasonable maintenance for her, & shall by such neglect have caused her to leave & live separately & apart from him, may apply to a ct. of summary jurisdiction for an order under the Act, it is essential that there should be a cohabitation which is broken by the act of the husband; but such cohabitation does not necessarily imply that the parties must be living together continually under one roof.

A married female domestic servant, who never lived with her husband under the same roof, was visited from time to time by him at the house of

force with all its consequences except in so far as any of them may be modified by the decree. There have been numerous cases in which a division of property, between parties judicially separated, has been ordered, but none in which the offending party has been declared to have forfeited any benefits which had already accrued to him or her, either by virtue of community or ante-nuptial contract.—WESSELS *v.* WESSELS (1895), 12 S. C. 465.—**S. AF.**

PART XIII. SECT. 27, SUB-SECT. 1.

e. *What court has jurisdiction—Maintenance order.*]—A complaint under Criminal Procedure Code, Act X of 1882, s. 488, falls within the cognisance of the Magistrate competent to entertain such complaint, & within the local limits of whose jurisdiction the husband is actually residing at the date of such complaint.—*Re* SHAIK FAKRUDIN'S PETITION (1884), I. L. R. 9 Bom. 40.—**IND.**

f. *Ouster of jurisdiction—Parties having reverted to the Supreme Court.*]—

her mistress, & a child (which subsequently died) was born of the marriage in a lying-in hospital. The husband refused to receive his wife in the house where he lodged, or to give her any help towards her maintenance :—*Held :* the cohabitation was sufficient to give jurisdiction to the justices under above sect. to make an order under the Act.—BRADSHAW *v.* BRADSHAW, [1897] P. 24 ; 66 L. J. P. 31 ; 75 L. T. 391 ; 61 J. P. 8 ; 45 W. R. 142 ; 13 T. L. R. 82, D. C.

Annotation :—**Refd.** Cowley *v.* Cowley (1897), *Times*, Feb. 3 ; Huxtable *v.* Huxtable (1899), 68 L. J. P. 83 ; Wassell *v.* Wassell (1899), 68 L. J. P. 127 ; Kay *v.* Kay, [1904] P. 382 ; Harriman *v.* Harriman, [1909] P. 123.

6087. —— —— What is sufficient cohabitation.]—BRADSHAW *v.* BRADSHAW, No. 6086, *ante*.

6088. Ouster of jurisdiction—By separation agreement.]—If a wife having a cause of complaint, under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), against her husband on the ground of desertion, enters into a valid deed of separation the effect is to put an end to any desertion theretofore existing.

A husband & wife executed a deed of separation in 1896, by which the husband agreed to pay an allowance to his wife. No payment was made under the deed for nine months. Subsequently the wife received a portion of the arrears by means of legal proceedings, but for more than two years before Apr. 1902, the husband paid nothing at all under the deed. In Apr. 1902, she took out a summons against him under above Act, & the justices granted her a separation order, the custody of her child, & an allowance of 15*s*. a week :—*Held :* the deed of separation of 1896 was a bar to the jurisdiction of the justices on the ground of desertion.—PIPER *v.* PIPER, [1902] P. 198 ; 71 L. J. P. 100 ; 87 L. T. 150.

6089. —— By pendency of divorce suit.]—CRAXTON *v.* CRAXTON, No. 2980, *ante*.

6090. As to permanent legal custody of children—Matrimonial Causes Act, 1878 (c. 19).]—GROVE *v.* GROVE, No. 6151, *post*.

See, now, Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 4, 5.

Costs—Exclusive jurisdiction of magistrates as to.]—*See* No. 6257, *post*.

SUB-SECT. 2.—ON WHAT GROUND RELIEF WILL BE GIVEN.

A. Assault.

(*a*) *Summary Conviction.*

See Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.

6091. Summary conviction—Aggravated assault—Imprisonment or fine not inflicted.]—If a husband has been convicted of an aggravated assault, the magistrates may grant a judicial separation even though they do not fine or imprison him.—WOODS *v.* WOODS (1884), 10 P. D. 172 ; 50 J. P. 199 ; 33 W. R. 323.

Annotations :—**Folld.** Powell *v.* Powell (1889), 14 P. D. 177. **Consd.** Lewin *v.* Lewin, [1891] P. 254.

(*b*) *Conviction on Indictment.*

See Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.

6092. Common assault—Husband bound over—No power to make separation order.]—A husband was found guilty of a common assault upon his wife & was bound over to come up for judgment when called upon. On an application under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, asking the judge to grant the wife a separation order, & to say that she should no longer be compelled to live with her husband :—*Held :* the sect. did not apply to such a case.—R. *v.* CORRIGAN (1898), 62 J. P. 522.

6093. Throwing corrosive fluid—Term of imprisonment exceeding two months—Separation order made.]—Where a husband was convicted at assizes upon indictment of throwing a corrosive fluid on his wife with intent to burn, & sentenced to a term of imprisonment exceeding two months, an order, on the application of the wife, was made by the judge presiding at the trial under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 4, 5, that she be no longer bound to cohabit with her husband.—R. *v.* KNOWLES (1900), 65 J. P. 27.

B. Desertion.

Compare Sect. 5, sub-sect. 8, *ante*.

6094. What amounts to—Absence on ordinary occupation—Mariner.]—*Ex p.* ALDRIDGE, No. 2847, *ante*.

6095. —— —— Whether affected by previous desertion.]—*Ex p.* ALDRIDGE, No. 2847, *ante*.

6096. —— Question of fact.]—In 1881 a husband deserted his wife & left the kingdom. On his return from abroad in 1886 his wife applied at petty sessions, under Married Women's (Maintenance in Case of Desertion) Act, 1886 (c. 52), for maintenance, & the justices made an order :—*Held :* the order was properly made, the question of desertion being purely one of fact for the justices.—R. *v.* BIRWISTLE, ETC., JJ. (1889), 58 L. J. M. C. 158, D. C.

Annotations :—**Expld.** Lane *v.* Lane, [1896] P. 133. **Distd.** Forster *v.* Forster (1910), 54 Sol. Jo. 403.

6097. —— Refusal to resume cohabitation—After separation under deed—Maintenance allowance in arrear.]—R. *v.* LERESCHE, No. 2910, *ante*.

6098. —— Refusal to cohabit—After temporary separation.]—Mr. & Mrs. W. were about to remove to another house, & Mrs. W. during removal, temporarily stayed with a relative on June 19. When the new house was ready, Mr. W. refused to receive her back, or to maintain her till Aug. 7, when she claimed maintenance under 49 & 50 Vict. c. 52 :—*Held :* whether desertion began on June 19 or not was immaterial, if it clearly existed in Aug., & the order to maintain was right.—WILKINSON *v.* WILKINSON (1894), 58 J. P. 415.

Annotations :—**Apprvd.** Jones *v.* Jones (1895), 43 W. R. 421. **Refd.** Heard *v.* Heard, [1896] P. 188 ; Thomas *v.* Thomas, [1924] P. 194.

6099. —— —— ——.]—HUXTABLE *v.* HUXTABLE, No. 2858, *ante*.

Reasonable excuse for refusal.]

See Nos. 3001–3011, *ante*.

6100. —— Mere refusal to resume cohabitation.]—BOWEN *v.* BOWEN, No. 2902, *ante*.

6101. —— Conduct compelling wife to leave home.]—BROWN *v.* BROWN (1898), 79 L. T. 102 ; 62 J. P. 711, D. C.

Annotation :—**Consd.** Dodd *v.* Dodd, [1906] P. 189.

Re WILEY & WILEY (1919), 46 O. L. R. 176 ; 15 O. W. N. 408.—**CAN.**

g. —— ——.]—*Held :* once the Supreme Ct. is seised of the matter the magistrate ought not to entertain any application by the wife against her husband.—SMILEY *v.* SMILEY (1922), 30 B. C. R. 536.—**CAN.**

PART XIII. SECT. 27, SUB-SECT. 2.—B.

h. *What amounts to—Unreasonable conditions imposed—By husband in receiving wife back.*]—Where a wife, having left her husband's home, offers to return, the offer being *bonâ fide*, the husband in agreeing to receive her back, cannot attach conditions which are unreasonable or beyond the control of the wife so as to make it impossible for the wife to return. A wife, in such circumstances, may be found, on the evidence adduced, to be a wife who is deserted or destitute within the meaning of Deserted Wives' Maintenance Act, B.C., 1919, c. 19, &

27.—*Summary jurisdiction: Sub-sect.* 2, *B.*,

6102. -.]—CHARTER *v.* CHARTER, No. 2931, *ante.*

—— —— -.]—*See, also*, No. 6086, *ante*, No. 6168, *post.*

6103. —— Mere expression that wife can go where she likes—Wife's refusal to return.]—CHARTER *v.* CHARTER, No. 2931, *ante.*

6104. —— Termination of state of cohabitation—By agreement for separation.]—(1) A husband & wife married in 1882, and cohabited till July, 1887, when they executed a "memorandum of agreement" for a separation, bearing a sixpenny stamp. The next day the wife went to America, where she remained till Aug. 1899, when she returned to this country & presented herself at her husband's house, who shut the door in her face. The wife took out a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), a proceeding which must be taken within six months of the commission of the offence. At the hearing the justices refused to hear any evidence as to the agreement, beyond the bare statement of the wife, that the solr. who drew it said it was not worth the paper it was written on, & that it was never intended to be acted upon. The ground of their refusal to do so was not clearly stated, but it appeared, partly, at all events, to be based on the ground that it was insufficiently stamped. They granted the wife a separation order, & ordered the husband to pay ten shillings a week for her maintenance:—*Held:* the case depended on the terms of the agreement. If the parties intended to separate in July, 1887, then there was no offence within the Act, at all events within six months of the summons.

(2) Where a wife has obtained a decision in her favour under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), she is entitled to her costs of an appeal to the Div. Ct. even though the appeal is successful.—MEDWAY *v.* MEDWAY, [1900] P. 141; 69 L. J. P. 56; 82 L. T. 627; 64 J. P. 120; 48 W. R. 622, D. C.

Annotations:—As to (1) **Refd.** Nicholson *v.* Nicholson, [1917] P. 21; Bowron *v.* Bowron, [1925] P. 187. *As to* (2) **Folld.** Charter *v.* Charter (1900), 84 L. T. 272.

6105. —— —— ——.]—PIPER *v.* PIPER, No. 6088, *ante.*

6106. —— —— **By fault of one party.**]—(1) "Desertion" under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), means, & is to be interpreted & dealt with as meaning, the same as desertion under the Matrimonial Causes Act, 1857 (c. 85), save that no period is specified as requisite to constitute the offence.

(2) A mere separation does not necessarily constitute desertion without consideration of the question whether there is in fact reasonable cause for the desertion. A husband who is summoned before justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), should have the opportunity afforded him of showing by evidence that there is in fact reasonable cause or excuse on his part for the separation.

Desertion means the cessation of cohabitation brought about by the fault or act of one of the parties. Therefore, the conduct of the parties must be considered. If there is good cause or reasonable excuse, it seems to me there is no desertion at all in law (JEUNE, P.).—FROWD *v.* FROWD, [1904] P. 177; 73 L. J. P. 60; 90 L. T. 175; 68 J. P. 436, D. C.

Annotation:—**Refd.** Bowron *v.* Bowron, [1925] P. 187.

6107. —— —— **By complainant's own act—Voluntary separation by wife.**]—BLACKLEDGE *v.* BLACKLEDGE, No. 6175, *post.*

6108. —— —— —— ——.]—On appeal by a husband from a maintenance order made by justices under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), the ct. made some observations on the evidence which justices ought to require before making such an order, & allowed the appeal but granted resp. her costs.

This Act of Parliament [the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), is very improperly worked by justices throughout the country. They make decrees of desertion on the flimsiest evidence, & do not go into cases as they should. The wife here agreed that the cohabitation should be brought to an end; & she admits that she consented to live separate. There could therefore be no desertion unless there was first a resumption of cohabitation . . . (BARGRAVE DEANE, J.).—TERRY *v.* TERRY (1915), 32 T. L. R. 167, D. C.

Compare Nos. 2858, 6098, *ante.*

6109. —— —— **Reasonable excuse—What amounts to.**]—HOLT *v.* HOLT, No. 3010, *ante.*

6110. —— Intention not to resume cohabitation—Cohabitation involuntarily suspended.]—PULFORD *v.* PULFORD, No. 2846, *ante.*

See, also, Nos. 2845–2852, *ante.*

6111. —— Continued absence after separation order—Not in obedience to order—Order not served.]—ROBINSON *v.* ROBINSON, No. 6133, *post.*

6112. —— Fresh desertion after cohabitation resumed—Previous separation order undischarged.]—JONES *v.* JONES, No. 6241, *post.*

6113. —— Expulsion of wife from home—Subsequent repentance & offer to recohabit—Reasonable doubt as to genuineness of offer.]—THOMAS *v.* THOMAS, No. 2925, *ante.*

6114. What must be shown—Cohabitation at time of desertion.]—R. *v.* LERESCHE, No. 2910, *ante.*

6115. —— —— **What amounts to cohabitation.**]—BRADSHAW *v.* BRADSHAW, No. 6086, *ante.*

6116. —— Intention to break off marital relations.]—CHARTER *v.* CHARTER, No. 2931, *ante.*

6117. —— Whether continuance for any specified time.]—FROWD *v.* FROWD, No. 6106, *ante.*

Compare Sect. 5, sub-sect. 8, B. (*b*), *ante.*

6118. Existing desertion—How affected—By deed of separation.]—PIPER *v.* PIPER, No. 6088, *ante.*

6119. —— —— **By pending divorce proceedings.**]—CRAXTON *v.* CRAXTON, No. 2980, *ante.*

C. Persistent Cruelty causing Wife to leave and live apart.

6120. Retrospective operation of Act.]—The provision of Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, giving jurisdiction

entitled to a maintenance order.—JACKMAN *v.* JACKMAN, [1923] 3 W. W. R. 125; 3 D. L. R. 798; 32 B. C. R. 356.—**CAN.**

k. *Failure to maintain.*] "Desertion" in Destitute Persons Act is a breach of duty in connection with the maintenance of the classes of dependants named in the Act.

Misconduct on the part of the husband must be shown as a basis for an order for support against him.—FRASER *v.* FRASER (1907), 26 N. Z. L. R. 913.—**N.Z.**

l. —— *Coupled with other acts of cruelty.*]—Desertion although insufficient in itself to warrant a decree, does, when coupled with other acts of cruelty, form a material ingredient in determining a wife's right to relief.—SEVERN *v.* SEVERN (1852), 3 Gr. 431; 7 Gr. 109.—**CAN.**

under the Act to a ct. of summary jurisdiction in cases where a husband has been guilty of persistent cruelty to his wife, thereby causing her to live apart from him, is retrospective in its operation, & applies to acts of cruelty committed before the Act came into force.—LANE *v.* LANE, [1896] P. 133; 65 L. J. P. 63; 74 L. T. 557; 60 J. P. 345; 12 T. L. R. 249, D. C.

Annotation:—**Refd.** Ellis *v.* Ellis (1896), 60 J. P. 823.

6121. Persistent cruelty—What amounts to.]—GROVE *v.* GROVE (1896), 12 T. L. R. 620, D. C.

6122. —— —— Number of acts on one day.]—*Semble:* a number of acts of cruelty committed on one day may amount to persistent cruelty.—BROAD *v.* BROAD (1898), 78 L. T. 687, D. C.

6123. —— —— Whether acts entitling to judicial separation sufficient.]—Persistent cruelty, under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, means something more than such cruelty as would entitle a petitioner in the Divorce Div., to a judicial separation.—CORNALL *v.* CORNALL (1910), 74 J. P. 379, D. C.

—— —— To children—On application of wife.]—*See* Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (2) (*a*).

—— —— On application of husband.]—*See* Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (3).

Causing to leave & live apart—Necessity for physical departure.]—*Compare* No. 6127, *post.*

D. Neglect to maintain causing Wife to leave and live apart.

6124. Neglect to provide reasonable maintenance—Necessity for proof of husband's means—Actual or potential.]—(1) Upon the hearing by a ct. of summary jurisdiction of a summons taken out by a married woman under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, charging her husband with wilful neglect to provide reasonable maintenance for her, the ct. before making an order, must be satisfied that the husband either is in receipt of actual earnings, or has the capability of earning a livelihood; evidence of means cannot be entirely dispensed with.

(2) Where a married woman is an unsuccessful resp. in an appeal to the Probate, Divorce, & Admiralty Div. under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), the Court, without laying down any binding rule of practice, will in ordinary cases follow the practice in matrimonial causes, and order her costs of the appeal to be paid by the husband.—EARNSHAW *v.* EARNSHAW, [1896] P. 160; 65 L. J. P. 89; 74 L. T. 560; 60 J. P. 377; 12 T. L. R. 249, 386, D. C.

Annotations:—*As to* (1) **Distd.** Nott *v.* Nott, [1901] P. 241. **Refd.** R. *v.* Richardson, [1909] 2 K. B. 851; Martin *v.* Martin, [1919] P. 283.

6125. Causing to leave & live apart—Parties already separated—Subsequent cohabitation in wife's house—Wife denied admission to husband's house.]—Husband & wife had been living apart for many years, when the husband returned & resumed cohabitation with his wife at his wife's house. The wife then went to her husband's house, but her husband refused her admission:—*Held:* the husband caused his wife to leave & live apart from him within Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.—SNAPE *v.* SNAPE (1900), 64 J. P. 793; 17 T. L. R. 19, D. C.

6126. —— —— Husband's failure to pay allowance during separation—Subsequent bankruptcy to evade payment of arrears.]—When a husband & wife have lived apart for several years, & the husband has agreed to pay to his wife a certain weekly allowance, his failure to pay such allowance & his subsequent filing of his petition in bkpcy., with the object of evading the payment of arrears, do not replace the parties in the same position towards each other which they occupied before the separation actually took place. Under such circumstances a wife is not entitled to a separation order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 31), on the ground that she has been compelled to live separately & apart from her husband because he has neglected to maintain her, although she commences proceedings within six months of the making of the receiving order, as she is out of time under the Summary Jurisdiction Act, 1848 (c. 43), s. 11.—ROWLANDS *v.* ROWLANDS (1902), 86 L. T. 125; 18 T. L. R. 291, D. C.

6127. —— —— —— Or provide home.]—In order to constitute an offence within the words "Wilful neglect & shall by such neglect have caused her to leave & live separately & apart from him" in the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, there must be an actual departure by the wife caused by the conduct of the husband. When spouses are already living apart & without regard to the question whether there is desertion in law, which is a separate ground of complaint under the statute, mere refusal to provide a home or an allowance does not constitute the offence of causing by conduct to leave & live apart.—NICHOLSON *v.* NICHOLSON, [1917] P. 21; 86 L. J. P. 11; 115 L. T. 791; 81 J. P. 31; 33 T. L. R. 89; 61 Sol. Jo. 337, D. C.

6128. —— Physical departure necessary.]—NICHOLSON *v.* NICHOLSON, No. 6127, *ante.*

E. Habitual Drunkenness.

See Licensing Act, 1902 (c. 28), s. 5 (2).

6129. What amounts to—Question of fact in each case.]—The word "habitual" is not explained or defined in the Habitual Drunkards Act, 1879 (c. 19), & it is in each case a question of fact whether drunkenness is only occasional or is a state of intoxication. It is sufficient to show that she neglected her domestic duties so often & to such an extent that the neglect has become a habit—MACKIE *v.* MACKIE (1903), 22 N. Z. L. R. 567.—**N.Z.**

6129 i. *What amounts to—Question of fact in each case.*]—If a wife habitually gives way to intemperance & neglects her domestic duties, the inference is that such neglect is because, through her drinking habits, she has rendered herself unfit to discharge them, & in order to establish that a wife has habitually neglected her domestic duties it is not necessary to show that she never performed any domestic duties any more than it is necessary in order to establish that she is an habitual drunkard to show that she is always in a state of intoxication. It is sufficient to show that she neglected her domestic duties so often & to such an extent that the neglect has become a habit—MACKIE *v.* MACKIE (1903), 22 N. Z. L. R. 567.—**N.Z.**

6129 ii. —— ——.]—A man is an habitual drunkard within the meaning of Divorce and Matrimonial Causes Act, 1904, s. 22, if he had been in the habit almost every week of coming home in the evening two or three times in the week, & sometimes oftener, under the influence of drink. It is not necessary that he should have been drunk daily. Nor is he any the less an habitual drunkard because at times he had been sober for a month, or because at one time, during the period

PART XIII. SECT. 27, SUB-SECT. 2.—D.

m. *Neglect to provide necessaries.*]—A husband & wife being together in N. S. W., the wife with the husband's consent came to S. A. & thereafter remained there, & the husband failed to provide her with adequate means of support. On a summons under Inter-State Destitute Persons Relief Act, 1910, taken out by the wife against the husband, who was born in Q. in respect of which state the act was in force:—*Held:* an order might properly be made against the husband.—RENTON *v.* RENTON (1918), 25 C. L. R. 291. —**AUS.**

n. —— *Whether ground for prosecution.*]—R. *v.* BULLARD, [1924] 1 W. W. R. 326; 1 D. L. R. 956; 41 Can. Crim. Cas. 397; 20 Alta. L. R. 107. —**CAN.**

PART XIII. SECT. 27, SUB-SECT. 2.—E.

Sect. 27.—*Summary jurisdiction: Sub-sect.* 2, *E., F. & G.; sub-sect.* 3, *A., B. & C.* (*a*) *&* (*b*), *D. & E.*]

habitual within that Act.—ROBSON *v.* ROBSON (1904), 68 J. P. 416, D. C.

6130. —— Intemperance resulting in danger to self or others.]—Justices are not entitled to find that a person is a habitual drunkard within Habitual Drunkards Act, 1879 (c. 19), unless they are satisfied that by reason of the habitual intemperance the person charged is dangerous at times to himself or herself or to others, or is incapable of managing himself or herself & his or her affairs. It is necessary to prove that, though a person may be excessively intemperate & violent at times, the acts of violence were brought about by reason of the intemperance.—TAYLER *v.* TAYLER (1912), 56 Sol. Jo. 572, D. C.

6131. —— Intemperance resulting in inability to manage self or affairs.]—TAYLER *v.* TAYLER, No. 6130, *ante*.

——.]—*See, now*, Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 3.

—— Under Habitual Drunkards Act, 1879 (c. 19).]—*See* INTOXICATING LIQUORS.

F. Husband suffering from Venereal Disease.

See Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (2) (*b*).

G. Husband Compelling Wife's Prostitution.

See Summary Jurisdiction Separation & Maintenance Act, 1925 (c. 51), s. 1 (2) (*c*).

SUB-SECT. 3.—NATURE OF RELIEF GIVEN.

A. In General.

See Summary Jurisdiction Married Women Act, 1895 (c. 39), s. 5.

6132. Order for protection of wife—On conviction of husband of aggravated assault—Matrimonial Causes Act, 1878 (c. 19).]—POWELL *v.* POWELL, No. 6281, *post*.

B. Separation Orders.

See Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5.

6133. Effect of—Determination of duty to cohabit.]—An order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), that the husband pay a weekly sum for the wife's maintenance containing the clause "that the appct. be no longer bound to cohabit with her husband," releases both spouses from the duty to cohabit. The continuance after such an order by the husband of a separation commenced by him before the order under circumstances amounting to desertion cannot make him guilty of "desertion for two years without reasonable excuse," even though the continuance may be owing to his intention to desert his wife & not to obedience to the order; & (*semble*) though the order has not been served on him or brought to his notice.—ROBINSON *v.* ROBINSON, [1919] P. 352; 88 L. J. P. 126; 122 L. T. 222; 35 T. L. R. 637; 63 Sol. Jo. 705.

Annotations:—**Refd.** Jones *v.* Jones (1924), 132 L. T. 63. **Mentd.** Butterworth *v.* Butterworth & Englefield, Collins *v.* Collins & Harrison, Barratt *v.* Barratt & Fox, Howell *v.* Howell & Walker, Adams *v.* Adams & Ward, Ellworthy *v.* Ellworthy & Ledgard, [1920] P. 126.

Jurisdiction to make.]—*See* Nos. 6201, 6218, *post*.

On what grounds made.]—*See* Sub-sect. 2, *ante*.

C. Orders for Maintenance.

(a) Of Wife.

6134. Order for maintenance alone—Jurisdiction of court to make—Separation order previously made—Matrimonial Causes Act, 1878 (c. 19), s. 4.]—A husband having been convicted of an aggravated assault upon his wife, a separation order, under above sect. was made against him, such order not containing a provision for the wife's maintenance:—*Held:* there was no jurisdiction to make a subsequent order for wife's maintenance.—WOODHEAD *v.* WOODHEAD, [1895] P. 343; 11 R. 659, D. C.

6135. Amount of order—Proportion of joint incomes—Practice of High Court followed.]—In assessing the amount which a husband is to be ordered to pay for the support of his wife who has obtained a separation order against him under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), cts. of summary jurisdiction are to be guided by the principles & practice upon which allotments of alimony are made in cases of judicial separation in the High Ct.—COBB *v.* COBB, [1900] P. 294; 69 L. J. P. 125; 83 L. T. 716, D. C.

Annotation:—**Expld.** Stephenson *v.* Stephenson (1925), 133 L. T. 399.

6136. —— —— ——.]—WILCOX *v.* WILCOX, No. 6220, *post*.

6137. —— —— —— Discretion to depart from rule.]—The ct. of summary jurisdiction in fixing maintenance for a deserted wife is required by Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (*c*), to have regard to the means both of the husband & wife, & ordinarily follows the rule of Divorce Ct. in regard to alimony by allowing the wife one-third of the joint income. But that is not a hard & fast rule. & the wife's income being of a precarious nature & the husband having by his conduct shown that he could, if he chose, pay more than the amount ordered by the justices:—*Held:* the justices had exercised a judicial discretion in awarding the maximum allowance under the statute of £2 a week, though on the evidence before them as to the income of the spouses, that sum was considerably in excess of one-third of the joint income.—STEPHENSON *v.* STEPHENSON (1925), 133 L. T. 399; 41 T. L. R. 550; 69 Sol. Jo. 678, D. C.

See Sect. 9, sub-sect. 1; Sect. 22, sub-sect. 1, *ante*.

6138. —— Weekly sum provided by relative for wife.]—On an application by a wife for maintenance under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), after desertion, it being shown that a relative of the husband had undertaken to provide £1 a week for the wife, the justices ordered the husband to pay that sum weekly for her maintenance:—*Held:* there was evidence upon which the justices might make such order, & if the husband was unable to pay, he might show cause upon fresh evidence before the justices to have the order varied or discharged.—WALTON *v.* WALTON (1900), 64 J. P. 264, D. C.

Annotation:—**Refd.** Martin *v.* Martin, [1919] P. 283.

Compare No. 6140, *post*.

6139. —— What court will consider—Means of

in question, he may have left off drink for two or three months, or because during the four years he may have been hardly ever absent from his work.—DEMPSEY *v.* DEMPSEY (1904), 24 N. Z. L. R. 829.—**N.Z.**

PART XIII. SECT. 27, SUB-SECT. 3. C. (a).

o. *Order for maintenance alone.*]—Where a wife obtained a magistrate's order under 51 Vict. c. 23, s. 2 (*o*), for payment by her husband of a weekly sum for her support:—*Held:* her remedies were limited to those given by the statute.—*Re* SIMS *v.* KELLY (1890), 20 O. R. 291.—**CAN.**

both parties.]—EARNSHAW *v.* EARNSHAW, No. 6124, *ante.*

6140. —— —— —— Whether voluntary allowance included.]—In making an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), it is the duty of the justices, in computing the amount of such allowance, to inquire into the joint means of both husband & wife, & for the purposes of such inquiry they ought to take into account a voluntary allowance paid to the wife by a person other than her husband.—NOTT *v.* NOTT, [1901] P. 241; 70 L. J. P. 94; 84 L. T. 573; 65 J. P. 378; 17 T. L. R. 525, D. C.

Annotation:—**Refd.** Martin *v.* Martin, [1919] P. 283.

Compare No. 6138, *ante*, & Sect. 9, sub-sect. 1, D., *ante.*

6141. —— —— ——.]—BEDDINGTON *v.* BEDDINGTON, No. 6149, *post.*

6142. —— —— Actual or potential earnings of parties.]—EARNSHAW *v.* EARNSHAW, No. 6124, *ante.*

6143. —— —— ——.]—METCALFE-SMITH *v.* METCALFE-SMITH (1901), 17 T. L. R. 526, D. C.

6144. —— —— ——.]—STEPHENSON *v.* STEPHENSON, No. 6137, *ante.*

6145. —— Order exceeding statutory limit.]—BEDDINGTON *v.* BEDDINGTON, No. 6149, *post.*

6146. Whether sum alienable.]—The ct. has no jurisdiction on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), to appoint a receiver by way of equitable execution of a weekly sum ordered by the ct. of summary jurisdiction to be paid by the husband to his wife for her maintenance. PAQUINE *v.* SNARY, [1909] 1 K. B. 688; 78 L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212, C. A.

6147. Whether sum liable to equitable execution.]—PAQUINE *v.* SNARY, No. 6146, *ante.*

Compare Sect. 9, sub-sect. 1 & Sect. 22, sub-sect. 1, *ante.*

Interim allowance—Adjournment of hearing.]—*See* Summary Jurisdiction, etc. Act, 1925 (c. 51), s. 6.

(*b*) *Of Children.*

See Summary Jurisdiction Married Women Act, 1895 (c. 39), s. 4; Married Women (Maintenance) Act, 1920 (c. 63), s. 1 (1)

6148. Husband's liability—Children of wife by former husband.]—A husband who has been separated from his wife under an order made under the Summary Jurisdiction Act, 1895 (c. 39), by a ct. of summary jurisdiction, is liable to be ordered to make his wife an allowance for the support of her children by a former marriage.—HILL *v.* HILL, [1902] P. 140; 71 L. J. P. 81; 86 L. T. 597; 66 J. P. 344; 50 W. R. 400; 18 T. L. R. 393, D. C.

6149. —— Children under sixteen—Form of order.]—Where, in making an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, the justices award a weekly sum for the maintenance of a child under Married Women (Maintenance) Act, 1920 (c. 63), s. 1 (1), the order must show upon the face of it that such sum is for the maintenance of the child until it attains the age of sixteen years. An order awarding a weekly sum for the use of the wife in excess of the limit of £2 prescribed by s. 5 of the Act of 1895 is bad upon the face of it, even in cases where additional provision for the maintenance of children might have been made under the Act of 1920. In arriving at the amount of maintenance for the wife, the justices are bound to have regard to the wife's means as well as to the income of the husband.—BEDDINGTON *v.* BEDDINGTON (1922), 127 L. T. 755; 38 T. L. R. 743, D. C.

6150. Additional order—Order for maintenance of wife previously made—Jurisdiction of magistrate.]—Although the Summary Jurisdiction (Married Women) Act, 1895, (c. 39) & Married Women (Maintenance) Act, 1920 (c. 63), may be cited together as the Married Women (Maintenance) Acts, 1895 & 1920, justices have no power, on fresh evidence of means, to add an order providing maintenance for children to an order which provided maintenance for a married woman & which was made subsequent to the passing of the Act of 1920, & their jurisdiction is not extended by Criminal Justice Administration Act, 1914 (c. 58), s. 30 (3).—HARVEY *v.* HARVEY (1923), 128 L. T. 698; 39 T. L. R. 193, D. C.

D. Custody of Children.

See, now, Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5.

6151. Jurisdiction of court to order.]—A husband having been convicted of an aggravated assault upon his wife, the justices, under Matrimonial Causes Act, 1878 (c. 19), s. 4, made an order reciting that the wife's safety was in peril, & directing that she should be no longer bound to cohabit with her husband, that the husband should pay to the wife a weekly allowance of £3 & that the wife should have the legal custody of the only child of the marriage:—*Held:* although the Act gave the justices no jurisdiction to make an order as to the permanent legal custody of the child, the order was valid until the child should have attained the age of ten years.—GROVE *v.* GROVE (1878), 39 L. T. 546; 27 W. R. 324; 14 Cox, C. C. 200.

E. Protection Orders.

See Matrimonial Causes Act, 1857 (c. 85), s. 21; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226.

6152. Who may apply—Whether wife resident in City of London—Matrimonial Causes Act, 1857 (c. 85), s. 21.]—*Ex p.* ALDRIDGE, No. 2847, *ante.*

6153. Property affected—Reversionary legacy.]—A married woman entitled to a reversionary legacy, was deserted by her husband, who went abroad, & had not been heard of, when such

PART XIII. SECT. 27, SUB-SECT. 3.—C. (b).

p. *No jurisdiction—Where wife's own application fails.*]—On an application by a wife for maintenance under Act XXV of 1861, s. 316, the magistrate held she had failed to establish her right of maintenance under that sect., but he awarded maintenance to her for her two infant children, though the husband stated he was willing to take charge of them, provided they lived with him:—*Held:* the order was illegal.—PANCHUDAS *v.* SHUDHAMAYI (1871), 8 B. L. R. App. 19; 16 W. R. 72.—**IND.**

PART XIII. SECT. 27, SUB-SECT. 3.—D.

6151 i. *Jurisdiction of court to order.*]—Upon an application by the mother, under C. S. U. C. c. 74, s. 8, for the custody of her infant daughter, four years of age, the husband & wife having separated:—*Held:* the ct. will inquire into the cause of the separation, in order to ascertain whether the husband has forfeited by breach of his marital duties, his *primâ facie* right to the possession of his child, & whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit & protection of the statute, which was intended to protect wives from the tyranny of their husbands who ill-use them.—*Re* LEIGH (1871), 5 P. R. 402.—**CAN.**

PART XIII. SECT. 27, SUB-SECT. 3.—E.

q. *Application—Form of affidavit in support.*]—COCHRANE *v.* COCHRANE, 21 C. L. T. 87.—**CAN.**

Sect. 27.—*Summary jurisdiction: Sub-sect.* 3, *E.; sub-sect.* 4, *A. & B.*]

legacy fell into possession. She then obtained a protection order from a magistrate, under Matrimonial Causes Act, 1857 (c. 85), & the trustee of the will having paid the legacy into ct., under the Trustee Relief Act, she petitioned for payment out:—*Held:* she was entitled to the order.—*Re* SHICKLE'S TRUST (1859), 7 W. R. 280.

6154. —— ——.]—A married woman entitled to a legacy in reversion was deserted by her husband in the year 1845. The legacy fell into possession & was paid into ct. under the Trustees' Relief Act. The married woman then obtained a protection order under the Divorce & Matrimonial Causes Act, & upon her petition the ct. ordered the money to be paid out to her.—*Re* RAINSDON'S TRUSTS (1859), 4 Drew. 446 28 L. J. Ch. 334; 32 L. T. O. S. 290; 5 Jur. N. S. 55; 7 W. R. 184; 62 E. R. 172; *sub nom. Re* RAMDSDEN'S TRUSTS, 23 J. P. 132.

6155. —— Reversionary property—Not mentioned in order.]—Under Matrimonial Causes Act, 1857 (c. 85), s. 21, combined with Matrimonial Causes Act, 1858 (c. 108), s. 8, a protection order obtained by a married woman deserted by her husband will protect her reversionary property, though such reversionary property be not mentioned in the order itself.—*Re* WHITTINGHAM'S TRUSTS (1864), 4 New Rep. 134; 10 L. T. 368; 28 J. P. 407; 10 Jur. N. S. 818 12 W. R. 775.

Annotation:—**Refd.** Nicholson *v.* Drury Buildings Co. (1877), 7 Ch. D. 48.

——.]—*See, also,* Part V., Sect. 2, sub-sect. 3, *ante.*

6156. Operation of order—Whether retrospective.]—Matrimonial Causes Act, (c. 85), s. 21, is not retrospective. Where, therefore, a married woman whose husband had deserted her obtained a protection order from a magistrate under that sect., after the commencement of an action by her in her own name to recover damages against a carrier for the loss of goods entrusted to him by her for carriage:—*Held:* the order gave no right to sue.—MIDLAND RY. CO. *v.* PYE (1861), 10 C. B. N. S. 179; 30 L. J. C. P. 314; 4 L. T. 510; 9 W. R. 658; 142 E. R. 419.

Annotations:—**Consd.** Cuenod *v.* Leslie, [1909] 1 K. B. 880. **Refd.** R. *v.* Vine (1875), L. R. 10 Q. B. 195; *Re* Pulborough Parish School Board Election, Bourke *v.* Nutt, [1894] 1 Q. B. 725; Young *v.* Adams, [1898] A. C. 469; *Re* Cullwick, *Ex p.* London Senior Official Receiver, [1918] 1 K. B. 646; Bowling *v.* Camp (1922), 128 L. T. 342.

6157. —— —— To date of desertion.]—Testatrix was a married woman, who had been deserted by her husband in 1843. In 1851 she made a will & in 1858 she obtained under Matrimonial Causes Act, 1857 (c. 85), s. 21, a protection order by which all property acquired by her after the date of the desertion was declared to belong to her as if she were a *feme sole.* The ct. held that the order was retrospective in its effect, & granted probate to exor.—*In the Goods of* ELLIOTT (1871), L. R. 2 P. & D. 274; 40 L. J. P. & M. 76; 25 L. T. 203; 35 J. P. 712; 19 W. R. 1072.

Annotation:—**Consd.** *In the Goods of* Tharp, Tharp *v.* Macdonald (1878), 3 P. D. 76.

6158. Registration of order—Matrimonial Causes Act, 1857 (c. 85), s. 21.]—B., a married woman, obtained a protection order for her property on Apr. 12, 1861; she made a will on Apr. 19, & died on Apr. 24. The order was not entered with the registrar of the county ct. till Apr. 24, being more than ten days after it was obtained:—*Held:* the requirement of the statute as to the entry of the order with the registrar was directory, & not imperative, &, on affidavits from the exors. that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion.—*In the Goods of* FARADAY (1861), 2 Sw. & Tr. 369; 164 E. R. 1039; *sub nom. In the Goods of* FARRADAY, 31 L. J. P. M. & A; 7; 6 L. T. 57; 25 J. P. 808; 7 Jur. N. S. 1252.

Annotation:—**Distd.** *In the Goods of* Brighton (1865), 34 L. J. P. M. & A. 55.

6159. Effect of order—On wife's power to sue & defend.]—A married woman deserted by her husband, who has obtained a protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21, can, like a married woman who has obtained a decree of judicial separation under sect. 26, sue & be sued by herself in actions of tort as well as in actions of contract.—RAMSDEN *v.* BREARLEY (1875), L. R. 10 Q. B. 147 44 L. J. Q. B. 46; 32 L. T. 24; 39 J. P. 263; 23 W. R. 294; *subsequent proceedings,* 1 Char. Cham. Cas. 96.

Annotation:—**Refd.** Moore *v.* Robinson (1878), 48 L. J. Q. B. 156.

6160. —— On wife's power to contract.]—A wife who has been deserted by her husband & has obtained a protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21, cannot contract under sect. 26 of that Act so as to affect or bind her separate property acquired before the desertion in respect of which she is restrained from anticipation, &, therefore, a creditor who has obtained judgment against her upon a contract made after the desertion cannot obtain execution against such property.—HILL *v.* COOPER, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423; 69 L. T. 216 57 J. P. 664; 41 W. R. 500; 9 T. L. R. 457; 37 Sol. Jo. 475; 4 R. 418, C. A.

Annotation: **Distd.** *Re* Hughes, Brandon *v.* Hughes, [1898]

SUB-SECT. 4.—COMPLAINTS.

A. Time for making Complaints.

See Summary Jurisdiction Act, 1848 (c. 43), s. 11; Summary Jurisdiction (Married Woman) Act, 1895 (c. 39), s. 4.

6161. General rule—Within six months' of offence — Persistent cruelty.]—Persistent cruelty by a husband to a wife, & wilful neglect by him to provide reasonable maintenance for her, in consequence of which he causes her to leave & live separately & apart from him, within Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4 are not continuing offences. The limit of time imposed by the reference in sect. 8 to sect. 11 of Summary Jurisdiction Act, 1848 (c. 43), applies, & the complaint must in each case be made within six calendar months of the offence.—ELLIS *v.* ELLIS, [1896] P. 251; 65 L. J. P. 124; 75 L. T. 390; 60 J. P. 823; 45 W. R. 144; 12 T. L. R. 514, D. C.

Annotations:—**Refd.** Medway *v.* Medway, [1900] P. 141; Rowlands *v.* Rowlands (1902), 86 L. T. 125; Kay *v.* Kay (1912), 77 J. P. 128; Bowron *v.* Bowron, [1925] P. 187.

6162. —— —— ——.]—Persistent cruelty causing a wife to leave & live separate & apart from her husband is a different offence from that of desertion. Therefore it is necessary that any such complaint or information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.—KAY *v.* KAY (1912), 108 L. T. 813; 77 J. P. 128, D. C.

Annotations:—**Consd.** Bowron *v.* Bowron, [1924] P. 256. **Refd.** Bowron *v.* Bowron, [1925] P. 187.

6163. —— —— Neglect to maintain.]—ELLIS *v.* ELLIS, No. 6161, *ante.*

6164. —— —— ——.]—ROWLANDS *v.* ROWLANDS, No. 6126, *ante*.

6165. From what time calculated—Whether offence continuing offence—Persistent cruelty.]—ELLIS *v.* ELLIS, No. 6161, *ante*.

6166. —— —— **Neglect to maintain.**]—ELLIS *v.* ELLIS, No. 6161, *ante*.

6167. —— **Desertion—Continuing offence.**]—For the purpose of proceedings under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that sect. need not, therefore, be made within six months of the commencement of the desertion.—HEARD *v.* HEARD, [1896] P. 188; 65 L. J. P. 111; 60 J. P. 426; 12 T. L. R. 386, D. C.

Annotations:—**Consd.** Bowron *v.* Bowron, [1925] P. 187. **Refd.** Brown *v.* Brown (1898), 62 J. P. 711; Stokes *v.* Stokes, [1911] P. 195.

6168. —— —— **Constructive desertion—Cruelty causing wife to leave husband.**]—Desertion is a continuing offence, & a wife can, under Summary Jurisdiction (Married Women), Act, 1895 (c. 39), s. 4, obtain relief for constructive desertion on the ground of acts of cruelty which caused her to leave her husband, although those acts of cruelty would not avail her to obtain relief for persistent cruelty under the same sect. by reason of their not having taken place within six months of the complaint, as required by Summary Jurisdiction Act, 1848 (c. 43), s. 11.—BOWRON *v.* BOWRON, [1925] P. 187; 94 L. J. P. 33; 132 L. T. 773; 89 J. P. 43; 41 T. L. R. 245; 69 Sol. Jo. 325; 23 L. G. R. 223; 27 Cox, C. C. 769, C. A.

6169. —— **Effect of bankruptcy of husband.**]—ROWLANDS *v.* ROWLANDS, No. 6126, *ante*.

See, generally, LIMITATION OF ACTIONS.

B. Defences to Complaints.

6170. Res judicata—Summons withdrawn.]—PICKAVANCE *v.* PICKAVANCE, No. 6182, *post*.

6171. —— —— **Distinguished from adjournment.**]—HOPKINS *v.* HOPKINS, [1914] P. 282; 84 L. J. P. 26; 112 L. T. 171; 78 J. P. Jo. 556, D. C.

Annotation:—**Refd.** R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806.

6172. —— —— **Conditional withdrawal.**]—The withdrawal by a wife of a summons under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), does not necessarily render the subject-matter of complaint *res judicata* or dispose of her right to take further proceedings on similar facts. The withdrawal may be conditional; but if it is unconditional, it is an estoppel, barring the same cause of complaint in subsequent proceedings before justices, though the complaining wife may be able to raise the same subject-matter, coupled with adultery, to obtain relief in the Superior Ct.—HOPKINS *v.* HOPKINS, [1914] P. 282; 84 L. J. P. 26; 112 L. T. 174; 78 J. P. Jo. 556, D. C.

Annotation:—**Mentd.** R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806.

See, generally, ESTOPPEL, Vol. XXI., pp. 143, 144.

6173. —— **Summons dismissed—Second summons on same cause of complaint.**]—A wife, whose summons against her husband for desertion under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has been dismissed, cannot obtain an order on a second summons for the same cause of complaint. It is immaterial that desertion is a continuing offence; its commencement must be referable to some particular date, & if the evidence of it is incomplete or unavailable on the return of a summons complaining of it, the wife should apply for & be allowed, an adjournment for the purpose of completing her case. When the complaint has been once disposed of by the justices, the matter is *res judicata*.—STOKES *v.* STOKES, [1911] P. 195; 80 L. J. P. 142; 105 L. T. 416; 75 J. P. 502; 27 T. L. R. 553; 55 Sol. Jo. 690, D. C.

Annotations:—**Folld.** Blackledge *v.* Blackledge, [1913] P. 9. **Consd.** McGregor *v.* Telford, [1915] 3 K. B. 237. **Expld. & Distd.** Kenney *v.* Kenney (1925), 133 L. T. 400. **Refd.** Hopkins *v.* Hopkins, [1914] P. 282; Froud *v.* Froud (1920), 123 L. T. 176.

6174. —— —— **Desertion.**]—FROUD *v.* FROUD, No. 3035, *ante*.

6175. —— —— —— **Previous summons alleging specific date.**]—A wife, who was married in 1908, left her husband on Feb. 20, 1910, after which they never cohabited. In Apr. 1910, a summons which had been taken out by the wife in Mar., on the ground that her husband had deserted her on Feb. 20, 1910, was dismissed. A fortnight after the dismissal of that summons, the husband's solr. received a letter from the wife's then solrs. making accusations against the husband in reference to matters prior to the separation, which were said to have been since discovered by the wife, & asking whether the husband would agree to make arrangements for his wife's support, & hinting at proceedings in the Divorce Ct. The husband's solr. answered, in effect, that, in consequence of the statements made, he was not prepared to enter into any arrangement. No proceedings were taken in the Divorce Ct., & no further step was taken until Oct. 8, 1912, when a second summons at the instance of the wife was issued, the ground of complaint being alleged desertion by the husband, but without specifying a date. This second summons came before a bench of nine justices in another town, & they, on Oct. 14, 1912, after overruling an objection that the matter was *res judicata*, & after refusing an application for an adjournment to call rebutting evidence, found the cause of complaint proved, & ordered the husband to pay 10*s.* for the maintenance of his wife, together with a sum for costs:—*Held:* (1) the order was wrong & must be rescinded; (2) the objection which the justices had overruled was good; (3) the matter was *res judicata;* (4) there was neither in fact nor in law any desertion of the wife by the husband; (5) upon the question of costs, the wife must bear her own, both in the Div. Ct. & in the Ct. below.—BLACKLEDGE *v.* BLACKLEDGE, [1913] P. 9; 82 L. J. P. 13; 107 L. T. 720; 77 J. P. 427; 29 T. L. R. 120; 57 Sol. Jo. 159; 23 Cox, C. C. 230, D. C.

Annotation:—**Refd.** Froud *v.* Froud (1920), 123 L. T. 176.

6176. —— —— —— —— **As from date charged in second summons.**]—On the facts of the case no question of *res judicata* arose, as it was open to the justices to hold that there was desertion as from the date charged in the second summons, though there had not been desertion at the date of the prior summons.—KENNEY *v.* KENNEY (1925), 133 L. T. 400; 41 T. L. R. 571, D. C.

6177. Second summons in similar

PART XIII. SECT. 27, SUB-SECT. 4.—B.

r. *Desertion by complainant.*]—A wife, who had deserted her husband, took & kept away from his custody & against his will, a child of the marriage. The husband, though willing & able to support the child, if returned to his custody, refused to contribute to its support while it remained away from him in the custody of his wife:—*Held:* the husband was not guilty of leaving the child without means of support within Deserted Wives & Children's Act, 1901, ss. 4 & 7.—CHANTLER *v.* CHANTLER (1906), 4 C. L. R. 585.—**AUS.**

s. —.]—Where it appeared that

Sect. 27.—Summary jurisdiction: Sub-sect. 4, B. & C.; sub-sects. 5 & 6, A. & B.]

terms—Terms general.]—A wife took out a summons against her husband for neglecting to support her, & he subsequently returned to live with her until she gave birth to a child, the paternity of which the husband denied. She then took out another summons charging her husband with neglecting to maintain her, & thereby causing her to leave & live apart from him. The second summons was dismissed, & she thereupon took out a third summons charging persistent cruelty, wilful neglect, & desertion. This summons was also dismissed. She thereupon took out a fourth summons identical in terms with the second summons. The magistrate convicted on this fourth summons:—*Held:* on appeal, the conviction was right.

Where there is no date specified & the words of the summons are general, it does not follow that because the summons is dismissed the matter is *res judicata* (JEUNE, P.).—FLETCHER *v.* FLETCHER (1900), 64 J. P. 807, D. C.

Annotation:—**Consd.** Stokes *v.* Stokes, [1911] P. 195.

Effect of *res judicata* generally, *see* ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

6178. Offer of re-cohabitation—Application for protection order.]—CARGILL *v.* CARGILL, No. 2927, *ante.*

Adultery of wife.]—*See* No. 6253, *post.*

6179. Valid agreement for separation.]—MEDWAY *v.* MEDWAY, No. 6104, *ante.*

6180. Resumption of cohabitation—Condonation of desertion.]—The effect of condonation of an offence which is specified as a ground of complaint within Summary Jurisdiction (Married Women) Act, 1895 (c. 39), does not depend on the wording of any sect. of that Act, but on the common law.

Where a wife complained of desertion within that Act, &, during an adjournment of the hearing of the summons, resumed cohabitation with her husband, & subsequently, but before the date appointed for the adjourned hearing, separated from him again & obtained an order for separation & an allowance for maintenance:—*Held:* the order must be discharged, as the condonation by voluntary resumption of cohabitation had blotted out the cause of complaint, & there was nothing for the justices to adjudicate upon at the date of the order.—WILLIAMS *v.* WILLIAMS, [1904] P. 145; 73 L. J. P. 31; 90 L. T. 174; 68 J. P. 188; 20 T. L. R. 213, D. C.

Annotation:— **Consd.** Matthews *v.* Matthews, [1912] 3 K. B. 91.

Reasonable excuse for desertion.]—*See* No. 3010, *ante.*

6181. Agreement by wife not to institute proceedings.]—ROYLE *v.* ROYLE, No. 6209, *post.*

C. Withdrawal of Complaints.

6182. How effected—Leave of court—Necessity for.]—(1) The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has the effect of putting an end to the complaint in respect of which it is issued, &, after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

It is to be remembered as a very important element in these cases, that the withdrawal of a summons can only take place by leave of the justices or magistrate: a complainant cannot put an end to a criminal proceeding except by leave of the ct., & if that leave is given & the summons is withdrawn that amounts to a consent by the ct.; & that involves the obvious effect that the complaint upon which the summons was founded necessarily falls to the ground (JEUNE, P.).

(2) A ground of objection, however technical, is not waived by the omission to take the objection on the hearing of a summons under the Act, but where such an objection is taken by the husband for the first time on the hearing of an appeal & is allowed, the wife (resp.) will be allowed her costs of the appeal.—PICKAVANCE *v.* PICKAVANCE, [1901] P. 60; 70 L. J. P. 14; 84 L. T. 62, D. C.

Annotations:— *As to* (1) **Consd.** Stokes *v.* Stokes, [1911] P. 195; Davis *v.* Morton, [1913] 2 K. B. 479; Hopkins *v.* Hopkins, [1914] P. 282. **Distd.** R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806. *As to* (2) **Refd.** Blackledge *v.* Blackledge (1912), 82 L. J. P. 13.

Effect of withdrawal.]—*See* Nos. 6170, 6172, *ante.*

SUB-SECT. 5.—FORM OF SUMMONS.

6183. Desertion — Date of commencement — Whether must be set out.]—Where a summons alleges that a husband has deserted his wife where the justices find the alleged desertion established, the date when the desertion is said to have taken place should be set forth both in the summons & in the order of the justices.

The ct. will not act upon the uncorroborated statement of a party alleging that marital relations have taken place between the parties to a summons while they were living apart.—JOSEPH *v.* JOSEPH, [1915] P. 122; 84 L. J. P. 101; 112 L. T. 170; 78 J. P. Jo. 520, D. C.

Annotation:— **Refd.** Fengl *v.* Fengl (1914), 112 L. T. 173.

6184. ——— Omission of—Effect on order.]—PULFORD *v.* PULFORD, No. 2846, *ante.*

Compare No. 6177, *ante.*

SUB-SECT. 6. HEARING BEFORE MAGISTRATES.

A. In General.

6185. Principles on which court must act—No undue interference with matrimonial life.]—HARLING *v.* HARLING, No. 6288, *post.*

6186. —— Difference between parties to be treated with due importance.]—HUGHES *v.* HUGHES (1908), 72 J. P. Jo. 603, D. C.

6187. Duty of magistrates—To state reasons for decision.]—It is the duty of justices on determining applications under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), to state the reasons for their decision, & of their clerks to furnish on application by the parties an adequate note of the evidence taken on the hearing by the justices, in order that the Div. Ct. of the Probate, Divorce, & Admlty. Div., the appellate tribunal constituted by sect. 11 of the Act, may be enabled

pltf.'s absence from her husband's residence was voluntary, & caused chiefly by her own violent temper, & that her husband was still willing to receive & support her, the ct. dismissed the bill, but ordered deft. to pay costs.—MCKAY *v.* MCKAY (1858), 6 Gr. 380. **CAN.**

6179 i. *Valid agreement for separation.*] An agreement between a husband a wife whereby the wife purported to relieve the husband of his obligation to support her did not prevent a ct. of petty sessions from making an order under Marriage Act, 1915, s. 84, against the husband for the maintenance of the wife, nor an order for the maintenance of the child on the application of the wife.—DAVIES DAVIES (1919), 26 C. L. R. 348.—**AUS.**

t. *Offer of re-cohabitation—Must be sincere.*]—E—— *v.* E—— (1904), 15 Man. L. R. 352.—**CAN.**

PART XIII. SECT. 27, SUB-SECT. 6.—A.

a. *Evidence—Of wife.*]—The evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her, under 32 & 33 Vict.

to deal adequately & properly with appeals.—BARKER *v.* BARKER (1905), 74 L. J. P. 74; 69 J. P. 82, 192; 21 T. L. R. 253, D. C.

Annotation :— **Refd.** Royle *v.* Royle (1908), 73 J. P. 40.

6188. ——— ———.]—WENHAM *v.* WENHAM, No. 6193, *post.*

6189. Evidence—Right of husband to be heard—After conviction of aggravated assault.]—POWELL *v.* POWELL, No. 6281, *post.*

6190. ———.]—A husband who has been convicted by justices of an aggravated assault upon his wife is entitled to give evidence before them on an application by her for a separation order under Matrimonial Causes Act, 1878 (c. 19), s. 4.—JONES *v.* JONES, [1895] P. 201; 64 L. J. P. 84; 72 L. T. 662; 59 J. P. 360; 43 W. R. 656; 11 R. 614, D. C.

Annotation :— **Expld.** Woodhead *v.* Woodhead (1895), 11 R. 659.

6191. ——— **Of wife—Corroboration—Necessity for.**]—FORSTER *v.* FORSTER, No. 6289, *post.*

6192. ——— **Unstamped document — Admissibility.**]—FENGL *v.* FENGL, No. 6221, *post.*

See, also, EVIDENCE, Vol. XXII., pp. 262 *et seq.*

B. Notes of Proceedings by Magistrate's Clerk.

6193. Duty of clerk to take.]—It is the duty of justices' clerks to take a full note of the proceedings in the ct. below in any case arising out of Summary Jurisdiction (Married Women) Act, 1895 (c. 39), & of the justices to state the reasons for arriving at their decision. The ct. will decline to hear any appeal under the Act when it is not supplied with such notes & reasons. If an imperfect note is taken, such note cannot be supplemented or amplified by affidavit evidence.—WENHAM *v.* WENHAM (1906), 95 L. T. 548; 70 J. P. Jo. 340, D. C.

6194. ———.]—HUGHES *v.* HUGHES (1908), 72 J. P. Jo. 603, D. C.

6195. Must be full & adequate.]—BARKER *v.* BARKER, No. 6187, *ante.*

6196. ———.]—WENHAM *v.* WENHAM, No. 6193, *ante.*

6197. ———.]—HUGHES *v.* HUGHES (1908), 72 J. P. Jo. 603, D. C.

6198. What note must contain—Evidence.]—HARLING *v.* HARLING, No. 6288, *post.*

6199. ——— ———.]—JAGGER *v.* JAGGER, [1896] W. N. 63, D. C.

6200. ——— ———.]—On an application by a married woman for an order for judicial separation, custody of children, or maintenance, under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, it is the duty of the clerk to the justices to make a note of the evidence & of the reasons for the decision, & supply the note, should there be an appeal, to the Probate Div.—ROBINSON *v.* ROBINSON, [1898] P. 153; 67 L. J. P. 77; 78 L. T. 392; 14 T. L. R. 385, D. C.

Annotations :—**Folld.** Cobb *v.* Cobb (1900), 64 J. P. 106. **Refd.** Wenham *v.* Wenham (1906), 70 J. P. Jo. 340.

6201. ——— ———.]—(1) Upon the hearing of every summons under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), it is the duty of the clerk to the magistrate or justices to make a note, not only of the evidence & of the decision arrived at, but also of the reasons for arriving at the decision, & to furnish a copy of the note upon the application of either party.

(2) Desertion is a continuing offence, & a ct. of summary jurisdiction acting for any place in which the deserted wife is residing for the time being has jurisdiction under the Act to make a separation order.—COBB *v.* COBB, [1900] P. 145; 69 L. J. P. 52; 82 L. T. 626; 64 J. P. 200, D. C.

Annotations :—*As to* (1) **Folld.** Barker *v.* Barker (1905), 74 L. J. P. 74. **Refd.** Wenham *v.* Wenham (1906), 70 J. P. Jo. 340; Royle *v.* Royle (1908), 73 J. P. 40.

6202. — ———.]—BARKER *v.* BARKER, No. 6187, *ante.*

6203. — **Grounds of decision.**]—HARLING *v.* HARLING, No. 6288, *post.*

6204. ———.]—JAGGER *v.* JAGGER, [1896] W. N. 63, D. C.

6205. ——— — —.]—ROBINSON *v.* ROBINSON, No. 6200, *ante.*

6206. ——— ——— .]—COBB *v.* COBB, No. 6201, *ante.*

6207. ——— ———.]—BOWEN *v.* BOWEN (1908), 73 J. P. 87, D. C.

6208. ——— **Original letters.**]—PRACTICE NOTE (1923), 155 L. T. Jo. 298.

Imperfect note—Amplification by affidavit.]—*See* No. 6193, *ante*, No. 6283, *post.*

6209. Shorthand note—Only by consent of parties—No extra expense to fall on parties.]—(1) Where upon the hearing of a summons under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), the clerk of the justices allows a shorthand note to be taken in place of the ordinary longhand note, he must certify the transcript of such note as correct, & cannot discharge his duty with regard to the making of the note unless he so certifies the transcript of the shorthand note which he allowed to be taken.

(2) Unless the parties both agree to the taking of a shorthand note in place of the longhand note usually taken in such cases by the clerk to the justices, such longhand note must be taken, & in any event no extra expense must fall upon the parties in case either of them should require a transcript of the note for the purpose of an appeal.

(3) On the facts proved, the wife was shown to have been compelled to leave her husband under circumstances which, in law, amounted to desertion by him :—*Held :* An agreement not to take proceedings "for separation, or divorce, or maintenance," signed by the wife after the separation, was bad.—ROYLE *v.* ROYLE, [1909] P. 24; 78 L. J. P. 34; 99 L. T. 882; 73 J. P. 40; 25 T. L. R. 84; 53 Sol. Jo. 119, D. C.

6210. ——— **Must be certified by clerk.**]—ROYLE *v.* ROYLE, No. 6209, *ante.*

6211. To whom note must be supplied—To both parties.]—SNAPE *v.* SNAPE, No. 6283, *post.*

6212. ——— ———.]—COBB *v.* COBB, No. 6201, *ante.*

6213. ——— ———.]—BARKER *v.* BARKER, No. 6187, *ante.*

6214. — .]—BOWEN *v.* BOWEN (1908), 73 J. P. 87, D. C.

6215. ——— **To Probate Division—If appeal.**]—ROBINSON *v.* ROBINSON, No. 6200, *ante.*

6216. ——— ——— ——— —BOWEN *v.* BOWEN (1908), 73 J. P. 87, D. C.

c. 20, s. 25 (D).—R. *v.* BISSELL (1882), 1 O. R. 514.—**CAN.**

b. *Discretion of magistrate—To decide whether wife has reasonable cause to leave.*]—A magistrate in deciding under Destitute Persons Act, 1910, s. 17 (7), whether in his opinion a wife has reasonable cause for refusing or failing to live with her husband, may found his opinion upon any cause he thinks sufficient, untrammelled by the decisions of cts. as to what has previously been held to be a sufficient cause for the refusal or neglect of a wife to resume cohabitation with her husband.—WATKINS *v.* WATKINS (1914), 33 N. Z. L. R. 1497.—**N.Z.**

Sect. 27.—Summary jurisdiction: Sub-sect. 6, C.

C. Adjournment.

6217. Whether ordered as of course—Evidence incomplete or unavailable at hearing.]—STOKES *v.* STOKES, No. 6173, *ante*.

See, also, No. 6172, *ante*.

Refusal of adjournment.]—*See* Nos. 6262, 6263, *post*.

D. Orders.

(*a*) *Form of Orders.*

6218. What must be included—Adjudication on acts complained of.]—(1) An order of a ct. of summary jurisdiction under the Summary Jurisdiction (Married Women) Act,1895 (c. 39), should contained an adjudication on the facts constituting the cause of complaint.

(2) On appeal the High Ct. has power to make the order which in their opinion ought to have been made on the facts in evidence before the inferior ct.

(3) Desertion is a continuing course of conduct, & entitles the wife to apply for an order in that ct. within whose jurisdiction she is living in a deserted condition, although that is not the place in which she was originally deserted.—BROWN *v.* BROWN (1898), 79 L. T. 102; 62 J. P. 711, D. C.

Annotation:—As to (1) **Refd.** Dodd *v.* Dodd, [1906] P. 189.

6219. —— Recital of conviction.]—BULLIVANT *v.* BULLIVANT (1902), 18 T. L. R. 317.

6220. —— ——.]—In allotting maintenance on making an order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), the justices should follow the principles on which the ct. acted when awarding alimony, viz., one-third of the joint incomes. The order should recite the conviction on the face of it.—WILCOX *v.* WILCOX (1902), 66 J. P. 166; 18 T. L. R. 237, D. C.

6221. —— Desertion—Date of commencement.]—In all applications to a ct. of summary jurisdiction under Summary Jurisdiction (Married Women) Act, 1895 (c. 34), based upon the husband's desertion, the date upon which the desertion is found to have commenced should be inserted in the finding of fact & should appear upon the face of the order.

The effect of Stamp Act, 1891 (c. 39), s. 14 (4), is that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose.—FENGL *v.* FENGL, [1914] P. 274; 84 L. J. P. 29; 112 L. T. 173; 31 T. L. R. 45; 59 Sol. Jo. 42, D. C.

6222. —— —— ——.]—JOSEPH *v.* JOSEPH, No. 6183, *ante*.

6223. —— Aggravated assault—Copy of conviction.]—BRYANT *v.* BRYANT, No. 6267, *post*.

6224. —— Order for maintenance of children—Purpose to which sum to be applied.]—BEDDINGTON *v.* BEDDINGTON, No. 6149, *ante*.

6225. Printed forms—Necessity for care in drawing up.]—Observations as to the use of printed forms in drawing up separation orders under Summary Jurisdiction, Married Women, Act, 1895 (c. 39).

The way in which these separation orders were drawn up was very serious . . . great care should be exercised in drawing up these orders (BARGRAVE DEANE, J.).—HOLDEN *v.* HOLDEN & PEARSON (1910), 27 T. L. R. 38.

6226. Protection order — General terms.] — A protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21, should be in general terms, the ct. having no power to decide what title the wife may have to specific property.—*Ex p.* MULLINEUX (1858), 1 Sw. & Tr. 77; 27 L. J. P. & M. 19; 30 L. T. O. S. 352; 164 E. R. 636; *sub nom.* MULLINEUX *v.* MULLINEUX, 6 W. R. 356.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 226.

(*b*) *Enforcement of Orders.*

6227. Maintenance order—Action for arrears—Husband out of jurisdiction.]—ARCHER *v.* ARCHER, [1886] W. N. 66.

6228. —— —— Right of widow to recover against estate of husband.]—Where a separation order has been made by justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), against a husband & also an order for maintenance, his widow may recover against his estate arrears of maintenance due under the order at his death.—FIRMAN *v.* ROYAL, [1925] 1 K. B. 681; 94 L. J. K. B. 649; 133 L. T. 48.

See, also, Part XIII., Sect. 23, sub-sect. 2, *ante*.

6229. —— Injunction—To restrain payment by executors of legacy to husband.] — ARCHER *v.* ARCHER, [1886] W. N. 66.

6230. —— Distress.]—R. *v.* RICHARDSON, No. 6231, *post*.

6231. —— Committal order—Evidence of husband's means—Necessity for.]—An order for the payment of maintenance money to a wife under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), may be enforced in default of sufficient distress by committal to prison, although no affirmative evidence of means is given by the person applying for such committal.—R. *v.* RICHARDSON, [1909] 2 K. B. 851; *sub nom.* R. *v.* RICHARDSON, *Ex p.* SHERRY, 79 L. J. K. B. 13; 101 L. T. 511; 73 J. P. 431; 25 T. L. R. 711; 22 Cox, C. C. 183, D. C.

6232. —— —— Appeals.]—RUTHER *v.* RUTHER, No. 6250, *post*.

6233. —— ——.]—A married woman having been deserted by her husband obtained from a stipendiary magistrate an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, directing her husband to pay a weekly sum for her maintenance. After the date of this order, namely, on Nov. 17, 1906, & at various dates down to Feb. 1907, the parties resumed cohabitation. On Dec. 1, 1911, the husband was brought before justices on the information of the wife, who alleged that a sum of £97 4*s.* had accrued due in respect of arrears of weekly payments. This sum had accrued since Nov. 17, 1906. The justices made an order committing the husband in default of distress to imprisonment for three months, unless all the arrears were sooner paid or satisfied:—*Held:* (1) the committal was bad because no more than six calendar months' arrears were recoverable; (2) the return to cohabitation did not of itself annul the order for weekly payments, but the order remained in force until discharged under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.—MATTHEWS *v.* MATTHEWS, [1912] 3 K. B. 91; 81 L. J. K. B. 970; 107 L. T. 56; 76 J. P. 315; 28 T. L. R. 421; 23 Cox, C. C. 65, D. C.

Annotations:—As to (1) **Consd.** Grocock *v.* Grocock, [1920]

PART XIII. SECT. 27, SUB-SECT. 6. D.

c. *Maintenance order—Cannot be registered against land.*]—An order made under Married Persons Summary Separation Act, 1896, s. 4, cannot be registered against the land of the person against whom the order is made. —*Re* DUNCAN (1905), 25 N. Z. L. R. 24. —**N.Z.**

1 K. B. 1. *As to* (2) **Foll'd.** Jones *v.* Jones, [1924] P. 203. *Generally,* **Refd.** Adams *v.* Adams, [1914] P. 155.

6234. —— Order for payment of arrears—Discretion of magistrates.]—A married woman, on the desertion of her husband in 1912, obtained an order against him from the justices at Sheffield for payment of weekly sums. After two weeks' payments had been made the wife removed from Sheffield to London without informing her husband of her address. She made no application to him for payment, & took no proceedings against him for six years; & he made no further payments. In 1918, she preferred an information against him before a Metropolitan magistrate, under Bastardy Laws Amendment Act, 1872 (c. 65), s. 4, & Summary Jurisdiction (Married Women) Act, 1895 (c. 30), s. 9, claiming the arrears under the order made in 1912. The magistrate made the order, holding that he had no discretion in the matter:—*Held:* (1) the magistrate had a discretion either to make or not make the order for payment of arrears, but that he had no discretion to make an order for partial payment only of arrears; (2) the Criminal Justice Administration Act, 1914 (c. 58), s. 32 (1), is not retrospective, & only six months arrears could be recovered, as before the passing of that Act.—GROCOCK *v.* GROCOCK, [1920] 1 K. B. 1; 88 L. J. K. B. 1068; 121 L. T. 466; 83 J. P. 185; 35 T. L. R. 509; 63 Sol. Jo. 627; 17 L. G. R. 623; 26 Cox, C. C. 485, D. C.

6235. Order for custody of children—Attachment.]—An order made by the High Ct. of Justice (Probate, Divorce, & Admlty. Div.) under R. S. C. Ord. 59, rr. 4A., 7, & Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 5, 11, that a wife be no longer bound to cohabit with her husband, on the ground of his desertion of her, & that the custody of the child whilst under the age of sixteen be committed to the wife, may be enforced as to the custody of the child by motion for attachment.—BROWN *v.* BROWN (1898), 62 J. P. 568; 42 Sol. Jo. 739.

——.]—*See* Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 5.

Attachment & committal generally, *see* CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

6236. Recovery of arrears—Limited to six months' arrears.]—MATTHEWS *v.* MATTHEWS, No. 6233, *ante.*

(c) *Discharge and Variation of Orders.*

See Matrimonial Causes Act, 1857 (c. 85), s. 21.

6237. Discretion of magistrates.]—R. *v.* HUGGINS, ETC., JJ. & HUMPHREYS, No. 6276, *post.*

6238. ——.]—BRAGG *v.* BRAGG, No. 6242, *post.*

6239. Discharge of order — How effected — Whether by resumption of cohabitation.]—Upon the conviction of a husband for an aggravated assault on his wife, justices made an order, under Matrimonial Causes Act, 1878 (c. 19), s. 4, that the wife should be no longer bound to cohabit with her husband, & that he should pay to her a weekly sum for her maintenance. The wife subsequently resumed cohabitation with her husband for a time, & then again left him:—*Held:* (1) the order was annulled by reason of the subsequent resumption of cohabitation, & therefore the wife could not enforce payment of weekly sums alleged to have become due under it after she again left her husband; (2) as to the wife's costs, the wife was not entitled to her costs in the ct. below or on appeal, as this was not a suit for judicial separation or for alimony, but an appeal by the husband against an order obtained by the wife to enforce an order the legal effect of which had been exhausted.—HADDON *v.* HADDON (1887), 18 Q. B. D. 778; 56 L. J. M. C. 69; 56 L. T. 716; 51 J. P. 486; 3 T. L. R. 574, D. C.

Annotations:—*As to* (1) **Apld.** Williams *v.* Williams, [1904] P. 145. **Distd.** Matthews *v.* Matthews, [1912] 3 K. B. 91. **Refd.** Jones *v.* Jones, [1924] P. 203.

6240. —— —— —— Necessity for order of court.]—MATTHEWS *v.* MATTHEWS, No. 6233, *ante.*

6241. ——.]—An order for separation & maintenance under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, is not *ipso facto* discharged by a return to cohabitation, as a decree for judicial separation is. The Summary Jurisdiction Act by s. 5 (*a*) expressly provided that an order under the Act shall have the effect of a decree of judicial separation while "in force"; & s. 7 provides for the discharge of such an order "upon proof" of return to cohabitation. The result of these provisions is that a husband cannot, while an order for separation exists against him undischarged, be guilty of a fresh desertion in the event of his resuming cohabitation & then deserting his wife again, because until the discharge of the order he was not bound to cohabit.—JONES *v.* JONES, [1924] P. 203; 93 L. J. P. 94; 132 L. T. 63; 40 T. L. R. 794; 22 L. G. R. 697, D. C.

See, also, No. 6180, *ante.*

6242. —— —— —— Whether by divorce decree.]—Dissolution of a marriage by a decree absolute of divorce does not *ipso facto* discharge a maintenance order previously obtained by a wife under Summary Jurisdiction (Married Women) Act, 1895 (c. 39). Nor does such dissolution compel the ct. of summary jurisdiction to discharge such an order. Every such case comes within the discretion given to the ct. by sect. 7 of the Act to vary or discharge the order on evidence of fresh facts.—BRAGG *v.* BRAGG, [1925] P. 20: 94 L. J. P. 11; 132 L. T. 346; 41 T. L. R. 8; 69 Sol. Jo. 73; 27 Cox, C. C. 729, D. C.

6243. —— Protection orders—Effect of.]—A married woman who had obtained a protecting order under Matrimonial Causes Act, 1857 (c. 85), s. 21, on the ground of causeless desertion, was made a deft. without her husband to a suit for the administration of the estate of a testator who died after the alleged desertion, giving her a beneficial interest in his property; & a decree was made for accounts & inquiries. Shortly after this, the protecting order was discharged on the application of the husband, on the ground that there had never been any desertion. Pltf. thereupon obtained a supplemental order under 15 & 16 Vict. c. 86, s. 52, to bring the husband before the ct.:—*Held:* such an order was proper.—RUDGE *v.* WEEDON (1859), 4 De G. & J. 216; 28 L. J. Ch. 788; 33 L. T. O. S. 214; 23 J. P. 756; 5 Jur. N. S. 723; 7 W. R. 519; 45 E. R. 84, L. JJ.

Annotation:—**Mentd.** Hills *v.* Springett (1868), L. R. 5 Eq. 123.

PART XIII. SECT. 27, SUB-SECT. 6.—D. (c).

6237 i. *Discretion of magistrates.*]—A magistrate has power to cancel an order for the maintenance of a wife where the wife has, since the making of the order, been sentenced to a term of imprisonment, & is undergoing the sentence.—MCWILLIAM *v.* MCWILLIAM (1899), 18 N. Z. L. R. 821.—**N.Z.**

6237 ii. ——.]—A magistrate is not bound to cancel an order made against a husband for the maintenance of his wife under Part III. of Destitute Persons Act, 1908, merely because of the wilful refusal of the wife to obey an order of the Supreme Ct. for restitution of conjugal rights. The matter is one within his discretion under sect. 39 of the said Act.—BUSCH *v.* BUSCH (1912), 32 N. Z. L. R. 49.—**N.Z.**

d. *Discharge of order—How effected—Whether by offer to maintain wife.*]—A husband against whom his wife has obtained alimony on the ground of desertion, is not entitled, as of

Sect. 27.—*Summary jurisdiction: Sub-sect.* 6, *D.* (*c*).]

6244. —— —— To what court application must be made.]—Under Matrimonial Causes Act, 1857 (c. 85), s. 21, the application to discharge an order for the protection of a wife's property must be made to the magistrate by whom it was granted; or, *semble*, to the Ct. for Divorce & Matrimonial Causes.—R. *v.* ARNOLD (1864), 5 B. & S. 322; 28 J. P. 454; 122 E. R. 850.

6245. —— —— ——.]—No magistrate other than the one by whom a protection order has been made has power under Matrimonial Causes Act, 1857 (c. 85), s. 21, to discharge it, even in the case where such magistrate is dead. *Qu.:* whether the Divorce Ct. has not power under the Act to adjudicate in such a case.—*Re* SHARP (1864), 4 New Rep. 145; 33 L. J. M. C. 152; 10 L. T. 458; 10 Jur. N. S. 1018; 12 W. R. 756.

6246. —— —— Time for application—Whether within lifetime of wife.]—An application to discharge a protection order is not limited to the lifetime of the married woman. A claim to pronounce against the validity of the will of a married woman who had obtained a protection order, & a counter-claim to discharge the protection order, may be included in the same action.—MUDGE *v.* ADAMS (1881), 6 P. D. 54; 50 L. J. P. 49; 44 L. T. 185; 29 W. R. 307.

Annotation:—**Consd.** Mahoney *v.* M'Carthy, [1892] P. 21.

6247. —— —— Grounds for—Order obtained by fraud.]—(1) A husband left his home on Mar. 2, 1867, with his wife's consent, to seek employment in America. He was absent nearly ten years, & during that time he did not communicate with his wife except by one verbal message, as to the receipt of which there was no evidence. On his return at the end of 1876, he went at once to his wife's house, but she refused to receive him, & shut the door in his face. Next day she went before a police magistrate, & obtained a protection order under Matrimonial Causes Act, 1857 (c. 85), s. 21, on the ground that her husband had deserted her on Mar. 2, 1867. She did not inform the magistrate that her husband had returned, & had offered to resume cohabitation, nor that when he went away he had left her in possession of a furnished lodging house by which she had earned her livelihood. No notice was given to the husband of the application for the protection order, & he did not know of the existence of the order until it was found among her papers after her death. The husband & wife met occasionally on friendly terms after the date of the order, but they never resumed cohabitation:—*Held:* the order must be taken to have been obtained by false statements, by the concealment of material facts, & without notice to the husband, & it was therefore invalid, & must be set aside.

(2) There are several points to be considered. In the first place, was there any desertion at all? It is clear that the husband left the country with his wife's consent. That is admitted by pltf.'s witnesses. It is further, indeed, urged on behalf of the husband that the case of *Fitzgerald* v. *Fitzgerald*, No. 2845, *ante*, shows that there must be a resumption of cohabitation before there can be desertion. I cannot, however, agree that that is so, because though it may be perfectly true that if there has been a separation by consent, that is to say, an agreement to live separate, there cannot be desertion without a return to cohabitation, such a rule does not apply where the absence has not been in pursuance of an agreement to live separate, but merely for a temporary reason & amounting only to a temporary separation. In this case a temporary separation only was at first intended, & I agree with the counsel for pltf., that there may be circumstances tending to show that although there be no intention to desert at the beginning, there may afterwards be desertion without resumption of cohabitation. That is a matter of evidence (JEUNE, J.).—MAHONEY *v.* M'CARTHY, [1892] P. 21; 61 L. J. P. 41; 8 T. L. R. 97.

6248. —— —— —— Order obtained without notice form to husband.]—MAHONEY *v.* M'CARTHY, No. 6247, *ante*.

6249. —— —— —— ——.]—A married woman in 1872 obtained a protection order from a magistrate on the ground of the alleged desertion of her husband by fraudulently concealing the real facts of the case. The effect of that order was to give the wife the position of a *feme sole*, so that she could dispose of her property as if her husband was already dead, & in the event of an intestacy her estate would pass to her next of kin & heir-at-law. No notice was given to the husband of the application to the magistrate, & the husband did not know of the protection order until after his wife's death. On proof of the facts the ct. set aside the protection order.—HOPKINS *v.* BULBECK (1920), 64 Sol. Jo. 409.

6250. —— Husband's right to—Adultery of wife—Conduced to by husband.]—(1) Where an order for a weekly payment by a husband to his wife is made under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), & the wife subsequently commits adultery, the husband is entitled under sect. 7 of the Act, on proof thereof before a ct. of summary jurisdiction, to have the order discharged in spite of a finding by the ct. that he has been guilty of conduct conducing to the adultery; & he is not liable to make any further payments to his wife, although the order may not have been in terms discharged by the adjudication as to the wife's adultery.

(2) The decision of a ct. of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), are in arrear, is not a matter in respect of which an appeal lies under sect. 11 of that Act to the Probate, Divorce, & Admlty. Div.; but the ct. has power to state a case for the opinion of the K. B. Div. upon a point of law arising on the information. RUTHER *v.* RUTHER, [1903] 2 K. B. 270; 72 L. J. K. B. 826; 67 J. P. 359; 52 W. R. 154; 47 Sol. Jo. 640, D. C.

Annotations:—*As to* (1) **Refd.** Matthews *v.* Matthews, [1912] 3 K. B. 91; Wickens *v.* Wickens (No. 2), [1918] P. 282 Jones *v.* Jones, [1924] P. 203. *As to* (2) **Folld.** Griffiths *v.* Griffiths (1909), 73 J. P. 391 Adams *v.* Adams, [1914] P. 155.

—— —— —— ——.]—*See, now*, Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 2.

6251. Variation of order—Order for custody—Jurisdiction to grant.]—Applt. wife obtained on Mar. 19, 1908, an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), for

right, to have the order vacated or suspended, on his afterwards offering to receive & maintain her.—CRONK *v.* K (1872), 19 Gr. 283.—**CAN.**

e. Reference may be ordered.]—HOOPER *v.* HOOPER (1870), 3 Ch. Ch. 114.—**CAN.**

f. Variation of order—Increase.]—An order, under Destitute Persons Act, 1894, s. 32, varying an order previously made for the maintenance of a wife, by ordering payment of an

separation; custody of the two children while under sixteen; & for 7*s.* 6*d.* a week until the order should be altered, varied, or discharged. On July 23, 1908, the order was varied on the application of applt. by increasing the allowance to 12*s.* 6*d.* a week. The amount proving insufficient, applt., to support herself & the children, became a hospital nurse, & left the children with her mother. On Dec. 24, 1908, on resp.'s application, the justices varied the order by reducing the allowance to 7*s.* 6*d.* a week, & gave resp. the custody of one of the children:—*Held:* in the absence of misconduct on the part of applt. of which there was no suggestion, the justices had no jurisdiction to vary their order as to the custody of the children, & as their order was wrong as to custody it must be set aside *in toto*. Liberty to resp. to apply to the magistrates *re* reduction of allowance.—COBBE *v.* COBBE (1909), 73 J. P. 208; 25 T. L. R. 305, D. C.

Annotation:—**Refd.** Timmins *v.* Timmins, [1919] P. 75.

—— **Order for maintenance after separation order.**]—*See* No. 6150, *ante*.

6252. Fresh evidence—What amounts to.]—"Fresh evidence" within Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7, to confer jurisdiction to rescind a separation order previously made under sect. 4, must be such as would afford ground for a new trial or rehearing in any other class of case. It must be evidence which could not reasonably have been made available at the date of the order, or it must relate to something which has happened since the date of the order, & which affords ground for revision within the terms of the Act under which the order was made.

On June 15, 1899, a married woman obtained an order for separation & maintenance against her husband under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4. At the time of the hearing the husband was seriously ill, &, although he knew he had an answer to the charge, his brain & faculties were so far paralysed that he could neither indicate the lines of his defence nor give the names of his witnesses. As he was supposed to be actually dying, his solr. allowed the order to go without opposition, & declined an adjournment. Subsequently the husband so far recovered as to be able to give the names of his witnesses, & the matter having been again brought before them on a fresh summons, the justices, after hearing the evidence, discharged their order of June 15, on the ground that "fresh evidence" had been brought before them within Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7. Against this decision the wife appealed:—*Held:* "fresh evidence" within sect. 7 meant evidence which had not come to the knowledge of the party wishing to call it at the time of the hearing, or evidence which he could not then have called, but not evidence which could have been called & was not; &, although the ultimate result may have been right, the magistrates were wrong in re-hearing the matter on that ground. The ct., having regard to the physical condition of resp. on June 15, remitted the case to the magistrates to be re-heard *ab initio*.—JOHNSON *v.* JOHNSON, [1900] P. 19; 69 L. J. P. 13; 81 L. T. 791; 64 J. P. 72; 16 T. L. R. 26, D. C.

Annotations:—**Distd.** Groves *v.* Groves (1906), 71 J. P. 167. **Folld.** Weightman *v.* Weightman (1906), 94 L. T. 620. **Consd.** Timmins *v.* Timmins, [1919] P. 75. **Refd.** Dodd *v.* Dodd, [1906] P. 189.

6253. —— ——.]—(1) An application under Summary Jurisdiction (Married Women), Act, 1895 (c. 39), s. 7, to alter, vary, or discharge an order made under that Act is on the same footing, as far as fresh evidence is concerned, as an application for a new trial. When, therefore, there is fresh evidence, that is, evidence which could not reasonably have been made available at the date of the order, or relating to something which has happened since the date of the order, either party is entitled to take out a fresh summons under the sect., & have the case determined.

(2) There is no time limit fixed, & Summary Jurisdiction Act, 1848 (c. 43), s. 11, prescribing six months as the time within which an application must be made, does not apply.—WEIGHTMAN *v.* WEIGHTMAN (1906), 94 L. T. 620; 70 J. P. 120; 22 T. L. R. 362, D. C.

6254. —— —— **Whether certificate of death of former husband—Obtained subsequent to separation order.**]—In 1887 applt. was deserted by her husband who went to New Zealand. Believing him dead, in 1895 she went through a ceremony of marriage with resp. In Mar. 1906, applt. obtained against resp. a separation order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39). At this date resp. had written to New Zealand for a certificate of the death of the husband, but the same had not been received. In May, 1906, resp., having in the meanwhile received the certificate in question, applied to discharge the order on the ground that the husband of applt. was alive at the time of the ceremony of marriage in 1895. At this hearing hearsay evidence was given in support of the contention of resp., & evidence was received of a statement by applt. to the effect that her husband was alive at the time of the ceremony in 1895, & a certificate of his death was forthcoming, but no evidence of identification. At an adjourned hearing of the application by resp. on July 11, 1906, the stipendiary magistrate discharged the separation order. On appeal on the grounds (*inter alia*), that there was no "fresh evidence" within the meaning of the Act before the stipendiary magistrate, & that there was no evidence of anything that had occurred since the order:—*Held:* the certificate was in this case "fresh evidence," as it could not have been previously obtained, & resp. had been in fact ignorant of its existence, & the stipendiary magistrate had sufficient evidence before him to justify the discharge of the separation order.—GROVES *v.* GROVES (1906), 71 J. P. 167, D. C.

6255. —— —— **Child returned to custody of father—Offer to recohabit refused.**]—In Aug. 1916, justices, on the application of a wife deserted by her husband, made an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), that the wife should not be bound to cohabit: she should have the custody of the eldest child of the marriage, a girl; the husband should pay her 6*s.* a week for maintenance. This order was obeyed until Oct. 1917, when the wife sent the girl back to her husband. He received the girl; stopped paying the 6*s.* a week, & wrote to his wife asking her to come back & promising to receive & maintain her. The wife refused. The justices then on the application of the husband discharged the order. The wife appealed to the Div. Ct.:—*Held:* the evidence of the facts stated above was fresh evidence within the meaning of Summary Jurisdiction (Married Women) Act, 1895 (c. 39), & gave the justices jurisdiction to discharge the order, & the appeal should be dismissed.—TIMMINS *v.*

increased amount in lieu of that previously ordered, is an order which the magistrate may direct to be filed in the Supreme Ct. under sect. 24 of the Act.—BISHOP *v.* ROWE (1903), 23 N. Z. L. R. 66.—**N.Z.**

Sect. 27.—*Summary jurisdiction: Sub-sect.* 6, *D.* (*c*), *E.* & *F.*; *sub-sect.* 7, *A.*, *B.* & *C.*]

TIMMINS, [1919] P. 75; 88 L. J. P. 78; 120 L. T. 544; 63 Sol. Jo. 287, D. C.

Annotation:—**Mentd.** Garnett *v.* Garnett & Calderon (1919), 35 T. L. R. 521.

See, also, PRACTICE.

6256. Time for application—Whether six months' time limit applies.]—WEIGHTMAN *v.* WEIGHTMAN, No. 6253, *ante.*

E. Costs.

6257. Jurisdiction as to—Exclusively in magistrates.]—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (d), confers upon justices exclusive jurisdiction over costs, & upon the dismissal of a wife's summons against her husband for a separation order, under sect. 4, by justices who decline to make any order as to costs under sect. 5, the solr. who acted for the wife cannot recover his costs in an action against the husband.—CALE *v.* JAMES, [1897] 1 Q. B. 418; 66 L. J. Q. B. 249; 76 L. T. 119; 61 J. P. 230; 45 W. R. 317; 13 T. L. R. 169, D. C.

Annotations:—**Consd.** Abrahams *v.* Buckley, [1924] 1 K. B. 903. **Refd.** Cobbett *v.* Wood, [1908] 2 K. B. 420; Durnford *v.* Baker, [1924] 2 K. B. 587.

6258. Wife's costs—Application to enforce order—Order deprived of effect—By resumption of cohabitation.]—HADDON *v.* HADDON, No. 6239, *ante.*

6259. —— Whether recoverable in suit against husband—No order as to costs made.]—CALE *v.* JAMES, No. 6257, *ante.*

6260. —— Subject matter of summons "res judicata"—Pleaded by husband.]—BLACKLEDGE *v.* BLACKLEDGE, No. 6175, *ante.*

F. Rehearing.

6261. Jurisdiction to grant—Only on proof of wife's adultery after order.]—The power given to justices by 49 & 50 Vict. c. 52, s. 2, to "rehear any such summons at the instance of the husband at any time" is, on the true construction of the Act, confined to the cases mentioned in the second proviso to sect. 1, in which proof is offered that the wife has since the making of the order been guilty of adultery.—SEPHTON *v.* SEPHTON (1888), 58 L. T. 281; 52 J. P. 356; 4 T. L. R. 209, D. C.

See, now, Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 12.

6262. When granted—Not after refusal of adjournment at hearing.]—Mrs. H. applied to justices under 49 & 50 Vict. c. 52, for order of maintenance against H., who suggested adultery against Mrs. H., but was not prepared with legal evidence thereof. The justices offered to adjourn the hearing so as to give H. time to get evidence, but he declined, & wished the case to go on. The justices made the order against H.:—*Held:* H. could not afterwards insist on a rehearing on the ground that he had since obtained evidence of the wife's adultery.—R. *v.* CLDHAM JJ. (1887), 51 J. P. 647, D. C.

6263. ——.]—R. *v.* WILD, ETC., JJ. (1887), 51 J. P. Jo. 404, D. C.

6264. Defendant seriously ill at time of hearing.]—JOHNSON *v.* JOHNSON, No. 6252, *ante.*

SUB-SECT. 7.—APPEALS.

A. To What Court.

See Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 11.

6265. From separation orders—During pendency of appeal against conviction for assault.]—A husband having been convicted of an aggravated assault upon his wife, & sentenced to one month's imprisonment, & it being ordered by the justices at the same time that he be judicially separated from his wife, & that he pay her £2 a week for maintenance, he gave notice of appeal to quarter sessions against the conviction, &, pending that appeal, he came to this ct. to have the order varied:—*Held:* this court should hear his appeal notwithstanding the pendency of the appeal to quarter sessions.—GOODWIN *v.* GOODWIN (1887), 51 J. P. 583.

6266. ——.]—Matrimonial Causes Act, 1878 (c. 19), s. 4, does not give an appeal to the Probate, Divorce, & Admlty. Div. from a conviction for aggravated assault, but only from the order for judicial separation, made by virtue of the provision of the above Act, as one of the results of the conviction.—LEWIN *v.* LEWIN, [1891] P. 254; 60 L. J. P. 85; 64 L. T. 834; 55 J. P. 296; 39 W. R. 575; 17 Cox, C. C. 314.

6267. ——.]—(1) An appeal does not lie to the Div. Ct. of the Divorce Div. from a conviction by justices under Offences Against the Person Act, 1861 (c. 100), s. 43.

(2) Where justices grant a separation order to a wife immediately after convicting the husband of an aggravated assault upon her there is no need to exhibit a copy of the conviction in the order.—BRYANT *v.* BRYANT, [1914] P. 277; 84 L. J. P. 30; 112 L. T. 171; 31 T. L. R. 36; 59 Sol. Jo. 75; 78 J. P. Jo. 556, D. C.

6268. From convictions for assault.]—LEWIN *v.* LEWIN, No. 6266, *ante.*

6269. ——.]—BRYANT *v.* BRYANT, No. 6267, *ante.*

6270. —— Revival of—Previous order discharged.]—By Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7, a ct. of summary jurisdiction may at any time "alter, vary, or discharge" an order made by the ct. under the Act; & by sect. 11 an appeal shall lie from any order under the Act to the Probate, Divorce & Admlty. Div. By Criminal Justice Administration Act, 1914 (c. 58), s. 30 (3), any order made by a ct. of summary jurisdiction for the periodical payment of money may be "revoked, revived, or varied" by a subsequent order. Justices, having made an order under the Act of 1895 for separation & for periodical payments by the husband to the wife, subsequently discharged the order on the ground of the wife's adultery. At a later date on fresh evidence the justices made an order revoking the second order & reviving the payments under the

PART XIII. SECT. 27, SUB-SECT. 6.—F.

g. *When granted—Not when issue decided.*]—A husband, upon whom an order to make an allowance for the maintenance of his wife had been made under Act X of 1872, s. 536, objected to the payment of the allowance on the ground that his wife was living in adultery. The magistrate, entertaining this objection, disallowed it, on the ground that the charge of adultery against the wife was not established. The husband subsequently again objected to the payment of the allowance on the same ground. The magistrate, entertaining the second objection, allowed it, & directed the husband to discontinue paying the allowance. His order was based on proof of adultery by the wife before the date of the order of the former magistrate:—*Held:* on the general principal of the rule of *res judicata,* the second magistrate was wrong.—LARAITI *v.* RAM DIAL (1882), I. L. R. 5 All. 224.—**IND.**

PART XIII. SECT. 27, SUB-SECT. 7.—A.

h. *Supreme Court.*]—An appeal lies on the facts to the Supreme Ct. from the adjudication of the magistrate under Destitute Persons Act, 1910, s. 17 (7), in which case the opinion of the Supreme Ct. is substituted for the

original order. The justices stated a case for the opinion of the K. B. Div. on the question whether they had power to revive the original order after it had been discharged :—*Held :* notwithstanding that the power to order the revival of the payments was contained in sect. 30, sub-sect. 3, of the Act of 1914, & not in the Act of 1895, the justices had no power to state a case, & the only method by which their decision could be questioned was by an appeal to the Probate, Divorce & Admlty. Div. under sect. 11 of the Act of 1895.—DODD *v.* DODD, [1920] 1 K. B. 71 ; 89 L. J. K. B. 221 ; 122 L. T. 190 ; 83 J. P. 287 ; 18 L. G. R. 115, D. C.

6271. From refusal of magistrates to discharge order.]—After the refusal of magistrates to discharge an order for payment of money or for custody of children after an order for judicial separation under Matrimonial Causes Act, 1878 (c. 19), s. 4, the statement of a special case under Summary Jurisdiction Act, 1857 (c. 43), for the opinion of the Q. B. Div. does not preclude the husband from appealing to the Probate, Divorce & Admlty. Div. under sect. 4 of the former Act.

The Probate, Divorce & Admlty. Div. has no jurisdiction to discharge, on the ground of a wife's adultery, an order of magistrates for payment of money or for custody of children after an order for judicial separation ; but the jurisdiction must be exercised by the ct. or magistrate by whom the order was made, subject to an appeal to the Probate, Divorce & Admlty. Div.—HETHERINGTON *v.* HETHERINGTON (1887), 12 P. D. 112 ; 56 L. J. P. 78 ; 57 L. T. 533 ; 51 J. P. 294 ; 36 W. R. 12.

Annotations :—**Refd.** Manders *v.* Manders, [1897] 1 Q. B. 471. **Mentd.** Andrews *v.* Andrews & Chalmers (1924), 132 L. T. 400 ; Russell *v.* Russell, [1921] A. C. 687.

Appeal from convictions to quarter sessions generally, *see* MAGISTRATES.

6272. On point of law arising on application.]—There is no power in a ct. of summary jurisdiction to state a case for the opinion of the Q. B. Div. upon a point of law arising on an application for an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39) ; the only mode in which their decision can be questioned is by an appeal to the Probate, Divorce & Admlty. Div. under s. 11 of that Act.—MANDERS *v.* MANDERS, [1897] 1 Q. B. 471 ; 66 L. J. Q. B. 296 ; 61 J. P. 105 ; 45 W. R. 287 ; 41 Sol. Jo. 226, D. C.

Annotations : **Distd.** Ruther *v.* Ruther, [1903] 2 K. B. 270 ; Griffiths *v.* Griffiths (1909), 53 Sol. Jo. 504. **Apld.** Dodd *v.* Dodd, [1920] 1 K. B. 71.

6273. From decisions on applications to enforce orders—Payments under maintenance order in arrear.]—RUTHER *v.* RUTHER, No. 6250, *ante*.

6274. —— ——.]—Where an order for a weekly payment by a husband to his wife is made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, & the payments fall into arrear, & the wife applies to the magistrate to enforce payment of such arrears, & the magistrate directs the payment of those arrears, & orders imprisonment in default of distress, no appeal lies from such direction & order to the Probate, Divorce & Admlty. Div.—GRIFFITHS *v.* GRIFFITHS (1909), 73 J. P. 391 ; 25 T. L. R. 544 ; 53 Sol. Jo. 504, D. C.

Annotation :—**Refd.** Adams *v.* Adams (1914), 111 L. T. 414.

6275. —— ——.]—An appeal from the refusal of a ct. of summary jurisdiction to enforce arrears under an order for maintenance made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), lies to the K. B. Div. under sect. 9 of Summary Jurisdiction Act, & not to the Probate, Divorce, & Admlty. Div. under sect. 11 of the Act.—ADAMS *v.* ADAMS, [1914] P. 155 ; 83 L. J. P. 151 ; 111 L. T. 414 ; 58 Sol. Jo. 613, D. C.

B. What Matters Appealable.

Separation orders.]—*See* Nos. 6265–6267, *ante*.

Decisions on application to enforce orders.]—*See* Nos. 6273–6275, *ante*.

Revival of order previously discharged.]—*See* No. 6270, *ante*.

6276. Refusal of magistrates to grant application—For reduction of maintenance.]—Justices made an order under Matrimonial Causes Act, 1878 (c. 19), s. 4 (*inter alia*), that a husband should pay his wife 30*s.* a week. This order was not appealed against. More than a year afterwards the husband applied to the justices for a summons calling upon his wife to show cause why this order should not be varied by reduction of the weekly payment, upon the ground that his means had diminished. The justices having heard what the husband had to say refused to issue the summons : *Held :* (1) the justices had a discretion to grant or to refuse a summons, & had exercised it properly ; (2) such discretion was not under the terms of sect. 4, the subject of review.—R. *v.* HUGGINS, ETC., JJ. & HUMPHREYS (1891), 60 L. J. M. C. 139 ; *sub nom.* R. *v.* GRAVESEND JJ., 55 J. P. Jo. 277, D. C.

6277. Refusal of magistrates to determine question of custody of children.]—Where the magistrates, who had rightly granted a separation order to the wife, refused to determine in a judicial manner, in the interests of the children, the question of their custody ; this ct., on appeal, declined to deal with the matter, by receiving fresh evidence, & remitted the case to the magistrates upon the points as to the wife's fitness or unfitness, & as to the amount of her allowance.—FOULKES *v.* FOULKES (1893), 69 L. T. 461, D. C.

C. Practice.

See R. S. C., Ord. 59, rr. 4A, 7, 8, 10–12, 16.

6278. Whether court will hear affidavits as to merits of case.]—POWELL *v.* POWELL, No. 6281, *post*.

6279. Appeals to Probate & Divorce Division—Governed by R. S. C., Ord. 59, rr. 4A, 7, 8, 10-12, 16.]—Upon an appeal to the Probate, Divorce & Admiralty Div. from the decision of a ct. of summary jurisdiction under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), the practice under the Divorce Acts has no application, & it is not necessary that any case should be stated or filed. The practice in such appeals is governed by the above rules.—SWOFFER *v.* SWOFFER, [1896] P. 131 ; 65 L. J. P. 82 ; 60 J. P. 344, D. C.

6280. —— Statement & filing of case—Whether necessary.]—SWOFFER *v.* SWOFFER, No. 6279, *ante*.

See, now, Statutory Rules & Orders, 1923, No. 703.

Notice of appeal.]—*See* R. S. C., Ord. 59, rr. 10, 11.

opinion of the magistrate & is final.—WATKINS *v.* WATKINS (1914), 33 N. Z. L. R. 1497.—**N.Z.**

PART XIII. SECT. 27, SUB-SECT. 7.—C.

k. *Notice to other side—Must state "cause or matter"—Notice cannot be amended at hearing.*]—Applt. shall give to the opposite party a notice in writing of his appeal, & of the cause or matter thereof, eight days at least before the holding of the ct. at which the appeal is to be heard. Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal :—*Held :* on a motion for prohibition, the judge presiding at the division ct. had no power to allow the notice to be amended.—*Re* COE *v.* COE (1891), 21 O. R. 109.—**CAN.**

Sect. 27.—*Summary jurisdiction: Sub-sect.* 7, *C.*, *D.*, *E. & F. Parts XIV. & XV.*]

Time for appeal.]—*See* R. S. C., Ord. 59, r. 12.

—— **Extension of time.**]—*See* R. S. C., Ord. 59, r. 16.

D. Jurisdiction of Court on Appeal.

6281. To enter into matters touching merits of case.]—A husband having been summarily convicted of an aggravated assault on his wife within Offences Against the Person Act, 1861 (c. 100), s. 43, the justices before whom he was convicted made an order that he should pay her a weekly sum for her maintenance; & they refused to hear the husband's evidence as to his means:—*Held:* (1) the justices were warranted in refusing to allow the husband to be called as a witness, as it was not the intention of Matrimonial Causes Act, 1878 (c. 19), that there should be any further hearing of the cases by the justices after the conviction for assault; (2) on the hearing of the appeal affidavits as to the merits of the case could not be admitted.—POWELL *v.* POWELL (1889), 14 P. D. 177; *sub nom. Re* POWELL, POWELL *v.* POWELL, 61 L. T. 436; 53 J. P. 519; 16 Cox, C. C. 722.

Annotations:—As to (1) **Folld.** Lewin *v.* Lewin, [1891] P. 254. **N.F.** Jones *v.* Jones, [1895] P. 201.

6282. To make such orders as justices should have made.]—BROWN *v.* BROWN, No. 6218, *ante.*

6283. To receive fresh evidence—By affidavit.]—Except in very rare instances, no fresh evidence will be received by the Div. Ct. on the hearing of appeals from orders made under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39),

The note to be taken by the clerk to the justices on the hearing of summonses under the Act, & which is to be furnished to either party, or the solr. for either party, on application, will be accepted by the Div. Ct., on the hearing of appeals, as a *primâ facie* statement of the facts; but, if the note is defective, an affidavit will be received in order to supplement the statement of what took place in the ct. below, but no fresh facts, which were not tendered in evidence before the justices, should be introduced into the affidavit.—SNAPE *v.* SNAPE (1897), 62 J. P. 153, D. C.

6284. To decline to hear appeal—Where full note of hearing not furnished.]—WENHAM *v.* WENHAM, No. 6193, *ante.*

6285. To receive objections—Omitted on hearing of application.]—PICKAVANCE *v.* PICKAVANCE, No. 6182, *ante.*

6286. To vary order of justices—Striking out clause in order.]—In proceedings before justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), a married woman obtained an order by which it was adjudged that her husband had deserted her, & it was ordered that she was no longer bound to cohabit with him. The husband unsuccessfully appealed, but on his application the ct. varied the justices' order by striking out the non-cohabitation clause.—DUNNING *v.* DUNNING (1911), 27 T. L. R. 534; 55 Sol. Jo. 650, D. C.

6287. Whether bound by justices' findings of fact—Evidence conflicting.]—MUSTHER *v.* MUSTHER (1894), 58 J. P. Jo. 53.

6288. —— Justice clearly wrong.]—(1) Upon appeals under the Act, the Div. Ct. will not reverse a finding of fact, unless it be shown that the ct. of summary jurisdiction was clearly wrong in the conclusion at which it arrived.

(2) In administering the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), cts. of summary jurisdiction should be careful not to interfere too much in matrimonial life.

(3) Magistrates' clerks should take notes of the evidence & of the grounds upon which decisions are based, & the costs of such notes will be allowed in the costs of appeals under the Act.—HARLING *v.* HARLING (1896), 74 L. T. 559; 60 J. P. 376, D. C.

Annotations:—As to (3) **Refd.** Robinson *v.* Robinson (1898), 14 T. L. R. 385; Wenham *v.* Wenham (1906), 70 J. P. Jo. 310.

6289. —— .]—A Div. Ct. of this Division is not bound by the finding of fact on the part of justices who have made an order under Summary Jurisdiction, Married Women, Act, 1895 (c. 39), but is entitled to draw a different inference of fact from the evidence.

The rule adopted in the Divorce Div., that the evidence of a wife should be corroborated, is applicable to cases under this Act.—FORSTER *v.* FORSTER (1910), 54 Sol. Jo. 403, D. C.

E. Costs.

6290. Wife's costs—Wife respondent—Unsuccessful—General practice.]—EARNSHAW *v.* EARNSHAW, No. 6124, *ante.*

·.]—MEDWAY *v.* MEDWAY, No. 6104, *ante.*

6292. —— —— —— Appeal by husband "in formâ pauperis."]—The fact that a husband who successfully appeals from an order of justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has been admitted as a poor person is no ground for departing from the usual practice of allowing the wife her costs of appearing in support of an order made by the ct. below.

R. S. C., Ord. 16, r. 29, gives the ct. power to make an order against the husband for the wife's costs.—HOPE *v.* HOPE, [1915] P. 125; 84 L. J. P. 176; 113 L. T. 377; 79 J. P. 320; 59 Sol. Jo. 457, D. C.

Annotation:—**Refd.** West *v.* West & Maxted (1917), 34 T. L. R. 169.

6293. —— —— Appeal from order to enforce previous order—First order deprived of effect—By resumption of cohabitation.]—HADDON *v.* HADDON, No. 6239, *ante.*

6294. —— —— —— On objection not taken in inferior court.]—PICKAVANCE *v.* PICKAVANCE, No. 6182, *ante.*

6295. —— —— —— Wife having separate property.]—Where a husband successfully appealed from an order for payment of a weekly sum on desertion of petty sessional ct., the wife, who did not appear, being shown to have separate estate, was condemned in costs, without notice of the application.—DAVIES *v.* DAVIES (1907), 51 Sol. Jo. 412, D. C.

6296. —— —— —— Res judicata—Pleaded by husband in inferior court.]—BLACKLEDGE *v.* BLACKLEDGE, No. 6175, *ante.*

6297. —— Wife appellant—Unsuccessful.]—JACKSON *v.* JACKSON (1909), 25 T. L. R. 713, D. C.

6298. —— —— Resumption of cohabitation—Retractation & apology by husband.]—A wife

PART XIII. SECT. 27, SUB-SECT. 7.—D.

6289 i. *Whether bound by justices' findings of fact.*]—Where the opinion of a Trial Judge as to the credibility of witnesses on a charge of misconduct against a wife was attached solely on the ground of general probability the App. Div. refused to disturb the finding.—PARKES *v.*]

69.—**S. AF.**

1. *To set judgment aside on ground of fraud.*]—JENKINS *v.* JENKINS & MITCHINSON (1876), 3 C. A. 303; 2 J. R. N. S. 32.—**N.Z.**

applied to justices for an order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), on the ground of her husband's desertion. The defence was an allegation that the wife had committed adultery. The justices dismissed the application on the ground that the husband had not deserted the wife without just cause. The wife appealed on the ground that there was evidence that the adultery, if any, was condoned, but after the appeal had been lodged the parties resumed cohabitation, & the husband published in the newspaper an apology & retracted the evidence which he had given on the summons before the justices: —*Held:* the wife was entitled to the costs of the appeal.—PARTINGTON *v.* PARTINGTON (1909), 73 J. P. 200; 25 T. L. R. 305, D. C.

6299. Security for wife's costs—Whether husband to find—Wife without means.]—Where a husband, possessed of means, appealed from an order of the ct. of summary jurisdiction, the President granted the application of the wife, without means, that the husband should find security for her costs of appeal.—L—— *v.* L—— (1911), 55 Sol. Jo. 330.

6300. —— —— —— Stay of hearing.]—A husband having appealed from an order obtained by his wife under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), application for security for the wife's costs was made to a judge in chambers supported by an affidavit stating that he had no property to answer any order for costs & also stating that the wife had no means of her own. An order was made that the husband, applt., should pay into ct. or give security for the costs of his wife, resp. on the appeal, & the hearing of the appeal was stayed meanwhile.—SIRRELL *v.* SIRRELL, [1911] P. 38; 80 L. J. P. 8; 104 L. T. 79; 27 T. L. R. 155, D. C.

6301. Copies of notes supplied to court—Whether costs allowed on taxation.]—WALTON *v.* WALTON, No. 6303, *post.*

F. Notes of Proceedings before Magistrates.

6302. Acceptance as primâ facie statement of facts.]—SNAPE *v.* SNAPE, No. 6283, *ante.*

6303. Must be for use of court—Two copies.]—Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), it is the duty of applt. to furnish, for the use of the judges of the Div. Ct., two copies of the notes taken by the clerk of the ct. below, & the costs of these copies will be allowed on taxation.—WALTON *v.* WALTON, [1900] P. 147; 69 L. J. P. 54; 82 L. T. 627; 48 W. R. 622, D. C.

6304. By whom copies must be supplied—By appellant.]—WALTON *v.* WALTON, No. 6303, *ante.*

6305. —— By appellant's solicitor.]—Observations as to the duty of applt.'s solr. in an appeal from justices under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), to furnish for the use of the ct. notes of the evidence before the justices, & of the reasons for the justices' decision. —MCHUGH *v.* MCHUGH (1909), 26 T. L. R. 60.

6306. —— By party relying on contents—Copies of letters.]—PRACTICE NOTE (1923), 155 L. T. Jo. 298.

—— By justices' clerk.]—*See* Nos. 6193, 6194, *ante.*

6307. Costs of providing—Whether allowed on taxation.]—WALTON *v.* WALTON, No. 6303, *ante.*

6308. Imperfect note—Amplification by affidavit.]—WENHAM *v.* WENHAM, No. 6193, *ante.*

6309. —— —— No fresh facts to be included.]—SNAPE *v.* SNAPE, No. 6283, *ante.*

Part XIV.—Divorce Bills.

See PARLIAMENT.

Part XV.—Conflict of Laws.

Marriage.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 413–421.

Divorce & other matrimonial causes—Dissolution of marriage.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 421–426, Nos. 874–915.

—— Judicial separation.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 426, 427, Nos. 916–920.

—— Restitution of conjugal rights.]—*See* CONFLICT OF LAWS, Vol. XI., p. 427, Nos. 921–923.

—— Nullity of marriage.]—*See* CONFLICT OF LAWS, Vol. XI., p. 428, Nos. 924–926.

—— Recognition of foreign decrees.]—*See* CONFLICT OF LAWS, Vol. XI., pp. 428–432, Nos. 927–954.

—— Recognition of other modes of divorce.]—*See* CONFLICT OF LAWS, Vol. XI., p. 432, Nos. 955, 956.

PART XV.

English law in force In Manitoba.]—WALKER *v.* WALKER, [1919] 2 W. W. R. 935; 48 D. L. R. 1.—**CAN.**

n. —— *In Alberta.*]—BOARD *v.* BOARD, [1919] 2 W. W. R 940; 48 D. L. R. 13.—**CAN.**

Part XVI.—Costs.

Implied authority of wife to pledge husband's credit for costs.]—*See* Part VIII., Sect. 2, sub-sect. 11, *ante*.

Civil proceedings by & against married women.]—*See* Part XII., Sect. 1, sub-sect. 1, I., *ante*.

Alimony pendente lite.]—*See* Part XIII., Sect. 9, sub-sect. 1, J., *ante*.

Applications as to custody & maintenance of children — Pending decree.]—*See* Part XIII., Sect. 9, sub-sect. 3, *ante*.

—— **After decree.**]—*See* Part XIII., Sect. 22, sub-sect. 6, *ante*.

Security for costs.]—*See* Part XIII., Sect. 9, sub-sect. 4, *ante*.

Disposing of causes—Death of party.]—*See* Part XIII., Sect. 15, sub-sect. 1, E., *ante*.

Order for costs on decree.]—*See* Part XIII., Sect. 18, *ante*.

Cause shown against decree by King's Proctor.]—*See* Part XIII., Sect. 20, sub-sect. 4, A. (*g*), *ante*.

Appeal as to costs.]—*See* Part XIII., Sect. 21, sub-sect. 1, D., *ante*.

Variation of settlements.]—*See* Part XIII., Sect. 22, sub-sect. 5, G. (*g*), *ante*.

Apportionment of damages.]—*See* Part XIII., Sect. 22, sub-sect. 7, D., *ante*.

Taxation of costs.]—*See* Part XIII., Sect. 22, sub-sect. 8, *ante*.

Summary jurisdiction.]—*See* Part XIII., Sect. 27, sub-sect. 6, E., sub-sect. 7, E., *ante*.

HYPOTHECATION.

Lien; Mortgage; Shipping and Navigation.

IDIOTS.

Lunatics and Persons of Unsound

IDLE AND DISORDERLY PERSONS.

See Magistrates; Poor Law.

LLEGAL ARREST AND IMPRISONMENT.

See Criminal Law and Procedure; Trespass.

ILLEGAL CONTRACTS

See Contract.

ILLEGITIMACY.

e Bastardy.

IMBECILES.

See LUNATICS AND PERSONS OF UNSOUND MIND.

IMMEMORIAL USAGE.

See CUSTOM AND USAGES.

IMMIGRATION.

See ALIENS.

MMORAL CONTRACTS.

See CONTRACT.

MPEACHMENT.

See PARLIAMENT.

MPEACHMENT OF WASTE.

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

IMPOTENCE.

See HUSBAND AND WIFE.

IMPRISONMENT.

See CRIMINAL LAW AND PROCEDURE; MAGISTRATES; PRISONS.

IMPROVEMENT OF LAND.

See LAND IMPROVEMENT; SETTLEMENTS; SEWERS AND DRAINS.

INCEST.

See CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE.

INCLOSURE.

See COMMONS AND RIGHTS OF COMMON; HIGHWAYS, STREETS, AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS.

INCOME AND CAPITAL.

See PARTICULAR TITLES *passim*.

END OF VOL. XXVII.

PRINTED IN GREAT BRITAIN BY WILLIAM CLOWES AND SONS, LIMITED, LONDON AND BECCLES.